INDIANA'S ATTORNEY TOO GENERAL: A CONSTITUTIONAL AND POLICY ANALYSIS ON THE NEED FOR STATUTORY REFORM

CHRISTOPHER T. RUPERT*

"'[T]he executive power is more easily confined when it is one'; that it is far more safe there should be a single object for the jealousy and watchfulness of the people; and, in a word, that all multiplication of the Executive is rather dangerous than friendly to liberty."[1]

INTRODUCTION

In April 2021, Governor Eric Holcomb employed outside counsel to bring a lawsuit against the Indiana General Assembly alleging a recently enacted bill was an unconstitutional infringement on his expressly granted powers in the Indiana Constitution.[2] Attorney General Todd Rokita subsequently filed a motion to strike Governor Holcomb's private counsel in the suit on grounds that, pursuant to Indiana statutes, the attorney general alone represents the State in matters concerning the state and the attorney general must give consent before outside counsel is employed.[3] The trial court rejected the Attorney General's procedural argument regarding outside counsel and, nearly a year later, the Indiana Supreme Court subsequently affirmed the ruling that the Governor could retain outside counsel without the attorney general's consent.[4]

This lawsuit is a recent example highlighting a constitutional dilemma involving Indiana's attorney general position and its overall authority within the state government.[5] This case is far from an anomaly; Indiana courts have long

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* J.D. Candidate, 2023, Indiana University Robert H. McKinney School of Law; M.B.A. 2013, B.A. 2011, Baylor University – Waco, Texas. Thank you to Professor Joel Schumm for his guidance throughout this topic, Professor Frank Sullivan, Jr. for his insight and inspiration, and to my friends and colleagues on the *Indiana Law Review* for their thoughtful edits and support.

1. THE FEDERALIST NO. 70, at 430 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (quoting J.L. DE LOLME, THE CONSTITUTION OF ENGLAND 209 (Gilbert Stuart trans., 1800) (1784)).

2. Complaint for Declaratory Judgment and Injunctive Relief, Holcomb v. Bray, No. 49D12-2104-PL-014068 (Marion Co. Super. Ct. Apr. 27, 2021).

3. Memorandum in Support of Motion to Strike and for Alternative Relief, Holcomb v. Bray, No. 49D12-2104-PL-014068 (Marion Co. Super. Ct. Apr. 30, 2021).

4. Order Denying Motion to Strike and for Alternative Relief, Holcomb v. Bray, No. 49D12-2104-PL-014068 (Marion Co. Super. Ct. July 3, 2021); Holcomb v. Bray, 187 N.E.3d 1268, 1288 (Ind. 2022).

5. *See* Marilyn Odendahl, *Holcomb's Lawsuit Draws Rebuke from Attorney General*, IND. LAW. (Apr. 27, 2021), https://www.theindianalawyer.com/articles/holcombs-lawsuit-draw-rebuke-from-attorney-general [https://perma.cc/L66T-VUJ7]; Marilyn Odendahl, *Lawyers Question Rokita's Actions in Lawsuit Filed by Governor*, IND. LAW. (Apr. 29, 2021), https://www.theindianalawyer.com/articles/lawyers-question-rokitas-actions-in-lawsuit-filed-by-governor [https://perma.cc/6UPV-N8YK]; Marilyn Odendahl, *Holcomb Claims Rokita Seeking to Expand Power of Attorney General's Office*, IND. LAW. (May 18, 2021), https://www.theindianalawyer.

wrestled with the scope of the attorney general's authority and its implication on the separation of powers outlined in Article III of the Indiana Constitution.[6] The attorney general is a statutorily elected position and is not found in the Indiana Constitution.[7]

Though the Indiana Supreme Court's decision clarified the question of whether a governor may hire "outside counsel to protect the interests of the state in a suit, particularly in one he has initiated,"[8] the court left open the constitutional separation-of-powers implication. That is, just how far the attorney general's overall authority with respect to governor involvement in state lawsuits goes, particularly in cases dealing with state agencies or certain enforcement actions. Under the rationale of allowing the governor to hire private counsel in *this* instance, why should the Indiana Constitution tolerate a limitation to governor action in other instances?

