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Separation of Powers, State Constitutions & the Attorney General: Who Represents the State

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SEPARATION OF POWERS, STATE CONSTITUTIONS & THE ATTORNEY GENERAL:
WHO REPRESENTS THE STATE?

Patrick C. McGinley

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No political truth is of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty, than that . . . the accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.

-James Madison, The Federalist, No. 47.

I. INTRODUCTION

Madison’s observation relates to the fundamental separated powers structure that lies at the core of federal and state constitutions in the United States. While the federal constitution and those of the states all share the separation of powers format, unlike the federal constitution, a key structural feature of state constitutions is the “non-unified” or divided executive branch.

In forty-three states, including West Virginia, the executive department operates under the supervision of an elected Governor and elected executive department officers.1 The holders of these constitutional executive department offices may be members of differing political parties. Typical executive officers created by state constitutions are Treasurer, Auditor, Attorney General, Superintendent of Schools, and Secretary of State. Even if all executive officers are members of the same political party, because each is an independently elected executive officer, each may possess significantly different perspectives as to desirable policies under prevailing law. Each officer may have different views on the proper operation of their offices in relation to other components of the executive, legislative and judicial departments. In addition, in a divided executive department, the elected executive officers may assume differing positions regarding issues of policy which arise in the administration of various state statutes.

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1 NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 15 (Lynne M. Ross ed., 1990) [hereinafter NAAG REPORT].
For the better part of a century, West Virginia’s Attorney General has struggled intermittently with other constitutional executive officers and the state’s legislature to block encroachment on the core functions of the office. The Attorney General’s unique calling is to provide legal services to the diverse and often conflicting interests of elected and appointed state officials and agencies.\(^2\) Such a job challenges the most competent and ethical of lawyers. The Attorney General must avoid conflicts of interest and other pitfalls involving legal ethics while often being called upon to represent elected officers of another political party or political appointees asserting legal and policy positions at odds with her own.

If this environment were not complex enough, in West Virginia, repeated attempts have been made by state agencies and officers to employ lawyers other than those assigned by the Attorney General.\(^3\) These attempts to emasculate the Attorney General’s authority by transferring her responsibility to others in government are little more than power plays expected of competing political interests. If political dominance of one force over another in state politics were the only fruit borne by such conflict, it would simply be written off as partisan political in-fighting.

More is at stake however, when the powers and duties of constitutionally elected state officials are usurped. At issue is the decision of constitutional framers to decentralize governmental power as part of the system of checks and balances that is so familiar to high school civics students. This separation of powers doctrine lies at the core of the controversy discussed below.

\(^2\) In a dissenting opinion issued shortly before this article was scheduled for publication, Justice Starcher of the West Virginia Supreme Court of Appeals emphasized the constitutional basis for creation of the office of Attorney General in a divided executive branch:

one of the principal reasons that our founders established an Attorney General’s office was to assure that important legal issues that will affect all state agencies had an advocate who is able to bring the expertise of government-wide representation before this Court, when we consider matters of overall importance to state government.


\(^3\) Justice Starcher also recently observed a current example of the potentially adverse impact of state officials and agencies represented by lawyers other than those employed and supervised by the Attorney General:

The DEP is not represented by the Attorney General in this case, but by their own agency counsel, as permitted in the statute. This situation ... can lead to problems. Important issues of what and how law applies to the State may be considered by this Court without the input and exercise of the State’s chief legal officer, and without consideration of the impact on decisions on these issues upon a wide variety of government agencies.

Id.; see also infra, note 44 and accompanying text.
When a constitution's discrete and thoughtfully crafted structure is realigned or altered by self-serving political interests without constitutional sanction, the foundation of a democratic system is corrupted and weakened. An over-arching theme of this Article is the exposure of forces within state government that subtly and often imperceptibly erode those foundations for self-serving political reasons, and in so doing, contribute to the disempowerment of the very citizens they are sworn to serve.

This Article provides a case study which focuses on the Office of the Attorney General in one state government's divided executive branch. Examined below is the constitutional allocation of power to the West Virginia Attorney General and the internal conflicts within the divided executive and between the executive and the legislative branches that inexorably arise in the context of such a common state constitutional structure.

II. THE DIVIDED EXECUTIVE AND THE WEST VIRGINIA ATTORNEY GENERAL

West Virginia shares a constitutionally designed divided executive department with the vast majority of sister states. West Virginia's constitution, like so many others, is structured in such way as to both check gubernatorial power and diffuse executive authority among elected state house "row officers." The West Virginia Constitution -- like those of many other states -- empowers the state legislative branch to define the scope of the powers and duties of these elected officials. In common with these states, West Virginia's constitution does not speak explicitly to whether the legislature has the power to shift the duties of these elected executive officials to other state offices and officials or to private parties.

A. Constitutional Structure And The Divided Executive

The Office of the Attorney General was established by the West Virginia Constitution of 1872 as part of a divided or "non-unified" executive department. Article VII, section 1, created the offices of Governor, Attorney General, Auditor,

4. See, e.g., In Estate of Sharp, 217 N.W.2d 258, 262 (Wis. 1974); Shute v. Frohmiler, 90 P.2d 998 (Ariz. 1939).

5. The term "non-unified" is used here to distinguish the executive department of West Virginia's constitutional scheme of government and most other states from the three States (Hawaii, New Jersey and Alaska) that have a "unified" executive in the sense that the Governor is elected and appoints all other executive officers. See, e.g., Robert J. Dilger, The Governor's Office: A Comparative Analysis, W. VA. PUB. AFFAIRS REP., Fall 1993, at 2.
and Treasurer. Later constitutional amendments added an elected Secretary of State and Commissioner of Agriculture to the executive department.\(^6\)

Article VII, section 1, provides that officers of the executive department “shall perform such duties as may be prescribed by law.”\(^7\) Accordingly, the legislature has prescribed duties of the Attorney General by statute.\(^8\) West Virginia Code sections 5-3-1 to 5-3-3 set forth the general duties of the Attorney General.\(^9\) Legislatively prescribed duties of the Attorney General may be traced to those initially established by the Virginia Legislature in 1849.\(^10\)

It is important to note that in 1932, West Virginia Code section 5-3-1 was amended to prohibit expenditure of public funds for legal services provided by any private person, firm, or corporation.\(^11\) While generally prohibiting the hiring of private lawyers to provide legal services for the state, the Legislature has provided in West Virginia Code section 5-3-3 for the appointment of assistant Attorneys General to the extent necessary to assist in performing the duties of the office of Attorney General.\(^12\) Such assistants are to be appointed by and serve at the pleasure

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\(^6\) The Secretary of State was added to the executive department in 1902. 1901 W. Va. Acts 451, ratified by popular vote, Nov. 4, 1902. A 1934 amendment to article VII, section 1, added the office of Commissioner of Agriculture to the list of constitutionally designated executive department officers. 1933 W. Va. Acts 213, 1st Ex. Sess., ratified by popular vote, Nov. 6, 1934.

\(^7\) W. VA. CONST. art. VII, § 1.

\(^8\) The debates regarding the proposed Constitution of 1872 included discussion of the role of the Attorney General in the Executive Department of state government. In adopting a provision relating to the election of the officers of the executive branch, the convention voted to have the Attorney General’s term of office and date of election correspond with that of the Governor, the Auditor, and the Treasurer. In that context it was stated on the floor of the constitutional convention that “[t]he attorney general is an officer of the State, he is the Governor’s law adviser . . . .” DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION OF WEST VIRGINIA, 1861-1863, at 984 (Charles H. Ambler et al., eds., 1939).

\(^9\) Other statutes require the Attorney General to perform additional duties. See supra note 8.

\(^10\) Ch. 165, § 1, Va. Code of 1849.


\(^12\) W. VA. CODE § 5-3-3 (1994). “[C]ompensation of all such assistant[] [attorneys general] shall be within the limits of the amounts appropriated by the Legislature for personal services.” Id. This language is consistent with and authorizes the current practice of State agencies contracting with the Office of the Attorney General for legal services and the payment for such contracted services from the agency’s budget allocated from “amounts appropriated by the Legislature for personal services” for that agency. Id.
of the Attorney General. They are required to perform those duties that the Attorney General assigns to them.

West Virginia Code section 5-3-1 is examined below in order to determine the nature and scope of the statute’s ban on payment of public funds for legal services performed for State officers, commissions and boards, by persons and entities who have neither been appointed nor supervised by the Attorney General.

B. Statutory Duties Of The Attorney General

The West Virginia legislature has by statute assigned a variety of responsibilities to the Attorney General. For example, West Virginia Code section 5-3-1 requires the Attorney General to provide legal services, upon written request, to:

the governor, secretary of state, auditor, state superintendent of schools, treasurer, commissioner of agriculture, board of public works, tax commissioner, commissioner of banking, adjutant general, commissioner of division of energy (now the division of environmental protection), superintendent of public safety, commissioner of public institutions, road commission, commissioner of the bureau of employment programs, public service commission, and any other state officer, board, or commission, or the head of any state educational, correctional, penal, or eleemosynary institution.\(^\text{13}\)

The legal services that the Attorney General is duly bound to provide under section 5-3-1 include the following: written opinions and advice on questions of law; prosecution and defense of suits, actions, and other legal proceedings; generally rendering and performing all other legal services; and rendering to the President of the Senate and/or the Speaker of the House of Delegates a written opinion or advice upon any written questions submitted to him by either or both of them.\(^\text{14}\)

West Virginia Code section 5-3-2 requires the Attorney General to provide other additional and numerous legal services for the state. These services include appearance as counsel for the state in all causes pending in the Supreme Court of Appeals in which the state is interested, appearance as counsel for the state in all causes in any federal court in which the state is interested, and appearance in any

\(^{13}\) W. VA. CODE § 5-3-1 (1994).

\(^{14}\) Id.
cause in which the state is interested that is pending in any other court in the state, all upon the written request of the Governor.\textsuperscript{15}

Upon written request, the Attorney General is also required by section 5-3-2 to institute and prosecute all civil actions "in favor of or for the use of the state" which may be "necessary in the execution of the official duties of any state officer, board or commission."\textsuperscript{16} Further, when requested by the prosecuting attorney of a county where a state correctional institution is located, the Attorney General is to provide attorneys for appointment as special prosecuting attorneys.\textsuperscript{17} The Attorney General is also required by the statute to consult with and advise county prosecuting attorneys in matters relating to the official duties of their office.\textsuperscript{18}

Miscellaneous statutorily mandated duties include "keep[ing] proper books, a register of all causes prosecuted or defended by [the office of the Attorney General] in behalf of the state or its officers and of the proceedings had in relation

\textsuperscript{15} W. VA. CODE § 5-3-2 (1994), providing in pertinent part:

> When such appearance is entered he shall take charge of and have control of such cause; he shall defend all actions and proceedings against any state officer in his official capacity in any of the courts of this state or of the any federal courts when the state is not interested in such cause against such officer, but should the state be interested against such officer, he shall appear for the state.

\textit{Id.}

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} This responsibility of the Attorney General to assist the prosecuting attorney in counties where state prisons or similar facilities are located relates only to the prosecution of criminal proceedings. The duty of the Attorney General to assist is not triggered until a circuit judge in the county or a justice of the state Supreme Court finds that "extraordinary circumstances exist at said institution which render the financial resources of the office of the prosecuting attorney inadequate to prosecute said cases."