Currently, the Indiana statutes concerning the attorney general provide no mechanism for oversight or control by the head of the executive branch.[9] The legislature has created an unimpeded ability to define and expand the scope of an executive officer's power with no accountability reserved for the chief executive. This poses problematic implications on separation of powers as the attorney general can essentially act as an independent position with limitless authority.

Based on the current statutes pertaining to executive officials, the executive branch in Indiana appears loosely based on an "unbundled executive" structure, or a "plural executive regime in which discrete authority is taken from the [governor] and given exclusively to a directly elected executive official."[10] The "unbundled" theory contrasts with the "unitary executive," as found in the federal executive branch.[11] The "unitary" theory allows for a single official to wholly preside over and control all aspects of the executive branch.[12]

As Alexander Hamilton discusses in *The Federalist No. 70*, the framers of the United States Constitution expressly rejected a plural *executive* system.[13] Rather, a plural *legislature* was seen as ideal because it would lead to discussion that reflects the people's will; legislative factions were an inconvenient but necessary

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com/articles/holcomb-claims-rokita-seeking-to-expand-power-of-attorney-generals-office [https://perma.cc/2B62-VJ2G].

6. *See* IND. CONST. art. III, § 1; *see* discussion *infra* Section II.C.

7. IND. CODE § 4-6-1-2 (2022); *see also* State v. Rankin, 294 N.E.2d 604 (Ind. 1973).

8. *Holcomb*, 187 N.E.3d at 1289.

9. *See* discussion *infra* Section II.B.

10. Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1386 (2008); *see also infra* Part IV.

11. Berry & Gersen, *supra* note 10, at 1385-86.

12. *See* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995); Richard J. Pierce Jr., *Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of the Unitary Executive by Steven G. Calabresi and Christopher S. Yoo*, 12 U. PA. J. CONST. L. 593 (2010).

13. *See* THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 1, at 425.

aspect of free government.[14] But plurality in the executive would "lessen the respectability, weaken the authority, and distract the plans and operations of those whom they divide."[15] Unity in the executive was thought to be necessary for energy of action and accountability of the chief officer.[16]

Many aspects of the "unitary executive" theory are applicable to this issue, but this Note does not investigate the particular aspect of whether the attorney general should be elected or appointed. Many states have elected attorneys general while retaining express oversight power for the governor.[17] While Indiana certainly has a history of changing positions from elected to appointed (even with regard to the attorney general position itself), this Note simply analyzes the constitutional and policy arguments regarding statutory power and authority.[18] Further, this Note does not advocate for a complete overhaul to a unitary system based on *The Federalist No. 70* or its aspects discussed *infra* in Part IV. The discussion of the unitary system is meant to highlight why statutory reform in this specific area will be effective and in accordance with the Indiana Constitution.

It should be noted that, above all else, the Indiana Constitution's express view of the executive branch is what informs how statutes can affect the department and its officers. This Note argues that, because the Indiana Constitution gives full power of the executive branch to the governor, the governor must have increased input over representation of the state. While the state attorney general position becomes more of a proactive entity, rather than simply the defender of the State,[19] it is important to ensure the constitutional doctrine of separation of powers remains intact and that unchecked power is not placed in the wrong hands.

Part I discusses the Indiana Constitution's construct of the executive branch, its separation of powers doctrine, and several Indiana cases examining the executive branch and implications on separation of powers between branches. Part II examines Indiana's attorney general position and notable Indiana court interpretations of the position and its scope of power. Part III analyzes the problems present as a result of the current attorney general structure. Part IV discusses the unitary and unbundled executive models in more detail, arguments for and against each, and implications on the chief executive versus lower-level officers. Part V explores comparable state constitutional and statutory structures for other state attorneys general, as well as various state court holdings, for the purpose of identifying a possible solution. Finally, Part VI proposes a solution that revolves around repealing the statute requiring attorney general consent for

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14. *Id.* at 426-27.

15. *Id.* at 426.

16. *Id.* at 423-24, 427-28.

17. *See infra* Part V.

18. *See* Arika Herron, *Indiana Has Its Last Elected Education Leader, as Holcomb Signs Bill to Make It an Appointed Job*, INDYSTAR (Mar. 19, 2019, 2:26 PM), https://www.indystar.com/story/news/politics/2019/03/19/indiana-statehouse-jennifer-mccormick-last-elected-education-leader/3213172002/ [https://perma.cc/EE5D-GZ6T]; *see also infra* Parts I-III.

19. *See generally* Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998 (2001).

outside counsel and replacing it with a provision that gives the governor discretion to appoint outside counsel. Part VI also discusses counterarguments to reform and reasons why they fall short.

I. INDIANA CONSTITUTION AND COURT INTERPRETATION

A. Relevant Constitutional Provisions

A state's "constitution serves as a charter of law and government for the state—the supreme law of the state—and prescribes in more or less detail the structure and functions of state . . . government."[20] More specifically, the state constitution's role is "to protect the people . . . from governmental intrusions on their freedoms" through its reflection of that same people's "fundamental values."[21]

The Indiana Constitution outlines the three branches, or departments, of government and expressly holds for the separation of powers doctrine.[22] "The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."[23]

The Indiana Constitution specifically vests executive power to the governor and the governor alone; this section could be considered a "vesting clause."[24] Further, the Indiana Constitution states the "Governor shall take care that the laws are faithfully executed."[25] This section could likewise be considered as a "take care clause." Referring to the United States Constitution's "vesting clause," Justice Antonin Scalia noted that the vesting of executive power in the President "does not mean *some of* the executive power, but *all of* the executive power."[26]

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20. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 3 (2009).

21. Loretta H. Rush & Marie Forney Miller, *A Constellation of Constitutions: Discovering & Embracing State Constitutions as Guardians of Civil Liberties*, 82 ALB. L. REV. 1353, 1355 (2019); Randall T. Shepard, *The Maturing Nature of State Constitutional Jurisprudence*, 30 VAL. U. L. REV. 421, 430 (1996).

22. IND. CONST. art. III, § 1.

23. *Id.*

24. *Compare* IND. CONST. art. V, § 1 ("The executive power of the State shall be vested in a Governor."), *with* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America . . . .").

25. *Compare* IND. CONST. art. V, § 16 ("The Governor shall take care that the laws are faithfully executed."), *with* U.S. CONST. art. II, § 3 ("[The president] shall take Care that the Laws be faithfully executed . . . .").

26. Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

B. Indiana Supreme Court Interpretation of Executive Branch Power, The Governor's Role, and Legislative Encroachment

Indiana courts have been clear and consistent on interpreting both of the above sections and their practical implications. *Tucker v. State* is a seminal case outlining the executive role and power in Indiana state government.[27] The court's holding in this case outlines the general executive power vested in the governor with regard to other statutorily elected positions.[28] "The executive power is vested not in the 'Executive including the Administrative' department, but in one man, one officer, the Governor."[29] The court noted that if it were subsequently thought that the Indiana Constitution had vested too much power in the governor through this clause, the remedy would be to amend the Constitution.[30]

French v. State ex rel. Harley dealt with the executive and administrative "subdivisions" in relation to the governor and provides a clear view of the court's approval for the governor's involvement in the affairs of *all* aspects, executive and administrative, of the executive branch.[31]

> [T]hat the relation of the executive and the administrative subdivisions are not to be so separated as to deny to the former all participancy in the affairs of the latter. Not only is there *no expressed inhibition* against the association of the governor with administrative state officers in the discharge of any duty . . . but, in our opinion, such association is *proper*, and within the spirit of the provisions of the constitution just referred to.[32]

Separation of powers requires each branch be kept independent from the other "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 [branches]."[33] Notwithstanding this notion, "[a]ny office . . . which had its duties set out by statute, is not immune from further legislative enactments which might increase or diminish the duties of that office."[34] Thus, if the act itself is constitutionally permissible, the legislature is able to change the scope of the duties of an office, like the attorney general, to grant or take away power of an executive or administrative office so long as doing so does not allow the legislature to either control or influence the executive branch. However, if the

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27. Tucker v. State, 35 N.E.2d 270 (Ind. 1941).

28. *Id.*

29. *Id.* at 279.

30. *Id.* at 280.