\textit{Id.}

\textsuperscript{18} A written report may be required from the prosecuting attorneys setting forth "the state and condition" of the cases in which the state is a party, pending in the courts of their respective counties. \textit{Id.} The Attorney General may also require the several prosecuting attorneys to perform, within the respective counties in which they are elected, "any of the legal duties required to be performed by the attorney general which are not inconsistent with the duties of the prosecuting attorneys as the legal representatives of their respective counties." \textit{Id.} When the performance of these duties by the prosecuting attorney conflicts with her/his duties as the legal representative of a county, or if for any reason any prosecuting attorney is disqualified from performing such duties, the Attorney General "may require the prosecuting attorney of any other county to perform such duties in any county other than that in which such prosecuting attorney is elected." \textit{Id.}
thereto." The statute also requires appearance by the Attorney General as counsel for any National Guardsman in certain narrow circumstances.

In addition to setting forth the duties of the Attorney General as the "general lawyer for the State," West Virginia Code section 5-3-1 flatly prohibits the expenditure of state funds for the retention of private lawyers to perform legal services for any of the public officials, commissions or other persons mentioned in that section.

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19 Id.

20 The Attorney General's duty of representation arises "upon [the] request of any member of the West Virginia national guard who has been named defendant in any civil action arising out of that guardsman's action while under orders from the governor relating to national guard assistance in disasters and civil disorders." Id. The duties above the Attorney General are further supplemented by other statutory responsibilities. See, e.g., W. VA. CODE § 47-18-6 to 7 (1996) (requiring Attorney General's Office to enforce state antitrust laws); and W. VA. CODE § 46A-7-102 (1996) (giving Attorney General investigatory and enforcement powers to administer consumer protection laws).

21 W. VA. CODE § 5-3-1 (1994) (re enacted in 1994, supra note 11). The Supreme Court of Appeals has recognized that the Attorney General is the "general lawyer for the state." Manchin v. Browning, 296 S.E.2d 909, 917 (W. Va. 1982).

22 W. VA. CODE § 5-3-1 (1994):

[1]It shall be unlawful from and after the time this section becomes effective for any of the public officers, commissions, or other persons above mentioned to expend any public funds of the state of West Virginia for the purpose of paying any person, firm, or corporation for the performance of any legal services.

Id.
III. STATUTORY PROHIBITION OF "OUTSIDE" LEGAL SERVICES: HISTORICAL PERSPECTIVE, RATIONALE AND ANALYSIS

A. Pre-1963 Perspective

The nature of the problems attendant to the employment of lawyers who are not hired or supervised by the Attorney General, has long been recognized in West Virginia. For example, between 1905 and 1932, three Attorneys General warned of the extremely serious consequences flowing from the employment of such counsel. The second part of this section reviews a 1963 official opinion of the Attorney General, the most exhaustive discussion of the issue to date.

In 1932, after Governor Howard M. Gore and Attorney General Howard B. Lee expressed serious concern regarding "the presence upon the state payroll of numerous attorneys other than those directly employed by the Attorney General," the legislature took action to deal with the problem. The result was an amendment to West Virginia Code section 5-3-1 strictly prohibiting payment for legal services other than those provided by the Attorney General.

Subsequently, in 1943, acting Attorney General Ira J. Partlow received a request for an official opinion from the State Tax Commissioner asking Partlow to determine whether an item in the Commissioner’s budget -- which authorized that “not more than $6,000.00 annually should be expended only for Special Legal

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23 “Outside” legal services and “outside counsel” as used in this Article refer to legal services provided by lawyers who are not retained, employed and supervised by the Attorney General. The terms apply herein to lawyers employed as so-called “in house” counsel directly by executive agencies and offices as well as to lawyers and law firms hired by such agencies and offices as “outside” counsel. The terms “outside legal services” and “outside counsel” as used herein do not apply to lawyers and law firms hired by or with the approval of the Attorney General and thereafter supervised by the office of the Attorney General. The terms also exclude those lawyers and law firms retained with the approval of the Attorney General but not supervised by her in circumstances where such retain is required because a conflict of interest does not permit the Attorney General to represent a state agency client.

24 In 1963, an official opinion of the Attorney General observed that “the practice of state officers and agencies employing counsel outside of the Attorney General’s office is not of recent vintage; it has been the subject matter of critical comment for well over fifty years.” 50 W. Va. ATT’Y GEN. BIENNIAL REP. & OPINIONS 190 (1962-1964).

25 See id at 190 (citing 21 W. Va. ATT’Y GEN. BIENNIAL REP. & OPINIONS (1905-1906); 31 W. Va. ATT’Y GEN. BIENNIAL REP. & OPINIONS xiii, xiv, xv (1925-1926)).


Services"—was proper in view of the prohibition contained in West Virginia Code section 5-3-1. Partlow's response to this request stated that section 5-3-1 makes it the duty of the Attorney General to act as counsel for designated state officials, boards and commissions, including the Tax Commissioner. 28 The opinion advised that, to be consistent with the prohibition against payment for legal services provided by lawyers other than those appointed by the Attorney General in West Virginia Code section 5-3-1, the Tax Commissioner should utilize the budgeted appropriation to pay for the legal services of counsel appointed by the Attorney General. 29

In 1956 yet another Attorney General, John G. Fox, also expressed his strong disapproval of the practice of state agencies employing attorneys other than those appointed by the Attorney General to perform legal services:

Former Attorney General Fox has estimated that there are approximately a hundred attorneys employed in the various departments of the State government, although only a few of them are filling legal positions. He estimates also that at the time he took office there were ten or fifteen such attorneys who were acting in the capacity of 'house counsel' to the various departments by which they were employed. Such practice results in numerous difficulties, one being that a department head may act upon the advice of an attorney within his department, who is not actually a practicing attorney, until the former has gotten in trouble, before asking the Attorney General for assistance. Besides the fact that additional work may be created for him, the Attorney General is handicapped by the fact that he has not handled the matter from the outset. Another is the conflict of opinions which would undoubtedly result from numerous independent legal advisors within the administrative branch of the State. It is apparently not enough that the legislature has enacted a prohibition against the

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28 40 W. VA. ATT'Y GEN. BIENNIAL REP. & OPINIONS 206 (1943). The opinion, after quoting the relevant language of § 5-3-1 stated, "[t]here is serious doubt in my mind as to whether the provisions of the Budget Bill can repeal or modify a general law.... It is assumed that the bill will carry only such appropriations as may be made without violating any provisions of general law." Id. at 207.

29 The use of budgeted appropriations of a state agency to reimburse the Office of the Attorney General for legal services rendered by a duly appointed Assistant Attorney General was also endorsed by a subsequent Attorney General opinion. See 50 W. VA. ATT'Y GEN. BIENNIAL REP. & OPINIONS 185, 194.
expenditure of funds for legal services. Attorneys are employed by department heads to fill nonlegal positions, often resulting eventually in each attorney acting as ‘house counsel’ for his department. 30

Thus, for more than half of a century prior to 1963, attempts to circumvent constitutional and statutory proscriptions of state agency retention of lawyers other than those employed by the Attorney General were made and rebuffed.

B. Attorney General’s 1963 Opinion Interpreting Statutory Prohibition of Retention of Outside Counsel

In 1963, then Attorney General C. Donald Robertson issued an official opinion in response to a request made by the Speaker of the House of Delegates.31 The Speaker requested a written opinion discussing the legality of expending West Virginia’s public funds to employ and pay attorneys for legal services to state officers, departments of State government, commissions, agencies, boards and instrumentalities created by the legislature or established under the laws of West Virginia.32


31 The opinion referred to State v. Ehrlick, 64 S.E. 935 (W. Va. 1909), but did not rely on Ehrlick in discussing the lawfulness of state agencies and officials using public funds to pay private persons, firms or corporations for legal services. 50 W. VA. ATT’Y GEN. BIENNIAL REP. & OPINIONS at 191. The Supreme Court of Appeals of West Virginia subsequently overruled Ehrlick in Manchin, 296 S.E.2d 909 (W. Va. 1982). However, the fact that Ehrlick was later overruled is irrelevant to both the analysis and the conclusions drawn by the Attorney General’s 1963 Opinion. Indeed, in a case decided after Manchin, the court found the 1963 opinion to be “persuasive.” State ex rel. Caryl v. MacQueen, 385 S.E.2d 646, 649 (W. Va. 1989).

32 The opinion explained that there is no legal impediment to persons with law degrees working in government in administrative positions that do not involve the rendering of legal services. 50 W. VA. ATT’Y GEN. BIENNIAL REP. & OPINIONS 185. Thus, the opinion distinguished lawyers who work in government from lawyers whose work for government entails providing legal services. It should also be noted that nothing in the history of W. Va. Code § 5-3-1 nor any opinion of the Attorney General regarding that provision of law suggests that the employment of attorneys as administrators in government is prohibited by that statute. On the contrary, there are many attorneys employed in administrative capacities by state departments. This practice is appropriate insofar as such individuals provide administrative and management assistance to State government. However, as the 1963 Attorney General’s opinion emphasized, “such attorneys[] holding administrative positions[] are prohibited from receiving State funds for ‘any legal services’ rendered to the employer-departments.” 50 W. VA. ATT’Y GEN. BIENNIAL REP. & OPINIONS 192 (1962-1964).
The resulting opinion, a most exhaustive examination of the scope of the Attorney General’s authority, was based primarily on an analysis of the statutory prohibitions of outside legal services. Moreover, the opinion outlines in detail the rationale for such a prohibition. Not surprisingly, the opinion takes on an expansive view of Attorney General’s powers and a most restrictive interpretation of the authority of state agencies to retain counsel other than those supplied by the Attorney General. Interestingly, however, over the period of more than a century of state governance under a divided executive department, not one publication has advocated or otherwise articulated the case for allowing retention of outside counsel.

The 1963 opinion addresses in detail several issues central to the question explored in this Article. Attorney General Robertson focused on interpretation of the statutory prohibition of hiring outside counsel, the rationale for this limitation, and the constitutional basis that underlies it.

1. Statutory Interpretation

The 1963 opinion found that the effect of West Virginia Code sections 5-3-1 and 5-3-2 was “to impose upon the Attorney General responsibility to perform all legal services for the State.”\(^{33}\) Moreover, the opinion explained that “[t]he terms of Code § 5-3-1, reciting specific duties of the Attorney General, merely serve to illustrate that the complete responsibility of the legal affairs of the State of West Virginia is centered in the Office of the Attorney General.”\(^{34}\) Thus, the opinion stated:

Every legal service, which the Attorney General may be requested to render any state office or agency, is, of course, not enumerated in the statute. The phrases, “generally render and perform all other legal services” and “any other state officer, board or commission” are certainly all encompassing. A more comprehensive word than the word “all” cannot be found in the English language; the word “any”, likewise, is a comprehensive term meaning “every” or “all” or “no matter what one.”\(^{35}\)

\(^{33}\) Id. at 187.

\(^{34}\) Id. at 187-88.

\(^{35}\) Id. at 188 (citations omitted).
The opinion declared that as a general rule the power of state agencies to employ “in-house counsel” is not incident to the mere existence of the agency. “This conclusion,” the opinion noted, “is especially true where statutes specifically place on the Attorney General the duty of furnishing legal advice and services to such state officials, departments and agencies.”

2. Rationale for Limitation of “In-House” Counsel

As explained above, the primary purpose of the 1963 Attorney General’s opinion was to interpret that portion of West Virginia Code section 5-3-1 that bans the payment of public funds for performance of any legal services other than those provided by the Attorney General. The opinion carefully analyzed the rationale for limiting the employment of counsel from outside the office of the Attorney General. It identified the Attorney General’s role in overseeing the development of the administrative law of state agencies as one important reason to significantly limit the employment of other lawyers who have no responsibility for such development.

The 1963 opinion also identifies numerous other problems that arise from the presence of department-employed counsel in various executive departments. It warned of “house counsel” of a department appearing in court proceedings and elsewhere, representing himself to be an assistant Attorney General, when in fact the lawyer did not hold that office. Another possibility suggested was that “house counsel” of one department may appear in court proceedings on behalf of the State, presenting claims only for his or her department, while failing to assert in such proceedings pending claims of another agency. “House counsel” of an agency might also issue an opinion in direct conflict with official opinions issued by the Attorney General.