31. French v. State *ex rel.* Harley, 41 N.E. 2 (Ind. 1895).

32. *Id.* at 7 (emphasis added).

33. Book v. State Off. Bldg. Comm'n, 149 N.E.2d 273, 294 (Ind. 1958) (ruling that part of the legislative's State Office Building Act violated separation of powers because of attempts to confer executive-administrative duties upon legislators).

34. State v. Market, 302 N.E.2d 528, 533-34 (Ind. Ct. App. 1973) (citing State *ex rel.* Hench v. Morrison, 64 Ind. 141 (1878)).

legislature attempts to expressly define an administrative officer's role within the executive, pertaining specifically to carrying out executive functions in place or with respect to the governor, that action will run afoul of the Indiana Supreme Court's holding in *Book v. State Office Building Commission*.[35]

"[T]here 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."[36] An interesting parallel to the Indiana legislature defining the scope of the attorney general's power in relation to the governor is found in a Virginia Supreme Court case that dealt with a similar application to separation of powers.[37] That court recognized that the "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."[38] That rationale reaches the same conclusion regarding the constitutional office of governor and statutory office of attorney general.[39]

The implications of these particular Indiana Supreme Court holdings are unambiguous: the governor's vested executive power cannot be encroached on by either of the other branches of government or another executive or administrative officer. Conversely, the governor himself has the right to be involved in all aspects of the executive branch.

C. The Indiana Constitution with Respect to the Federal Constitution

Two important distinctions for interpreting the Indiana Constitution with regard to the executive branch and separation of powers involve interpreting state constitutional provisions relative to their similar federal provisions and considering the limiting purpose of the state constitution.

The Indiana Constitution, like other state constitutions, shares similar language to the United States Constitution despite stark differences.[40] "The state constitutions are constrained by, and constitute integral parts of, the federal Constitution."[41] This does not mean that a state's constitution cannot be

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35. *Book*, 149 N.E.2d at 293.

36. Patrick C. McGinley, *Separation of Powers, State Constitutions, & the Attorney General: Who Represents the State?*, 99 W. VA. L. REV. 721, 763 (1997).

37. *See id*. at 759; Blair v. Marye, 80 Va. 485 (1895).

38. *Id.* (citing *Blair*, 80 Va. at 491).

39. *See* State *ex rel.* McGraw v. Burton, 569 S.E.2d 99, 110 (W. Va. 2002) ("[T]he Legislature cannot create offices that will conflict with or curtail the constitutional powers of the offices provided for by the *Constitution*; and to transfer the inherent functions of a constitutional office to another office is to curtail the former. Therefore, a legislative act that attempts to accomplish such a transfer is unconstitutional.").

40. WILLIAMS, *supra* note 20, at 3, 18.

41. *Id.* at 18; *see also* Rush & Miller, *supra* note 21, at 1354 ("[T]he ultimate goal is for state constitutional law to better facilitate the beneficence of federalism while enhancing the development of constitutional law throughout the United States.").

"independently decisive" nor does it mean the "state constitution will always produce a result different from the federal constitution—only that the result will derive from a different source of sovereign authority."[42] While certain provisions of a state constitution may be distinct or similar to other constitutions, a comparison of these provisions can "shed additional light on the meaning of the charters' provisions" and "if a provision closely resembles those of other constitutions, that resemblance may indicate kinship with them."[43]

The states are left to ultimately determine how they will use the broad power given to them from the United States Constitution's Tenth Amendment.[44] A state constitution "provides *limitations* on the otherwise plenary, residual, sovereign power of states to make law and govern themselves. . . . By contrast, the federal Constitution is a *grant of* enumerated powers upon which all exercises of federal power must be based."[45]

From this important distinction—that a state's constitution operates as a limitation of the state's plenary power—it reasonably follows that these limitations do not extend past any implied, unstated limitations as "the purpose of such provision[s] is to define the limitations" themselves.[46] Thus, there is no implication that the "vesting" and "take care" clauses under the Indiana Constitution's executive branch article are subject to any implied limitations (particularly any limitations of those powers imposed by the legislature or another executive officer). Certainly, a simple "plain meaning" interpretation should prevail; when "decid[ing] between two interpretations of a constitutional provision, we must favor a natural reading which avoids contradictions and difficulties in implementation, which completely conforms to the intent of the framers and which reflects the views of the ratifying voter."[47] Considering the attorney general position was never included in the Indiana Constitution, the executive provisions discussed *supra* cannot be interpreted with the position's inclusion.

A separation of powers clause is not expressly mentioned in the United States Constitution, but the Supreme Court has nonetheless spoken to the clear and practical need for separation of powers between branches. "The fundamental necessity of maintaining each of the . . . departments . . . entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question."[48]

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42. Rush & Miller, *supra* note 21, at 1358.

43. *Id.* at 1361; *see also infra* Part V.

44. *See* U.S. CONST. amend. X.

45. WILLIAMS, *supra* note 20, at 3.

46. *Id.* at 332 (quoting Idaho Press Club, Inc. v. State Legislature, 132 P.3d 397, 399-400 (Idaho 2006)). "Had [the framers] wanted to impose limitations in addition to those stated, they could easily have done so. Therefore, the rule of construction *expressio unius est exclusio alterius* applies to provisions of the [constitution] that expressly limit power, . . . but it does not apply to provisions that merely enumerate powers." *Idaho Press Club, Inc.*, 132 P.3d at 399-400 (citations omitted).

47. WILLIAMS, *supra* note 20, at 324.

48. Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935).

The inherent political nature of state constitutions causes them to be "much more reflective of current local values than the federal charter and much more responsive to changes in those values."[49] As explained *supra* in *Tucker*, the State should amend the constitution if there is a provision contrary to the current values of the state's constituents.[50]

II. HISTORY AND CURRENT STRUCTURE OF THE OFFICE OF ATTORNEY GENERAL IN INDIANA

A. History of Indiana's Attorney General Position

The first attorney general statute in Indiana was created in 1855.[51] While some states have the attorney general position explicitly written in their constitutions, Indiana's has always been only a statutory position having not been included as one of the constitutional officers.[52]

In 1933, Indiana Governor Paul McNutt presented a plan called the Executive Reorganization Act of 1933 which received bipartisan support for enactment and gave the governor expansive power as head of the executive department.[53] At the time, the attorney general was within the executive department, but the new act made it an appointive position to be filled by the governor rather than elected by popular vote as under the previous statute.[54]

In 1941, the political environment shifted, and the legislature repealed the Executive Reorganization Act on partisan grounds, thus eliminating this appointing power.[55]

In his first message to the Republican-dominated legislature, [Democrat

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49. Shepard, *supra* note 21, at 442 (quoting Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 239, 242 (Bradley D. McGraw ed., 1985)).

50. Tucker v. State, 35 N.E.2d 270, 280 (Ind. 1941); *see also* Shepard, *supra* note 21, at 442 (stating "states have certainly responded to the changing society by amending their constitutions far more regularly than the federal government").

51. Hord v. State, 79 N.E. 916, 920 (Ind. 1907) (citing 1855 Ind. Acts 16., c. 3, § 5656, Rev. St. 1881).

52. *See infra* Part V; State v. Rankin, 294 N.E.2d 604 (Ind. 1973); Emily Myers, *Origin and Development of the Office*, *in* STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 7 (Emily Myers & Lynne Ross eds., 2nd ed. 2007) (noting thirty-four of the fifty states created or otherwise provided for an attorney general in their first state constitution); Emily Myers, *Status in State Government*, *in* STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 38 (Emily Myers & Lynne Ross eds., 2nd ed. 2007) (noting forty-four of the fifty states now have constitutional provisions).

53. JAMES H. MADISON, INDIANA THROUGH TRADITION AND CHANGE 1920-1945, at 91 (1982).

54. *Id.* (citing Robert R. Neff, The Early Career and Governorship of Paul V. McNutt 231-32 (1963) (Ph.D. dissertation, Indiana University) (located at Auxiliary Library Facility, Indiana University, Bloomington)).

55. *Id.* at 398-99.