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36 Id. (citations omitted).

37 The 1963 opinion recognized that the opinions of the Attorney General provide “a major portion of the administrative law of [the] State.” 50 W. VA. ATT’Y GEN. BIENNIAL REP. & OPINIONS at 189. “In rendering opinions and advising as to questions of law in matters affecting executive departments, and agencies, he is . . . establishing a body of administrative law.” Id. at 189. The 1963 opinion also emphatically states that opinions rendered by the “department-employed attorney” have no legal effect whatsoever. “A department-employed attorney has no mandate from the people; he has no greater or higher standing than private counsel. Public funds of the State paid to him for his services are strictly in violation of Code 5-3-1.” Id. at 189.

38 It is conceivable that an agency’s “house counsel” might advise citizens that his or her agency was not going to abide by official opinions of the Attorney General.
Attorney General Robertson's opinion also raised the specter of an attorney employed by an agency to prepare interpretations of statutes or give advice on what is permissible under the law. Because such lawyers' salaries are paid by the agency, it would be difficult for these persons to "maintain the degree of objective detachment which every conscientious attorney should maintain in rendering an opinion to a client."\(^{39}\)

The opinion also considered the division of loyalties that face "in-house" counsel, who must represent the agency head who hires him or her, rather than being insulated from direct supervision by the state's "general counsel" -- the Attorney General. The opinion asserted that:

[An attorney] . . . has several loyalties and is subject to certain psychological influences in his work. Among these are loyalty to his clients, to the community, to the administration of justice, to his associates in practice, and to himself (where his own economic interests and ethical standards are concerned). These divergent and sometimes conflicting loyalties and influences must somehow be reconciled. With the use of State department-employed "house counsel" these loyalties and psychological influences are too easily distorted, making it difficult, if not impossible, for such department-employed attorneys to render independent opinions, free of bias and influence.\(^{40}\)

It seems apparent, as the 1963 opinion argues, that such divided loyalties can interfere with the Attorney General's ability to carry out her constitutionally mandated duties. Among the problems implicated by divided loyalties are (1) interference with the Attorney General's duty and obligation to develop consistency regarding the construction and application of administrative law, (2) disruption of the relationship between the Attorney General and her executive department clients, (3) creation of ethical conflicts where none otherwise exist, and ultimately (4) the undermining of the public interest implicit in the constitutional separation of powers scheme.

The 1963 opinion asserted that a lawyer employed by the Attorney General is bound to provide her independent judgment on legal issues. She must take into

\(^{39}\) Id. at 192. Of course a similar charge could be made regarding salaried lawyers representing non-governmental clients. A principal difference is the constitutional design of a divided executive branch render lawyers employed and paid by the Attorney General more likely to maintain desirable objective detachment.

\(^{40}\) Id.
consideration the inter-connected interests of all state government agencies, as well as the interests of the individual agency that requested legal advice. In contrast, agency-retained counsel may not possess the broader view and knowledge of state government possessed by the Attorney General, and therefore find it difficult to render the requisite independent legal judgment.\textsuperscript{41} The 1963 opinion observed that problems of the type quoted above motivated the Legislature in 1932 strictly to prohibit the expenditure of public funds for department-employed counsel.\textsuperscript{42}

3. Constitutional Basis for Limitation of Outside Counsel

The 1963 opinion identified a Constitutional basis underlying the proscription of legal services provided to the state by others than the staff of the Attorney General:

Since [the Constitution has explicitly designated the Attorney General as the general lawyer for state government and] the Legislature has directed a centralization of all of the State’s legal business in the Office of the Attorney General, then it is his complete responsibility to attend to all legal affairs of the State.\textsuperscript{43}

\textsuperscript{41} The opinion stated:
Department-employ[ed] counsel are more inclined to rationalize, finding “good” reasons to justify their department-employers’ policies rather than seek the “real” reasons (based on sincere concern for the public welfare of all of the people) upon which to impartially evaluate the department’s questions of law. “House counsel” in a department naturally would be hesitant to inform that the action taken or about to be taken by his department head is unauthorized or unlawful. It is important that departments of state government receive legal advice which is free from domination, subjection, control, restriction, limitation or modification. An attorney’s opinions and advice should be the result of candor and fairness on the part of the attorney. In state government numerous problems arise in the administration of a department where the attorney[] . . . must exercise his power of choosing, selecting and electing a course to follow. A department-employed attorney, being dependent upon his employer’s pleasure for a livelihood, can hardly be expected, regardless of his personal honesty and sincerity, to preserve that independence of judgment which is so imperative in a representative of the legal profession, which seeks to achieve “Equal Justice under Law.”

\textit{Id.} at 193.

\textsuperscript{42} \textit{50 W. VA. ATT’Y GEN. BIENNIAL REP. \& OPINIONS} at 193.

\textsuperscript{43} \textit{Id.} at 193 (emphasis added).
In sum, the 1963 opinion found that the effect of state agency retention of lawyers other than those appointed by the Attorney General may severely undercut the ability to carry out effectively her constitutional responsibilities as the state’s chief legal officer. To permit various State departments and agencies to “dilute and chip away” centralized legal service by retaining their own attorneys to perform “legal service,” it was argued, will result in overlapping of authority, loss of uniformity in State administrative policies and unnecessary duplication of efforts which waste public funds. In light of the above, it is not surprising that the 1963 opinion reached an unequivocal conclusion:

Under our statute [W. Va. Code § 5-3-1] ... it is clearly unlawful for any public officers, commissions, departments or agencies of the State to spend any of the State’s funds in payment for the performance of any legal services unless it can be affirmatively shown that there is express and unambiguous statutory authority to retain such legal counsel.45

C. Analysis of Statutory Prohibition

When it enacted West Virginia Code section 5-3-1 in 1933, the legislature simply made explicit what the state’s constitution implicitly demands: state funds may not be used to pay for legal services provided by a lawyer who has not been chosen nor supervised by the Attorney General. The statutory bar in section 5-3-1 makes clear that the employment by state agencies and officers of in-house and outside counsel usurps the core constitutional function of the Attorney General.

44 Id.; accord Kingwood Coal Co., 1997 WL 406153, at *20 (Starcher, J. dissenting)

45 50 W. VA. ATT’Y GEN. BIENNIAL REP. & OPINIONS at 193 (emphasis added). The 1963 opinion might be read as suggesting that express, unambiguous statutory authority would authorize the payment of public funds for legal services provided by outside counsel. However, in this context a more reasonable interpretation of the opinion is that while such express statutory authority for state agencies and officials is required to spend state funds, authorization to spend public funds does not, and could not, negate the implicit requirement that such counsel be hired with the approval and supervision of the Attorney General. Id. at 194. This is consistent with the opinion given in 1943 by Attorney General Ira J. Partlow. See 40 W. VA. ATT’Y GEN. BIENNIAL REP. & OPINIONS 206, 206 (1943). The opinion suggested an approach to intra-executive cooperation in the provision of legal services that is utilized to an extent today in West Virginia. Agencies may request that “the Attorney General . . . assign an Assistant Attorney General to perform legal services for a particular department, or departments, providing that such departments reimburse the Attorney General’s budget for the expense thereof.” Id. “In this manner,” the opinion suggested, “a proper control of personnel and funds can be effected according to legislative directive.” Id.
The drafters of the Constitution of West Virginia and the voters who ratified it created the office of Attorney General to serve as the state's general lawyer.\textsuperscript{46} Implicit in the statutory prohibition of section 5-3-1 is a recognition of the constitutional designation of the Attorney General as the lawyer who is to serve as general counsel for the state. Section 5-3-1 also should be read as an explicit warning that such constitutional designation cannot be overridden by the decision of an appointed or elected executive officer to employ and to pay for legal services provided by someone else. Similarly, the legislature may not accomplish the same result by legislatively sanctioning the payment for legal services of in-house or outside counsel with public funds unless the lawyers performing the services are chosen and supervised by the Attorney General. Such legislation would run afoul of the separation of powers mandate of article V, section 1 of the West Virginia Constitution.

The explicit prohibition of payment for legal services delivered by lawyers not retained nor supervised by the Attorney General in section 5-3-1 leaves no room for conjecture. Payment of public funds for legal services in violation of section 5-3-1 is patently unlawful. Those who are responsible for the hiring and payment of such lawyers may clearly be held accountable, in the manner provided by law, for the misapplication of public funds.

However, two opinions of the West Virginia Supreme Court of Appeals suggest, in \textit{dicta}, that the legislature by explicit statutory authorization may allow for the employment and payment of state funds to lawyers not appointed and supervised by the Attorney General.\textsuperscript{47} There currently exists a narrow category of in-house and outside counsel employed and paid pursuant to a few special statutes. These special statutes seem at variance with the general prohibition contained in section 5-3-1 in that they purport to explicitly authorize payment for legal services notwithstanding section 5-3-1's bar. Careful scrutiny must be given to the wording of such statutes to determine if, indeed, such explicit authorization was intended.\textsuperscript{48}

The fact that the legislature enacted statutes authorizing state agencies and constitutional executive branch officers to retain in-house or outside counsel who are neither hired nor supervised by the Attorney General is obviously not dispositive of the \textit{constitutional} validity of such legislation. The question of

\textsuperscript{46} \textit{See infra} note 65 and accompanying text.

\textsuperscript{47} \textit{Manchin}, 296 S.E.2d at 919; \textit{MacQueen}, 385 S.E.2d at 649.

\textsuperscript{48} Explicit authorization would require that the language of the provision specifically state that payment for legal services may be made, notwithstanding the requirements of West Virginia Code § 5-3-1. A general authorization of an agency to employ counsel should be construed in a manner consistent with section 5-3-1. Thus, this general language would allow no more than payment by the agency to the office of the Attorney General for legal services provided by that office.
whether constitutional separation of powers principles preclude the legislature from assigning to others the Attorney General’s core function of providing legal services to the state is an issue of first impression that has yet to be resolved by the West Virginia Supreme Court of Appeals.\(^49\) However, the following section explores this issue when considering the scope of the Attorney General’s duties.

IV. JUDICIAL INTERPRETATION OF THE SCOPE OF ATTORNEY GENERAL’S DUTIES

Several opinions of the West Virginia Supreme Court of Appeals have addressed the powers and duties of the Attorney General of West Virginia.

A. Constitutional and Common Law Powers: State ex rel. Manchin v. Browning\(^50\)

In 1909, the West Virginia Supreme Court of Appeals held that the Attorney General possessed common law powers and duties.\(^51\) For more than sixty years after the court decided State v. Ehrlick,\(^52\) the Attorney General was believed to possess broad common law powers, although no cases dealt directly with the scope of the power of the office.\(^53\) However, in State ex rel. Manchin v. Browning,\(^54\) the court overruled Ehrlick.\(^55\) The Manchin court analyzed the historical roots of the office, holding that the West Virginia Constitution of 1873

\(^{49}\) However, as to the great majority of state agencies, offices and commissions, there exists absolutely no colorable statutory authority that could be argued to constitute an exemption from section 5-3-1’s explicit prohibition. When such agencies, commissions, and offices expend public funds for legal services provided by in-house and outside counsel, their action is both unlawful and untenable.

\(^{50}\) 296 S.E.2d 909 (W. Va. 1982).

\(^{51}\) State v. Ehrlick, 64 S.E. 935, 936 (W. Va. 1909).

\(^{52}\) 64 S.E. 935 (W. Va. 1909).

\(^{53}\) Ehrlick involved a dispute between a county prosecuting attorney and the Attorney General over which official possessed the authority to restrain illegal gambling activity. Id. at 936. The court found that the power rested with the Attorney General, reasoning that the office of the prosecutor was conferred by the legislature, while “[t]he office of the Attorney General is of very ancient origin, and its powers were recognized by the common law.” Id.

\(^{54}\) 296 S.E.2d 909.

\(^{55}\) To the extent that Ehrlick held that the Attorney General of West Virginia possessed common law executive powers, it was overruled by Manchin. See id. at 915.
did not invest in the Attorney General the powers and duties which the office had previously possessed under the common law.\textsuperscript{56} \textit{Manchin} involved a dispute over whether the Attorney General had the duty to represent a state officer \textit{in court litigation}, even though he disagreed with the policy decision of that officer.\textsuperscript{57} A citizen suit was filed in federal district court against the West Virginia Secretary of State, A. James Manchin, seeking to have a statute relating to apportionment of congressional districts declared unconstitutional and to have the Secretary enjoined from compelling Congressional candidates to run “at large.”\textsuperscript{58} The Secretary of State sided with the federal court plaintiff in the civil action, agreeing that the existing apportionment statute was unconstitutional.\textsuperscript{59} The Attorney General took the position that the apportionment statute was constitutional.\textsuperscript{60} In spite of this conflict between lawyer and client, the Attorney General refused the Secretary’s request that special counsel be appointed to represent the Secretary in federal court.

\footnotesize{\textsuperscript{56} In \textit{Manchin}, the court observed that the 1909 opinion “contained very little discussion of the history of the office of Attorney General or the powers and duties reposed therein.” \textit{Id.} at 914. “Indeed,” said the court, “we find no in-depth analysis of the office of Attorney General as it exists today . . . .” \textit{Id.}

\textsuperscript{57} The \textit{Manchin} court stated:

Ordinarily the state acts only through its officers and agents. Indeed, it has long been held that, in view of the constitutional prohibition contained in article VI, section 35 against the state being made a party defendant in any lawsuit, a civil action brought against a state officer or agency is not a suit against the state. All state officers . . . are sworn to uphold the constitutions . . . and to execute faithfully the duties of their offices. W. VA. CONST. art. IV, § 5. Upon their oath and in the performance of their statutorily prescribed duties, some officers . . . are empowered to make good faith policy decisions which implement the laws they administer and comport with the requirements of our constitutions. Furthermore, it is the duty of all state officers to interpret and implement the mandates of the constitutions. When the official policies of a particular state officer or agency are called into question in civil litigation, that officer or agency is entitled to the same access to the courts and zealous and adequate representation by counsel to vindicate the public interest, as is the private citizen . . . . His primary responsibility [when a state official or agency is sued] is to provide proper representation and competent counsel to the officer or agency on whose behalf he appears. The Attorney General’s role in this capacity is not to make public policy in his own right on behalf of the state . . . . The Attorney General’s role and duty is to exercise his skill as the state’s chief lawyer to zealously advocate and defend the policy position of the officer or agency in the litigation.

\textit{Id.} at 919-20 (citations omitted).

\textsuperscript{58} \textit{Manchin}, 296 S.E.2d at 912-913.

\textsuperscript{59} \textit{Id.} at 913.

\textsuperscript{60} \textit{Id.}
litigation. The Secretary responded by filing a writ of mandamus with the West Virginia Supreme Court of Appeals arguing that the Secretary was entitled to legal representation in federal court.

Manchin, clearly indicates that the West Virginia Attorney General cannot claim that the state’s constitution grants to her broad common law powers. Accordingly, this Article does not question that portion of the court’s holding in Manchin. The court’s opinion in Manchin is relevant to this Article not because of what the court held with regard to the scope of the office’s common law powers, but rather because of the court’s articulation of the power the Attorney General possesses as a constitutional officer in a divided executive branch of government. In focusing on this latter import of the case, it is important to understand the precise context in which the holding of Manchin was fashioned because Manchin did not involve a dispute over the Attorney General’s representation of a state official in a non-litigation context. Thus, in Manchin, the Court was specifically addressing only the role of the Attorney General in cases where he is defending a state officer who has been sued; it did not consider circumstances where litigation is not involved.

Manchin recognized that the powers and duties of the Attorney General in this state are both constitutional and statutory in origin. The Attorney General is an elected constitutional officer of the executive department. The Court found that the constitutional title “Attorney General,” explicitly designated the holder of the office as “general lawyer for the state.” The very nature of the office suggests no

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61 Id.

62 Id.

63 The Manchin Court stated:
The Attorney General performs quite a different function when he appears to defend a state officer who is sued in his official capacity. In this circumstance the Attorney General does not appear as a party to the action. That role is filled by the state officer against whom the suit is brought. Rather, the Attorney General’s function is to act as legal advisor and agent of the officer-litigant and to prosecute or defend, within the bounds of the law, the decision or policy of such officer which is called into question by such lawsuit. Id. at 919.

64 Syllabus point 1 of Manchin states that “[t]he powers and duties of the Attorney General are specified by the constitution and by rules of law prescribed pursuant thereto.” Id. at Syl. Pt. 1.

65 Id. at 918 (citation omitted). This observation simply recognizes that when the Constitution of 1872 created the elected office of Attorney General, while not intending to imbue the Office with common law powers, it did intend to place in the executive department an elected “general lawyer” for the state government.
other possible role for an attorney general. Moreover, as explained below, by virtue of the constitutional mandate that he be elected, the Attorney General possesses a constitutional residuum of responsibility that may not be abrogated other than by constitutional amendment.

Interestingly, in 1940 and 1989, constitutional amendments were proposed by the legislature that would have abolished the elected constitutional offices of Treasurer, Secretary of State, and Agriculture Commissioner. The proposed amendments would have placed in the Governor the power to appoint such officers who would serve at the Governor’s will and pleasure. In each instance, West Virginia voters overwhelmingly rejected the proposed amendments. The office of Attorney General was not included in either of the rejected constitutional amendments.

In Manchin, the court found that the constitution’s framers had envisioned that the Legislature would statutorily prescribe the duties of the state’s general lawyer. Citing West Virginia Code section 5-3-1, the court held that “[b]y statute the Attorney General is required to provide legal services to enumerated state agencies and officials . . . upon request.” The court in Manchin also observed that section 5-3-2 requires the Attorney General to represent and defend state officers in court proceedings. Moreover, West Virginia Code section 5-3-2 requires the Attorney General “to act as legal counsel and representative on behalf of the state.”

The court found that West Virginia Code sections 5-3-1 and 5-3-2 clearly designate the Attorney General as the legal advisor and representative of the Secretary of State and other state officers when they are sued in their official capacities; and that the Attorney General is required to give legal advice, to

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66 By a more than three to one margin in 1940 and a seven to one margin in 1989.

67 Manchin, 296 S.E.2d at 917. The court explained that “the Attorney General is more properly designated as the chief legal officer of the state, with the law as his area of special expertise. The Attorney General, as a complement to the Governor, is the chief ‘law-trained’ officer of the state. By the nature of his office, he is the general lawyer for the state, an office he could not hold if he did not have the proper legal qualifications and were not admitted to the bar.” Id. (emphasis added) (citations omitted).

68 Id.

69 Id. at 918.

70 Id. Manchin also observed that West Virginia Code section 5-3-2 provides that the Attorney General “shall appear in any cause in which the state is interested that is pending in any other court in the State, on the written request of the governor, and when such appearance is entered he shall take charge of and have control of such cause.” Manchin, 296 S.E.2d at 918 (emphasis added).
prosecute and defend suits and to appear in court on their behalf.\textsuperscript{71} Citing West Virginia Code section 5-3-1, the \textit{Manchin} Court reached a conclusion about the scope of that statute's prohibitory language:

by the plain terms of this statute it is unlawful for the executive department of state government, the governor, the secretary of state, the auditor, the state superintendent of free schools, [and other enumerated state executive officials, boards and commissions] to expend any public funds of the State of West Virginia, for the purpose of paying any person, firm or corporation, for the performance of any legal services.\textsuperscript{72}

Therefore, when the Secretary of State asked the Attorney General to provide him with legal counsel, he was operating within the constraints of section 5-3-1 since the Secretary was "\textit{forbidden by law} . . . to hire outside counsel."\textsuperscript{73} The court's opinion in \textit{Manchin} negates the West Virginia Attorney General's ability to exercise traditional common law powers that are incident to such office

\textsuperscript{71} Id. at 918. \textit{Manchin} recognized other duties of the Attorney General as well. He is, for example, "statutorily authorized to appear and 'represent the interests of the State' in all cases in that special court of record, the Court of Claims." Id. at 919 (citation omitted). "He also has standing to exercise judgment in the role of a party litigant when he appears in this Court as counsel for the state in criminal appeals and other actions to which the State of West Virginia is a party. For example, the Attorney General has the power and discretion to confess reversible error in criminal appeals before this Court." Id.

\textsuperscript{72} \textit{Manchin}, 296 S.E.2d at 917. The \textit{Manchin} court noted in dicta that "[s]ome executive department agencies are specifically exempted from this provision by virtue of statutory authorization to hire their own counsel using agency funds." Id. 917, n.4. The Court identified the following state agencies as having statutory authorization for hiring lawyers to provide legal services:

\begin{itemize}
  \item Bd. of Investments, § 12-6-5(6);
  \item W. Va. Resource Recovery-Solid Waste Disposal Authority, § 16-26-6(12);
  \item Department of Highways, § 17-2A-7;
  \item Water Development Authority, § 20-5C-6(12);
  \item Department of Employment Security, § 21A-2-18; and
  \item Public Service Commission, § 24-1-8.
\end{itemize}

\textit{Id.} In noting the existence of such statutes, the Court should properly be seen as merely having observed that such statutory provisions appear to exempt the respective agencies from the prohibition contained in West Virginia Code section 5-3-1. The case before the Court, however, did not present the question of the relationship of section 5-3-1's statutory prohibition to any of the cited statutes. Nor did \textit{Manchin} address the constitutional separation of powers issues attendant to legislative enactments which assign to others duties which are arguably solely within the purview of the Attorney General's responsibilities as the state's general lawyer.

\textsuperscript{73} Id. at 921 (emphasis added).
in many other states. Manchin clearly does not, however, address constitutional questions concerning the scope of legislative power to dilute the Attorney General's constitutional duty to act as the general lawyer of the state. Indeed, the recognition in Manchin and later cases that the Attorney General is the general lawyer for the state, and that her duties are constitutional as well as statutory in origin, strongly implies that core responsibilities of that office exist which may not be diluted by legislative action.

B. Subsequent Case Law

In State ex rel. Caryl v. MacQueen, the court held that "the Attorney General remains the legal representative of the State and its agencies . . . ." Caryl noted that the role of the Attorney General is defined in West Virginia Code section 5-3-1, and that the Attorney General is charged with additional duties by West Virginia Code section 5-3-2. The court explained that section 5-3-1 "clearly charges the Attorney General with the duty to give his legal opinion and advice to the Tax Commissioner." The court pointedly stated that "W. Va. Code §§ 5-3-1 and 5-3-2 make it . . . clear that the Attorney General is required to act as the representative and legal counsel on behalf of the State of West Virginia."

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75 Id. at 650. In Caryl v. MacQueen, the State Tax Commissioner filed an action seeking to prohibit a circuit judge from issuing a decision or releasing any information relating to the Commissioner's tax compromise in a companion civil action. In a companion case, The Daily Gazette Co. Inc. v. Caryl, 380 S.E.2d 209 (W. Va. 1989), the Court held that tax compromise information sought by the newspaper was statutorily exempted from disclosure under the West Virginia Freedom of Information Act. In Daily Gazette the Court addressed the issue of "whether the relationship between the Attorney General and the state Tax Commissioner is that of an attorney to client, which would have precluded the Attorney General from disclosing the CSX tax compromise information existing in his files." MacQueen, 385 S.E.2d at 647. As discussed in the text above, the Court held that an attorney-client relationship did exist between the Tax Commissioner and the Attorney General. In dicta, the Court suggested that the Attorney General may be "specifically exempted [from his duty as the legal representative of the State and its agencies] by statute." Id. at 650.