> Governor] Schricker . . . promised that he did "not crave dictatorial power." In direct repudiation of his Democratic predecessors, he called for repeal of McNutt's [act]—arguing that the measure gave too much power to the governor. . . . In one of the most thoroughly partisan ventures in Indiana history, [the legislature] set about to dismantle the gubernatorial power McNutt had created and to reduce Schricker to a figurehead. The Republican majority passed some two dozen bills that were chiefly designed to deprive Schricker of his power to make executive appointments to departments and agencies of state government.[56]

The legislature abolished the old office and then re-established the new Office of Attorney General as an elected position.[57] This history indicates the inherent political nature of executive officer positions, particularly the attorney general, and how there has long been a power struggle dealing with their respective powers.

B. Current Statutory Structure

Following the 1941 change that effectively made the position what it is today, courts have ruled using the statutory language set forth by the legislature.[58] Aptly noted in *Rankin*, as the attorney general is absent from the Constitution, its scope of authority is wholly derived by statute and not by common law.[59] "[T]he Office of Attorney General was created by statute and is not a constitutional office . . . [and] can therefore only derive authority via statute."[60]

Indiana Code article 4-6 assigns various responsibilities to the attorney general; Indiana Code section 4-6-1-2 creates the Office of Attorney General and requires the position to be elected to a four-year term while Indiana Code chapter 4-6-2 encompasses "Powers and Duties" of the office.[61] Specifically, in the first section of the "Powers and Duties" chapter, titled "Prosecuting and defending suits by or against state and state officers," "[t]he attorney general shall prosecute and defend all suits instituted by or against the state of Indiana," "represent the state in all criminal cases in the Supreme Court," "defend all suits brought against the state officers in their official relations, except suits brought against them by the state," and "attend to the interests of the state in all suits, actions, or claims in which the state is or may become interested in the Supreme Court of this state."[62]

The statute further provides that the attorney general shall prosecute or

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56. *Id.* at 398.

57. 1941 Ind. Acts 291, ch. 108, § 3; 1941 Ind. Acts 292, ch. 109, § 4; *see also* Tucker v. State, 35 N.E.2d 270, 277 (Ind. 1941).

58. *See* State v. Rankin, 294 N.E.2d 604 (Ind. 1973); Indiana State Toll-Bridge Comm'n v. Minor, 139 N.E.2d 445 (Ind. 1957); State *ex rel.* Young v. Niblack, 99 N.E.2d 839 (Ind. 1951).

59. *Rankin*, 294 N.E.2d at 605.

60. *Id.*

61. IND. CODE ch. 4-6-2 (2022).

62. *Id.* § 4-6-2-1.

defend a suit "whenever the governor or a majority of the officers of state require the attorney general in writing, with reasonable notice, to prosecute or defend a suit."[63] However, there is no consideration of when there might be a conflict of interest for the attorney general or a judgment by the governor that the attorney general's office is not able to adequately represent the state in a particular matter.[64] Further, this provision provides no guidance or requirement to the attorney general on *how* he is to proceed in this action; requiring the attorney general to simply bring or defend a certain suit is not sufficient oversight of the officer's scope of responsibility as there is nothing governing the process once the written and timely request is made.[65]

The broad, and most overarching, statutory authority is found in the provision that "[the attorney general] shall represent the state in any matter involving the rights or interests of the state, including actions in the name of the state, for which provision is not otherwise made by law."[66]

The statutory provision bolstering the attorney general's general duty to represent the state states "[n]o agency . . . shall have any right to . . . hire any attorney . . . to represent it or perform any legal service in behalf of the agency or state without the written consent of the attorney general."[67] While never confronting its constitutionality, the Indiana Supreme Court has affirmed this statute as applied to certain facts, particularly in *Sendak*.[68]

Although the legislature saw the apparent need to impose upon the executive branch the obligation to obtain the attorney general's consent before hiring outside counsel, they nonetheless exempted the legislative branch from a similar obligation.[69] The argument that the consent provision is due to the attorney general's statutory responsibility to represent the state in all suits is inconsistent with the legislature's own exemption from this provision.