76 Id. at 648.

77 Id. at 649, n.5. The Court also stated that "the Attorney General is required to give legal advice, to prosecute and defend suits, and to appear in court on the State and its agencies' behalf." Id. at 649 (citing Manchin, 296 S.E.2d at 917). "[E]ven in situations where the Attorney General stands as an 'administrator of the law,' he remains the legal representative of the state and its citizens." Id. at 649 (emphasis added).
As it did in Manchin, the court in Caryl held that “explicit in the title attorney general is the proposition that the holder of the title is the general counsel for the state.”78 The Caryl court also observed that “W. Va. Code § 5-3-1 . . . forbids an agency to expend public funds for the purpose of payment of outside counsel since the purpose of the Attorney General’s office is to fulfill that role.”79 More recently, in State ex rel. Fahlgren Martin v. McGraw,80 and Lawyer Disciplinary Board v. McGraw,81 the court once again emphasized the role of the Attorney General as the state’s “chief legal officer.”82

In summary, every modern decision of the Supreme Court of Appeals of West Virginia examining the constitutional and statutory duties of the state’s Attorney General has recognized the holder of the office to be the state’s “chief legal officer.” Several opinions have recognized that the constitutional title “Attorney General” explicitly designates the holder of the office as the state’s “general counsel.” Thus, the courts have seemingly recognized a basic irreducible residuum of power vested by the constitution in an elected Attorney General.

C. The Code of Professional Conduct and Attorney General’s Duty To Represent the Organizational Client—the State

There is an additional reason why Manchin is relevant to the constitutional separation of powers issue discussed herein. In Manchin, in addition to the assertion that the Attorney General is the state’s general lawyer pursuant to the state constitution, the court also held that “[a]s a lawyer and officer of the courts of this state, the Attorney General has the duty to conform his conduct to that prescribed by the rules of professional ethics.”83 Thus, one may look to the West Virginia

78 Id. at 650 (citing Manchin, 296 S.E.2d at 918).
79 Id. at 649.
81 461 S.E.2d 850, 862 (W. Va. 1995) (stating that the Attorney General is designated as “legal adviser to state officers sued in their official capacities” and is the “state’s chief lawyer”).
82 The Fahlgren Martin court emphasized that the Manchin court had recognized “the legislature’s intent to limit the power of the Attorney General to that of the State’s lawyer rather than the State’s law enforcement officer.” Fahlgren Martin, 438 S.E.2d at 345 n.7. See also McGraw v. Caperton, 446 S.E.2d 921 (W. Va. 1994).
83 Manchin, 296 S.E.2d at 920. See also Lawyers Disciplinary Bd. v. McGraw, 461 S.E.2d 850, 861 (W. Va. 1995) (“The Attorney General is required to conform his actions to the Rules of Professional Conduct, as is every lawyer in this State.”) (citing Manchin, 296 S.E.2d at 920).
Rules of Professional Conduct to understand the nature of the Attorney General's role as general lawyer of the state and her relationship to her government agency clients.84

As indicated above, the West Virginia Supreme Court of Appeals has observed that "explicit in the title attorney general is the proposition that the holder of the title is the general counsel for the state," and that as general counsel representing her government clients, she is subject to the Rules of Professional Conduct.85 The Rules, applicable to an entity's general counsel in private business, also apply to government lawyers, like the Attorney General, who are similarly situated. They suggest the significant conflicts inherent in legislative attempts to authorize legal representation of government officials and agencies by individuals other than the state's general counsel.

A general counsel is, essentially, the general lawyer for an entity.86 Corporations commonly employ general counsel. One rationale supporting a constitutional structure that calls for the election of the Attorney General rather than his/her appointment by the Governor is explained by drawing an analogy between corporate general counsel and the general counsel of a state:

Attorney General Clarence Meyer of Nebraska, in response to the argument that the Governor should be able to appoint his Attorney General, says that: The president of a large corporation does not name the general counsel. This is done by the board of directors and in some cases their action must be confirmed by a vote of the stockholders. Because of this, the same general counsel sees a good many presidents come and go.87

Both corporate general counsel and a state's general counsel are required to give independent legal advice. In the case of the corporate general counsel, her

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84 The Model Rules of Professional Conduct were promulgated and adopted by the West Virginia Supreme Court of Appeals on June 30, 1988, effective January 1, 1989. WEST VIRGINIA RULES OF PROFESSIONAL CONDUCT (1997).

85 MacQueen, 385 S.E.2d at 650 (citing Manchin, 296 S.E.2d at 918).

86 MacQueen, 385 S.E.2d at 650.

87 NAAG REPORT, supra note 1, at 67. One delegate of a state constitutional convention (Nebraska) succinctly explained the separation of powers purpose behind Nebraska's election of an Attorney General. He explained that, under ordinary circumstances, the judgment of one man [the Governor] is not better "than the combined judgment of the electors of the state of Nebraska on that proposition and an Attorney General should be a check on all the officers in the state." Id. at 69.
independence from the chief executive officer is intended to insure that she will
conform her conduct to the wishes of the board of directors rather than to the will
of a CEO. The state’s general counsel, the Attorney General, similarly can be said
to owe her position and allegiance ultimately to the electorate rather than to another
executive officer, the judiciary or the legislature. It is her responsibility to exercise
her independent judgment in providing legal services to executive officers, agencies
and the legislature.88

The analogy between corporate and the general counsel of a state is an apt
one which is consistent with a similar suggestion in the Rules of Professional
Conduct of the analogy between corporate (“entity”) counsel and government
counsel. As discussed in detail below, the drafters of the Rules found substantial
similarity between the degree of independence required of corporate counsel and
that of government lawyers carrying out their respective ethical responsibilities.89

The Rules examine the ethical responsibilities of lawyers who provide legal
services for an “organization” or “entity” including corporate and government
entities. Rule 1.13 of the West Virginia Rules of Professional Conduct relate to a
lawyer’s responsibility to an “organization as client.”90

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88 See Manchin, 296 S.E.2d 909.

89 See infra note 91 and accompanying text.

90 Rule 1.13 provides:
(a) A lawyer employed or retained by an organization represents the organization
acting through its duly authorized constituents.
(b) If a lawyer for an organization knows that an officer, employee or other person
associated with the organization is engaged in action, intends to act or refuses to
act in a manner related to the representation that is a violation of the legal
obligation to the organization, or a violation of law which reasonably might be
imputed to the organization, and is likely to result in substantial injury to the
organization, the lawyer shall proceed as is reasonably necessary in the best
interest of the organization. In determining how to proceed, the lawyer shall give
due consideration to the seriousness of the violation and its consequences, the
scope and the nature of the lawyers representation, the responsibility in the
organization and the apparent motivation of the person involved, the policies of
the organization concerning such matters and any other relevant considerations.
Any measures taken shall be designed to minimize disruption of the organization
and the risk of revealing information relating to representation to persons outside
the organization. Such measures may include among others:
(1) asking reconsideration of the matter;
(2) advising that a separate legal opinion on the matter be sought for
presentation to appropriate authority in the organization; and
(3) referring the matter to higher authority in the organization,
including, if warranted by the seriousness of the matter, referral to the
highest authority that can act in behalf of the organization as determined
The comments to Rule 1.13 and the general discussion of the "Scope" of the Rules elaborate upon the ethical responsibilities of the government lawyer. The comments make clear that government lawyers such as those of the office of the Attorney General fall within the category of lawyers to which Rule 1.13 applies.\(^9\) The Rules explicitly recognize that because the public has a substantial interest in the work of government lawyers, different considerations may come into play in situations involving government lawyers than in situations where lawyers represent private clients: "[W]hen the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved."\(^9\) For example, while the political appointee who is charged with supervision of a state agency may make policy decisions for the agency, she is considered by the Rules to be a "constituent" of the organizational client and not as the client.\(^9\)

\(^9\) Comment seven to Rule 1.13 states that "[t]he duty defined in this Rule applies to governmental organizations." \textit{Id.} at cmt. 7.

\(^9\) \textit{Id.} (emphasis added).

\(^9\) \textit{See}, e.g., \textit{Id.} at cmts. 1, 2, which state in relevant part:

An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

\textit{Id.}
"While in some circumstances the client may be a specific agency, it is generally the state as a whole."  

While lawyers employed by the office of the Attorney General must generally defer to the policy decisions of an agency director or commissioner who is a constituent of a state agency, "this does not mean, however, that constituents of an organizational client are the clients of the lawyer." Indeed, the Rule recognizes that, "in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances." The Comment emphasizes that "[t]his Rule does not limit that authority."  

The Comments to Rule 1.13 thus explicitly recognize the importance attached to the government lawyer's representation of his/her organizational client, as distinguished from representation of an individual who is but a constituent of the organizational client:  

There are times when the organization's interest may be or become adverse to that of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation.  

The Rules of Professional Conduct also recognize the unique function served by the Attorney General as a government lawyer who owes his or her ultimate allegiance to the state or an agency as an entity, rather than to the individuals through which the agency acts:  

94 Id. at cmt. 7.  

95 WEST VIRGINIA RULES OF PROFESSIONAL CONDUCT Rule 1.13 at cmt. 3 (1997).  

96 Id. at cmt. 7.  

97 Id.  

98 Id. at cmt. 8.55. Comment 8 to Rule 1.13 further explains that "care must be taken to assure that the individual understands that, when there is such diversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged." Id.
Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships . . . . Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intra-governmental legal controversies in circumstances where a private lawyer could not represent private clients.99

The West Virginia Rules of Professional Conduct explicitly state that "[t]hese Rules do not abrogate any such authority."100

The most casual student of human nature would likely predict that a government official will generally prefer to hire and accept advice from his/her own in-house lawyer rather than to heed the advice of a lawyer selected by an Attorney General.101 When the legislature either condones or itself promotes conflict between the Attorney General and state agencies and officials by allowing the latter to retain their own lawyers, it predictably plants fertile seeds for problems and even allegations of unethical conduct. It is just such legislative action that intrudes impermissibly into the constitutional core functions of the elected Attorney General.

The job of a lawyer employed by a State Attorney General is one often infused with great responsibility without commensurate compensation. It simply is not enough to say, as the West Virginia Supreme Court of Appeals did in Manchin, that they must conform their conduct to the Rules of Professional Conduct.102 The presence of in-house and outside counsel employed by state agencies and officers without the Attorney General's approval or supervision,

99 Id. The comment on the "Scope" of the Rules suggests such a scenario:
   For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the Attorney General and the state's attorney in state government.

Id. at Scope.

100 Id.

101 The reason for such preference is simple. A state Attorney General's Office, like the federal Justice Department and Solicitor General, must consider broader institutional concerns of government that may supereide the political or policy preference of an individual agency or officer. Lawyers hired by the head of an agency have no such institutional concerns or constraints and thus are free to support whatever partisan or personal agenda the agency or official may have.

102 Manchin, 296 S.E.2d at 919.
inevitably creates serious conflicts that are fundamentally inconsistent with the constitutional structure designed by the framers to advance the public.

D. Duties and Responsibilities of The Attorney General Under the Rules of Professional Conduct: Judicial Analysis

In Manchin, the court held that "[t]he Attorney General has the duty to conform his conduct to that prescribed by the rules of professional ethics."103 Manchin stated that "as a lawyer and an officer of the courts of this state, the Attorney General is subject to the rules of this Court governing the practice of law and the conduct of lawyers, which have the force and effect of law."104 The Manchin court listed some of the specific duties to which, under the Rules of Professional Conduct, the Attorney General must conform the conduct of his office.105

In Manchin, the court "emphasize[d] the importance" of the mandate in the Model Code of Professional Responsibility that lawyers "shall exercise independent professional judgment on behalf of a client."106 While the client must ultimately choose what policy position to take and what legal course to follow to "vindicate lawful public policy," the Attorney General "is required to exercise his independent professional judgment on behalf of a state officer for whom he is bound to provide

103 Id. at 912 Syl. Pt. 4.

104 Id. at 912 Syl. Pt. 5 (emphasis added). The court did not address the separation of powers issue implicit in its view that an elected executive department officer, the Attorney General, must conform his conduct to rules set forth by the judicial department. Also, implicit in its holding that the Attorney General is subject to the Rules of Professional Conduct, is the proposition that any other lawyer who seeks employment with or is otherwise employed to provide legal services to the State is similarly subject to such Court-promulgated rules.

105 Id. at Syl. Pt 6. The Code of Professional Responsibility referred to in Manchin was superseded by the Rules of Professional Conduct which became effective January 1, 1989. WEST VIRGINIA RULES OF PROFESSIONAL CONDUCT (1997). For the sake of clarity, the latter title will be used herein unless an earlier version of the Code is referenced in quotation. The ethical duties referred to by the Court included the mandate that he shall assist in maintaining the integrity and competence of the legal profession; shall assist the legal profession in fulfilling its duty to make legal counsel available; shall assist in preventing the unauthorized practice of law; shall preserve the confidence and secrets of a client; shall exercise independent professional judgment on behalf of a client; shall represent a client competently; shall represent a client zealously within the bounds of the law; shall assist in improving the legal system; and shall avoid even the appearance of professional impropriety. Manchin, 296 S.E.2d at 920.

106 Manchin, 296 S.E.2d at 920.
legal counsel." The court declared that in the context of litigation "his duty is to analyze and advise his clients as to the permissible alternative approaches to the conduct of the litigation." The Attorney General "should inform his client of the different legal strategies and defenses available and of his professional opinion as to the practical effect and probability of the outcome of each alternative" so that the state officer may make an intelligent decision with regard to how to proceed.

Subsequent to Manchin, in Lawyer Disciplinary Board v. McGraw, the West Virginia Supreme Court of Appeals was presented with a case involving charges that the Attorney General had committed violations of the Rules of Professional Conduct in his representation of the West Virginia Division of Environmental Protection (DEP), a state agency charged with enforcement of West Virginia's environmental regulatory statutes. Upon complaint filed by the appointed Director of DEP, the Attorney General was charged by the West Virginia Lawyer Disciplinary Board with four Rules violations. In McGraw, the court upheld the dismissal of three of the four charges of ethical violations directed at the Attorney General. The court upheld the charge that the Attorney General had violated Rule 1.6(a) of the Rules of Professional Conduct by revealing client

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107 Id.

108 Manchin, 296 S.E.2d at 920.

109 Id.


111 McGraw, 461 S.E.2d at 851.

112 The Attorney General was charged with the following violations of the West Virginia Rules of Professional Conduct:

(1) Contacting an intervenor aligned with the DEP in litigation concerning a solid waste permit and revealing client confidences to the intervenor in violation of Rule 1.6(a);

(2) Encouraging a citizen, if she disagreed with a position taken by DEP, to "apply political pressure to legislators as a means of opposing DEP's position, in violation of Rule 1.7(b);

(3) By refusing to advocate in court a change in position taken by DEP favorable to a landfill operator which the Attorney General found "repugnant, immoral, unethical and totally improper," in violation of Rule 1.2(a);

(4) By directing that a copy of "an in-house document" be attached to the Attorney General’s motion to withdraw from representation of DEP, in violation of Rule 1.6(a).

McGraw, 461 S.E.2d at 856-857.

113 McGraw, 461 S.E.2d at 851.
confidences to a third party. In publicly reprimanding the Attorney General, the court observed that:

[T]he lawyer’s broader ethical duty of confidentiality, embodied in rule 1.6, “applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.” Comment, Rule 1.6 of the Rules of Professional Conduct. Significantly, the duty of confidentiality binds the lawyer at all times, not only in cases where he or she faces inquiry from others.

The case is instructive in that it reveals the inherent conflicts that arise in a constitutionally structured divided executive. As observed above, the dispute in McGraw was between the elected Attorney General and a state agency official appointed by the Governor. The object of the controversy was an issue of significant statewide public interest: permit application made to the DEP for the disposal of large amounts of out-of-state wastes in a landfill.

The Attorney General received a credible report that the DEP Director had indicated a desire to change positions in a court case to align his agency with the position of the landfill operator after summary judgment had been granted against it in favor of the DEP and the intervenors. The Attorney General promptly

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114 Rule 1.6(b) provides:

A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act; or

(2) to establish a claim or defense on behalf of the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of a client.

WEST VIRGINIA RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1997).

115 McGraw, 461 S.E.2d at 860.

116 Id. at 852-856.


118 The facts of McGraw highlight the problems that arise when the Attorney General is pitted against another lawyer working for the government whose views differ from the Attorney General’s. In McGraw, the Deputy Director for DEP, who was herself a lawyer, attended a meeting with the Director of the DEP and a representative from an adverse party in pending litigation: the landfill operator.
contacted a representative of an intervenor to inform her of the DEP’s change of position. 119 This act, the Supreme Court held, violated:

a lawyer’s ethical duty of confidentiality under Rule 1.6 of the Rules of Professional Conduct [which] applies to all information relating to representation of a client, protecting more than just “confidences” or “secrets” of a client. The ethical duty of confidentiality is not nullified by the fact that . . . someone else is privy to it. 120

The Attorney General apparently did not claim, nor did the West Virginia Supreme Court of Appeals recognize, that the Rules of Professional Conduct distinguishes between a “constituent” (employee or official) of a governmental organization and the government itself which the Rules recognize as “the client.” 121

The dispute between West Virginia’s elected Attorney General and the Governor’s appointed DEP Director is not uncommon in state governments with a divided executive branch. However, one criticism of the McGraw decision is that the multiple interests that an Attorney General in a divided executive must take into account are substantially broader than that recognized by the court. Another criticism is that the court’s analysis failed to consider both the government’s interest in maintaining the integrity of the state’s environmental regulatory process and the public’s interest in ensuring that government agencies carry out their statutory


120 McGraw, 461 S.E.2d at 861. The court also observed that “we fail to see how [the attorney General’s] voluntary disclosure to Ms. Hogbin, a third party, was impliedly authorized simply because respondent was directed to file, in the future, a public pleading, and how such disclosure furthered respondent’s legal representation of his client.” Id.

121 See discussion, supra notes 91-102 and accompanying text.
responsibilities. The failure of the McGraw court to properly identify the “client” renders the court’s analysis incomplete and undermines the persuasiveness of the opinion.\textsuperscript{122}

It was obviously the much broader public interest in checks and balances between and among the officers of the divided executive and the three branches of state government that resulted in constitutional provisions requiring the election of Attorneys General. While the Attorney General, as any other lawyer, has a duty to represent his or her organizational clients in government, his ultimate fealty under the \textit{Rules of Professional Conduct} is not necessarily to bureaucratic political appointees, or even elected officials -- the “constituents” of the state organization -- but to the government as a whole and to rule of law.\textsuperscript{123} Thus, when analyzing the scope of the powers of an elected Attorney General, the \textit{Rules of Professional Conduct} help define the contours of that official’s relationship with individuals employed by government, with elected officials, with the government as a whole and with the public, whose interest was, after all, the constitutional framers’ reason for creating an elected Attorney General in the first instance.

\section*{V. CONSTITUTIONAL STATUS OF ATTORNEY GENERAL IN A DIVIDED EXECUTIVE}

Decisions of the West Virginia Supreme Court of Appeals and official opinions of past Attorneys General of the state have repeatedly declared the holder of the office of Attorney General to be the state’s “general lawyer.” By virtue of his constitutional title, the court has designated the Attorney General as the state’s

\begin{footnotesize}
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\item[\textsuperscript{122}]
The observation that the court failed to “properly identify the client” is intended to suggest that the Court simply \textit{assumed} that the Director of the DEP was “the client” to whom the Attorney General owed a duty of confidentiality under the \textit{Rules of Professional Conduct}. As observed above however, the Rules are not susceptible to simple answers where the conduct under examination is that of a government lawyer. The \textit{Rules} could not be more explicit in cautioning government lawyers that their first and primary duty is to their \textit{organizational client} -- the government as a whole. Whether the conclusions drawn by the court in defining the parameters of the Attorney General’s ethical responsibilities to the DEP Director in \textit{McGraw} were appropriate remains to be seen. Hopefully, at the very next opportunity, the court will carefully analyze all relevant provisions of the \textit{Rules} so as to clarify its application to government lawyers. Surely those attorneys who faithfully serve the public are entitled to a more comprehensive examination of the ethical constraints to which they must conform than that supplied by \textit{McGraw}.

\item[\textsuperscript{123}]
The very difficult assignment of an Attorney General in a divided executive to represent government entities within state government who often display wildly divergent legal and political positions has not received attention by the courts.
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"general counsel." The following discussion reviews cases and scholarly commentary relating to the status of Attorneys General in other states whose constitutions also provide for a divided executive department.

A. Constitutionally Designed Division of Executive Department Authority: Internal Checks and Balances

The election requirement of an Attorney General is the rule rather than the exception in state constitutions of the United States. One study found that more than a third of the elected state Attorneys General are members of a political party different than the party of the incumbent Governor. Implicit in such constitutional structuring of a divided executive department is the desire to provide checks and balances on those with executive responsibilities.

Where a state constitution calls for the election of the Attorney General for a finite term of office rather than requiring service at the will and pleasure of the Governor, constitutional drafters have provided for both the independence of the state’s legal counsel and a check on other components of government within the constitutional scheme:

The fear of loss of office should not deter the Attorney General from issuing an opinion. Since his duties are of the highest order,

124 Manchin, 296 S.E.2d at 917.

125 As of 1990, 43 of the 50 state constitutions provided for the election of an Attorney General; only 5 state constitutions provided for appointment of the Attorney General by the Governor. One was appointed by the state supreme court (Tennessee) and one was appointed by the legislature (Maine). NAAG REPORT, supra note 1, 15.

126 The creation of such strong internal intra-executive checks and balances as well the separation of inter-departmental powers has been recognized as underlying the constitutionally mandated election of Attorneys General:

The primary argument for the election of an Attorney General is that he is an attorney for all of the people, and should be chosen by them. He is the Governor’s advisor, but not exclusively; the Governor is merely one among many clients. By making the Attorney General directly responsible to the electorate, he remains subject to the ultimate source of power and will be more responsive to public needs. Another argument is that the legislative branch may also rely on him for advice. In some states [including West Virginia] he also has responsibilities toward the judiciary branch, such as serving as court reporter. Thus he should not be responsible to any single branch of government, but can serve to strengthen checks and balances within the system.

Id. at 66-67. West Virginia’s Attorney General has statutory responsibilities to all three branches of state government.
as high as any judicial officer, he should enjoy the same independence as a member of the judiciary. He should not be a creature of the Governor, but should render opinions solely on the basis of law. He should not be an advocate for a particular administration . . . \(^{127}\)

During the consideration of the 1968 constitution of the State of New York the importance of an independent elected Attorney General in a divided executive structure of constitutional governance was explained:

To sum it up -- an elected Attorney General has a measure of independence and a sense of personal and direct responsibility to the public. The elected official has a natural and impelling desire to be creative and to exercise broader initiative in the service of the public. He is free of the fear of dismissal by any superior official if he should exercise contrary independent judgment. He is in the best position to render maximum service to the People and impartial advice to the Governor, the Legislature and State departments and agencies. He can appear in Court without fear or favor -- an attorney in the fullest and finest sense of the word.\(^ {128}\)

As in the great majority of the constitutions of her sister states, West Virginia’s constitution creates a “divided” or “non-unified” executive department comprised of separately-elected executive officers, including an Attorney General.\(^ {129}\) The requirement that these officers stand for election compels one to

\(^{127}\) *Id.* at 67.


\(^{129}\) The historical roots of the election of state Attorneys General lie in notions of a Jacksonian democracy:

Andrew Jackson’s administration brought a new political ethic to American government. The common man was deemed competent to vote and hold office. Short terms of office ensured popular control of government, and direct election of officials became the rule. State constitutions provided for the election of numerous officials, including the Attorney General in most instances. *Id.* at 64. See also Louis E. Lambert, *Major Problems in State Constitutional Revision* 187 (W. Brooke Graves ed., 1960) (“Jacksonian democracy, however, also brought disadvantages where the governorship was concerned. A number of state administrative offices were created, and popular democracy decreed that they should be filled by the action of the voters. As the governor moved into a position of political leadership, he simultaneously suffered a loss of administrative control.”).
conclude that the constitution’s framers clearly intended to imbue each of them with a substantial degree of independence.

The constitutional scheme that creates an independently elected Attorney General and other executive officers thus provides internal checks and balances within the executive department akin, by analogy, to the familiar “three branch” separation of powers structure of the federal and state governments.\(^{130}\) Moreover, like most state constitutions, article V, section 1, of the West Virginia Constitution explicitly requires separation of powers between the three branches.\(^{131}\) This constitutional separation of powers mandate acts as an explicit check on the power of the legislative branch to intrude into the core functions of elected constitutional executive department officers.

B. Legislative Power to Alter Implicit Duties of Elected Constitutional Officers

1. Experience of States Other Than West Virginia

Many courts have held that implicit in the constitutionally designated titles of the elected officers of divided executive departments is a constitutional limitation on the authority of the legislature to significantly alter the powers and duties of those officers. One court has observed that:

> [t]he mandate in [the Minnesota Constitution], that the executive department shall consist of a governor . . . and [an] 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.\(^{132}\)

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\(^{130}\) One commentator has observed that “the independently elected Cabinet officers [under the constitution of the State of Florida], responsible separately to the electorate, tend to buck up and block capricious, mischievous, or autocratic abuses by the Governor and his appointed administrators.” M. B. Johnson, Why We Should Keep Florida’s Elected Cabinet, 6 FLA. ST. U. L. REV. 603 (1978). The commentator refers to Florida’s constitutional separation of executive department powers as a “safeguard against gubernatorial absolutism.” Id.

\(^{131}\) West Virginia Constitution article V, section 1, states in relevant part: “The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others . . . .” W. VA. CONST. art. V, § 1; see also State ex rel. State Bldg. Comm’n v. Bailey, 150 S.E.2d 449 (W. Va. 1966) (stating that “the phraseology of this article follows that of the constitutions of Virginia and other older states”).

\(^{132}\) State ex. rel. Mattson v. Kiedrowski, 391 N.W.2d 777, 782 (Minn. 1986).
Similarly, each independent constitutional officer of West Virginia’s executive department must be seen as exclusively invested with the duties and responsibilities pertaining to their respective offices. With regard to intrusion into the core constitutional power and duty of West Virginia’s Attorney General, a further constitutional impediment exists. Article VII, section 4, limits the power of other executive officers to choose who will provide legal services for their own offices insofar as it prohibits any executive officer mentioned in that article from simultaneously holding any other office.\(^ {133} \)

In addition to banning dual office holding by executive officers, implicit in article VII, section 4, is the proposition that the duties and responsibilities of each executive officer may be exercised only by that officer. Thus, the Treasurer may not usurp and perform duties of the Secretary of State, and the Agricultural Commissioner may not perform the work of the Auditor. It follows that article VII, section 4, bars any officer of the executive department from usurping the duty of the Attorney General to provide and supervise legal services to the state.

In addition, article V, section 1, of the West Virginia Constitution specifically mandates the separation of powers between the three branches of the state’s government: “The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time . . . .”\(^ {134} \) In mandating that the legislative department remain separate and distinct from the executive department, article V, section 1, limits the power of the legislature to take from the Attorney General the responsibility to provide legal services to entities of state government and give that responsibility to another elected or appointed state officer.

West Virginia Code section 5-3-1 is consistent with the Constitution’s mandate that the state’s legal services shall be supervised by the Attorney General, to the extent that it prohibits payment of state funds for legal service provided by persons or firms other than the Attorney General. Judicial decisions in other jurisdictions also support the view that there is a substantial state constitutional basis for barring legislative branch incursions into the implicit duties and responsibilities of elected constitutional executive officers.

\(^{133}\) Those state executive officers mentioned in VII, section 4 are the Governor, Auditor, Treasurer, Agriculture Commissioner, and Secretary of State. W. VA. CONST. art. VII, § 1.

\(^{134}\) Id. at art. V, § 1.
For example, in *Blair v. Marye*, as well as in subsequent cases before the court, the Supreme Court of Virginia has observed that a legislature does not have the power to take duties away from the constitutional office of Attorney General and give them to one whose office is created by mere statute:

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

In *Ex Parte Corliss*, the Supreme Court of North Dakota was faced with an attempt by that state’s legislature to remove duties and responsibilities from the constitutional office of County Sheriff and State’s Attorney and place them within the purview of a legislatively created office of Enforcement Commissioner. In rejecting this legislative act as unconstitutional, the North Dakota Supreme Court observed that:

If the legislative assembly has the power to do this, why has it not the power to provide for the appointment of a special enforcement Governor, or a special enforcement Attorney General . . . ? The Governor [and] the Attorney General are no more constitutional officers than are state’s attorneys and sheriffs. It seems too

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135 80 Va. 485 (1895).


137 *Ex Parte Corliss*, 114 N.W. 962, 964 (N. D. 1907).
obvious for discussion that the framers of the Constitution, in providing for the election of these officers by the people, thereby reserved unto themselves the right to have the inherent functions theretofore pertaining to said offices discharged only by persons elected as therein provided. The naming of these officers amounted to an implied restriction upon legislative authority to create other and appointive officers for the discharge of such functions.  

Ex Parte Corliss and the Virginia cases express the fundamental proposition that when a state constitution creates a constitutional office, the legislature may not by mere statute alter the core functions of that office. This is certainly not a novel concept. That the legislature may not alter a constitutional structure absent a constitutional amendment is so well established in state and federal constitutional law as to be axiomatic. The constitutional flaw implicit in legislative schemes that diminish the inherent duties and responsibilities of elected constitutional officers is apparent when one examines the constitutionally created executive offices of Auditor and Treasurer. Clearly those officers were intended by constitutional framers to perform the core functions of a Treasurer and an Auditor: banking state funds, monitoring income and approving expenditures of state moneys in the case of the former office and review and auditing of state books of account in the case of the latter office. Just as the West Virginia Supreme Court of Appeals found explicit in the title “Attorney General” the proposition that the holder of the title is the state’s general lawyer, so too is it explicit in the titles “Treasurer” and “Auditor” that the holders of those offices are to perform the banking and auditing functions of West Virginia’s state government. 

138 Id. The North Dakota Supreme Court emphasized the structural separation of powers design implicit in constitutions which apportions and allocates powers and responsibilities between and among elected executive officers and branches of government:

[W]hen the people have declared [in the state Constitution] that certain powers shall be possessed and duties performed by a particular officer or department, their exercise and discharge by any other officer or department are forbidden by a necessary and unavoidable implication. Every positive delegation of power to one officer or department implies a negation of its exercise by any other officer, department or person. If it did not, the whole constitutional fabric might be undermined and destroyed.

Id.

139 While no state statute analogous to West Virginia Code section 5-3-1, prohibits expenditure of state funds to individuals or firms to bank state revenues or assume responsibility for auditing the handling of state revenues, the assignment of those functions to someone other than the elected Treasurer and
Precisely such a situation presented itself to the supreme courts of Arizona and Illinois with regard to legislative usurpation of the constitutional duties of the elected Arizona State Auditor and Illinois Treasurer. The Arizona Court quoted Judge Cooley for the proposition that:

The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the law making authority as strong as through a negative was expressed in each instance.\(^\text{140}\)

Said the Court of a constitutionally mandated executive department:

Clearly under the constitution the auditor is a member of the executive department of the state. Under our system of government, and of the state governments of the United States from the organization of the colonies and the states under our federal constitution, the offices of governor, secretary of state, state auditor, state treasurer and attorney general, have had a well-understood meaning . . . To make a free and independent constitutional officer subservient to the dictates of some appointive officer is equivalent to abolishing the office and creating another in lieu thereof to exercise the duties and functions belonging to the first office.\(^\text{141}\)

Thus in *Hudson v. Kelly*, the Supreme Court of Arizona declared unconstitutional legislation that removed core functions of the elected state auditor, a constitutional executive officer. It then assigned these functions to the Commissioner of Finance, a non-constitutional official appointed by the Governor.

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Auditor would seem patent violative of the explicit constitutional separation of powers structure of West Virginia's Executive department. See W. VA. CONST. art. V, § 1.

\(^{140}\) Hudson v. Kelly, 263 P.2d 362, 367 (Ariz. 1953) (quoting THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 88 (1927)) (third emphasis added). It is noteworthy that the Arizona Supreme Court had previously decided that "no common law powers or duties attach to the . . . enumerated constitutional officers, but only those prescribed by statute." Shute v. Frohmiller, 90 P.2d 998 (Ariz. 1939). *Manchin* relied in part on *Shute* in concluding that the Attorney General of West Virginia possesses no common law powers. *Manchin*, 296 S.E.2d at 915-916. The fact that an Attorney General possesses no common law powers is not relevant to the issue of the power of the legislature to designate someone other than the Attorney General to perform legal services for the state.

\(^{141}\) *Hudson*, 263 P.2d at 365, 369.
The *Hudson* Court recognized that the State Auditor was the general accountant of the state whose core duties are inherent in Arizona’s constitutional scheme:

With the advent of statehood the auditor became a constitutional officer, with its incumbent being elected by the people . . . . The duties of the officer now and always have been those of the general accountant of the state . . . . Such officer has always been independent, responsible only to the law, his bond and the electors at the polls.\(^{142}\)

While the Arizona Constitution, like that of West Virginia, provides that the legislature may require a constitutional executive officer to perform such duties as provided by law, in *Hudson* the court emphasized that by virtue of the state Auditor’s constitutional status the legislative power to prescribe duties of the office is subject to implied limitation:\(^{143}\) “There was a purpose in the creation of the office of auditor which, by this Act, has been frustrated. We are not hesitant in holding that there exists the implied restriction against abolishing a constitutional office, in fact, if not in name.”\(^{144}\) Moreover, the Arizona court observed that a legislature has no power, in the absence of express constitutional authority, “to add to a

\(^{142}\) *Id.* at 366.

\(^{143}\) The Arizona constitutional provision at issue created the state’s executive department. That provision contains essentially the same language as article VII, section 1 of the Constitution of West Virginia. West Virginia Constitution, article VII, section 1, provides in relevant part: “The executive department shall consist of a governor, secretary of state, auditor, treasurer, commissioner of agriculture, and attorney general . . . [They] shall perform such duties as may be prescribed by law.” W. VA. CONST. art. VII, § 1. The Arizona Constitution article V, section 1, provides in relevant part: “The executive department of the state shall consist of governor, secretary of state, state auditor, state treasurer, attorney general, and superintendent of public instruction . . . . They shall perform such duties as are prescribed by this constitution and as may be provided by law.” *Hudson*, 263 P.2d at 365.

\(^{144}\) *Id.* at 367 (emphasis added). The court in *Ex Parte Corliss* further observed the effect of legislative usurpation of the powers of a constitutional officer, observing that:

This result could be as effectually accomplished by the creation of new officers and departments exercising the same power and jurisdiction as by the direct and formal abrogation of those now existing. And, although the exercise of this power by the Legislature is nowhere expressly prohibited, nevertheless they cannot do so. The people having in their sovereign capacity exerted the power and determined who shall be their Auditor, there is nothing left for the Legislature to act upon.

*Ex Parte Corliss*, 114 N.W. at 970 (quoting People *ex rel.* Metro. St. Ry. Co. v. Tax Comm’rs, 67 N.E. 69 (N.Y. 1903)).
constitutional office duties foreign to that office" nor may it "take away duties that naturally belong to it."\(^{145}\)

In accord with *Ex Parte Corliss*, is *American Legion Post No. 279 v. Barrett*,\(^ {146}\) a case involving the Illinois State Treasurer.\(^ {147}\) In that case the Illinois Supreme Court observed that:

> It is a rule frequently stated by this court, that the General Assembly may not take away from a constitutional officer the powers and duties given [to] him by the constitution. The constitution, by section 1 of article V, provides that public officers including the State Treasurer, shall perform such duties as may be required by law. Nothing in the constitution further defines the duties of the State Treasurer. This court has held that those duties are such as are to be implied from the nature of the office and of them he may not be deprived or relieved.\(^ {148}\)

Thus, from the cases reviewed above, it appears that there is significant authority in other states emphatically rejecting legislative attempts to dilute the powers of constitutional officers by statutorily assigning the officers' core constitutional duties to another individual or entity.

West Virginia's constitutional jurisprudence does not contain any cases which relate to legislative attempts to usurp the prerogatives of an elected executive

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145 *Id.* at 369 (quoting State ex rel. Josephs Douglas, 110 P. 177, 180 (Nev. 1926)). The Arizona court also quoted other pertinent portions of *Douglas*: "It is well settled by the courts that the legislature, in the absence of special authorization in the Constitution, is without power to abolish a constitutional office or to change, alter or modify its constitutional powers and functions." *Id.*

146 20 N.E.2d 45, 51 (Ill. 1939).

147 The language of the Illinois constitution creating the executive department of that state is substantially the same as the language of West Virginia Constitution, article VII, section 1.

148 *Barrett*, 20 N.E.2d at 51 (emphasis added); see also *Allen v. Rampton*, 463 P.2d 7 (Utah 1969) (holding unconstitutional removal of duties from state treasurer, where such duties, though not specified in the state constitution, predated statehood); *Thompson v. Legislative Audit Comm.*, 448 P.2d 799, 801-2 (N.M. 1968) (holding unconstitutional a statute removing duties implicit in office of state auditor, even though duties not expressly enumerated in the constitution); cf. *Murphy v. Yates*, 348 A.2d 837, 846 (Md. 1975) (holding unconstitutional statute creating office of state prosecutor independent of attorney general who retained common-law prosecutorial powers: "If an office is created by the Constitution . . . the position can neither be abolished by statute nor reduced to impotence by the transfer of duties characteristic of the office to another office created by the legislature . . . We regard this as but another facet of the principle of separation of powers.") (citations omitted).
officer by transferring them to another executive officer. West Virginia case law is replete, however, with cases involving constitutional separation of powers disputes between and among the three branches of the state government. The broader fundamental constitutional principles of these cases are relevant to a discussion of the legislature's power to displace the core functions of the Attorney General by either assigning them to in-house counsel of a state agency or office or by allowing an agency or office to retain outside counsel without approval or supervision by the Attorney General.

In a scholarly recent opinion of the West Virginia Supreme Court of Appeals, Justice Recht provided a historical overview of the court's separation of powers cases and found that the legislature had violated constitutional separation of powers strictures. In re Dailey, the Court held that a statute which imposed upon West Virginia trial court judges the responsibility of reviewing and issuing permits to carry concealed weapons was an unconstitutional attempt to expand the powers of the judiciary. Finding that "the regulation and control of dangerous weapons is exclusively within the police power of the State exercised through the Legislature and not the judiciary," the Court observed that "the Legislature cannot commit to the judiciary powers which are primarily legislative." In a quite different context, the West Virginia Supreme Court of Appeals twice held enactments creating schemes for the legislative veto of executive agency regulations to be violative of constitutional separation of powers principles. In State ex rel. Barker v. Manchin, the court rejected a statutory legislative veto procedure. Finding that the legislature had attempted to assume executive branch regulatory powers, the court held:


150 465 S.E.2d 601.


152 In re Dailey, 465 S.E.2d at Syl. Pts. 3 & 4; see also Hodges, 159 S.E. 834 (W. Va. 1931).

Article V, section 1 of the state constitution provides: The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time. This constitutional provision which prohibits any one department of our state government from exercising the powers of the others is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed. Where one branch of our state government seeks to exercise or to impinge upon the powers conferred to another branch, we are compelled by this mandate to restrain such action, absent a specific constitutional provision permitting such interference.\textsuperscript{154}

A decade and a half later, the court turned back a somewhat more sophisticated effort to exercise a legislative veto in \textit{State ex rel. Meadows v. Hechler}.\textsuperscript{155} In \textit{Meadows} the court explained the importance of the concept of separation of powers in terms applicable to the issue discussed herein:

The Constitution, in distributing the powers of government, creates three distinct and separate departments -- the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, namely, to preclude a commingling of these essentially different powers of government in the same hands. If it be important thus to separate the several departments of government

\textsuperscript{154} \textit{Id.} at 630-631 (emphasis added).

\textsuperscript{155} 462 S.E.2d 586 (W. Va. 1995). In \textit{Meadows} the court rejected a statute that permitted administrative regulations to “die” if the legislature failed to approve them within a time certain. Justice Workman’s opinion, which was consistent with the reasoning of a plethora of courts and leading constitutional scholars, evoked strident criticism from some legislative leaders apparently unconversant with the separation of powers doctrine as a basic tenet of constitutional law. Justice Workman’s quotation of the following famous statement of Justice Brandeis fell on deaf ears: “The doctrine of the separation of powers was adopted by the Convention of 1887, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.” \textit{Myers v. United States}, 272 U.S. 52 (1926) (Brandeis, J., dissenting). The West Virginia legislators’ failure to comprehend fundamental constitutional separation of powers principles reveals the wisdom of the system of checks and balances established by the constitutional framers who foresaw the never ending efforts of those in government to usurp powers reserved to others.
and restrict them to the exercise of their appointed powers, it follows, as a logical corollary . . . that each department should be kept completely independent of the others . . . in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other departments. 156

State ex rel. Barker v. Manchin, State ex rel. Meadows v. Hechler and In re Dailey are three of many West Virginia cases that recognize the fundamental importance of the constitutional separation of powers restriction. These cases strongly support the view that attempts by the West Virginia Legislature to assign to other executive officers and agencies the power to employ and supervise lawyers clearly violates the proscriptions of article V, section 1, of the West Virginia Constitution.

It is difficult to avoid the conclusion that statutes purporting to allow West Virginia agencies and officials to retain their own in-house counsel and/or employ outside counsel run directly counter to the West Virginia Court’s recent admonition in Meadows: one branch shall never be controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other departments. 157 Moreover, it is also difficult to imagine a more direct attempt to coercively influence another branch than legislatively limiting the duties of the state’s general counsel and supplanting her authority by the simple yet effective method of transferring them to others.

Thus, as set forth above, there is a wealth of precedent that informs as to limitations on the power of state legislatures to remove all or a substantial portion of an elected constitutional executive officer’s powers and transfer them to other officers or entities of state government. There is virtually no logic or law that supports such a realignment of constitutional structures.

VI. CONCLUSION

Article VII, section 1 of the West Virginia Constitution created the elected office of Attorney General, explicitly designating the holder of that office as the chief legal officer or general counsel for the state. 158 Elected executive officers are


157 Id.

158 It is possible that some may contend that, because article VII, section 1, states that elected executive officers “shall perform such duties as are prescribed by law,” the legislature has the unbridled power and complete discretion to take away core functions from one executive officer and give them to
intended to have a substantial degree of independence from each other by constitutional design. The elected Attorney General’s independence is sharply contrasted by the lack of independence of in-house or outside counsel who serve at the will and pleasure of appointed or elected officials.

The structural design of the West Virginia Constitution, the Rules of Professional Conduct, and the West Virginia Supreme Court of Appeal decisions in Manchin v. Browning and later cases require that the Attorney General play the role of an independent general counsel. Such independence as well as the viability of the constitutionally imposed attorney-client relationship between Attorney General and state entities is significantly compromised where lawyers neither chosen nor supervised by the Attorney General provide legal services to the state. Myriad conflicts inevitably arise when the state client is represented both by the state’s constitutionally designated lawyer and a lawyer employed by, and thus beholden to, others.

The legislature of West Virginia clearly lacks the power to assign to another the functions of the Attorney General. The Attorney General holds a constitutionally created executive department office by virtue of popular election. The fundamental constitutional separation of powers doctrine explicit in article V, section 1, prevents the legislature from transferring the core functions of the state’s general counsel by statutorily assigning such duties to other appointed or elected executive officials.

Moreover, without the oversight and coordination of the Attorney General’s office, extremely important matters of general administrative law and procedure may be seriously undermined by the conflicting opinions of outside and in-house another. See generally W. VA. CONST. art. VII, § 1. If such legislative power existed, it could logically be extended to achieve absurd results. For example, it would be possible for the legislature to assign powers of the purse to the Attorney General, powers of auditing to the Secretary of State, and the power of the governor as the state’s chief law enforcement officer to the Agriculture Commissioner. As courts in other jurisdictions have held, the legislature’s power to prescribe the duties of an elected executive officer emphatically do not include the power to take from that elected officer some or all of her/his core functions and invest them in another.

See W. VA. CONST. art. V, § 1, art. VII, §§ 1, 4. As observed in the discussion above, the Supreme Court of Appeals of West Virginia has recognized the Attorney General as the state’s general counsel and chief legal officer consistent with both article V, section 1 and article VII, sections 1 and 4. As such, the court has held that the Attorney General is bound to conform her/his conduct to the Rules of Professional Conduct. Manchin, 461 S.E.2d at 851. The Rules of Professional Conduct, in turn, emphasize the necessity that lawyers representing an organizational entity exercise her/his independent judgment in representation of the entity. Moreover, the Rules specifically recognize that the lawyer for a governmental entity has special cause to exercise independent judgment because the public’s business is involved and because the state itself is the client rather than a particular individual who is but a constituent part of state government. See WEST VIRGINIA RULES OF PROFESSIONAL CONDUCT 1.6 (1997).
counsel employed by agencies and state officials. As discussed above, the in-house or outside lawyer who serves at the will and pleasure of an agency director or another executive officer lacks the capacity to render truly independent legal judgment. The dependent nature of such lawyer's role stands in stark contrast to the Attorney General, who is beholden only to the voters and the rule of law. Thus, any legislative attempt to assign the core functions of the state's Attorney General to another public official necessarily disrupts constitutional checks and balances, violates the West Virginia Constitution's explicit separation of powers mandate of article V, section 1 and disempowers citizens. At bottom, legislative assignment of the implicit duties of one constitutionally elected executive officer to someone else constitutes a raw usurpation of power.