C. Indiana Supreme Court Interpretations of the Attorney General's Statutory Power

Sendak is an example providing a clear application of the consent statute as well as an important policy consideration with which to view it.[70] In *Sendak*, a complaint was filed against the Alcoholic Beverage Commission for which the governor requested an outside attorney to represent the agency.[71] The attorney general also entered an appearance to represent the agency and subsequently filed

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63. *Id.*

64. *See infra* Part V; *see also supra* INTRODUCTION.

65. *See infra* Part III.

66. IND. CODE § 4-6-1-6.

67. *Id.* § 4-6-5-3. This Note refers to this statute as the "Consent Statute."

68. *See* State *ex rel.* Sendak v. Marion County Superior Court, Room No. 2, 373 N.E.2d 145 (Ind. 1978).

69. IND. CODE §§ 2-3-8-1; 2-3-9-2, -3; *see also infra* Part VI.

70. *Sendak*, 373 N.E.2d 145.

71. *Id.* at 147.

a motion to strike the outside attorney's appearance.[72] The argument supporting the motion to strike was that, by statute, the agency must first obtain consent from the attorney general before hiring another attorney for representation, and it had not done so in this case.[73] To the extent a statute giving the governor "power to employ counsel in litigation" and the consent statute are in "irreconcilable conflict," the statute with the latter enactment will hold.[74]

The Indiana Supreme Court recognized, per the consent statute, that an agency must first obtain consent from the attorney general before hiring another attorney for representation.[75] This interpretation in favor of the attorney general limited the governor from acting as he did in this case.[76]

The *Sendak* opinion closes by recognizing there could be a different outcome if an attorney general were engaged in policymaking or otherwise infringing on the "execution of executive power."[77]

> We recognize that the executive power of the government is vested not in the various departments and agencies, but in the Governor alone. . . . However we see no relationship between the execution of executive power and the legal defense of a lawsuit . . . the Attorney General is not dictating policy or directing the State, but is merely defending the State.[78]

It is through this last thought from *Sendak* that the attorney general's duties and responsibilities, generally, can be bounded to determine their current compatibility or incompatibility with the separation of powers and executive authority provisions in the Indiana Constitution.[79]

In addition to the policymaking limitation expressed in *Sendak*, *French* also discusses the role that administrative officers should play regarding deference to the governor. "[S]uch officers should have the power to perform such duties as should be required of them by law . . . where such requirement in no wise conflicted with the powers delegated to the governor alone."[80]

No other official is delegated both executive power and the power to ensure

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72. *Id.*

73. *Id.* at 148.

74. *Id.* at 148-49 (noting the statute giving the Governor such power was "inconsistent with the Attorney General's duties as prescribed by law").

75. *Id.*

76. As there was no constitutional challenge in this case, it should be emphasized the court did not squarely address the constitutionality of the consent statute but merely interpreted its application. *See also* Holcomb v. Bray, 187 N.E.3d 1268, 1288 (Ind. 2022) (noting the court's decision in *Sendak* was limited to whether "the Governor could hire private counsel *on behalf of a state agency* without the Attorney General's consent.").

77. *Sendak*, 373 N.E.2d at 149.

78. *Id.* (citing Tucker v. State, 35 N.E.2d 270 (Ind. 1941)).

79. *See* IND. CONST. art. III, § 1; *id.* art. V, §§ 1, 16.

80. French v. State *ex rel.* Harley, 41 N.E. 2, 6 (Ind. 1895); *see also* State *ex rel.* Young v. Niblack, 99 N.E.2d 839, 842 (Ind. 1951) (recognizing the attorney general's office is one of "delegated powers" by statute).

faithful execution of the laws; the governor retains both powers alone. It is apparent that the attorney general is performing a duty "belonging to the governor"[81] by being the gatekeeper in deciding which cases are ultimately brought on behalf of the executive branch or, more specifically, when the governor may employ outside counsel in an attempt to ensure faithful execution of the laws, even with regard to counsel for an executive agency.

III. POLICY ISSUES ARISING FROM THE CURRENT STRUCTURE

Many problems stem from an attorney general's aims for higher office. If an attorney general aspires for higher office, namely the office of governor, their actions—right or wrong—as attorney general will likely influence both their political future as well as the current governor's.[82] With full independence and the ability to directly affect the perceived success of the current administration, the possibility and temptation to choose that route is facilitated by the current statutory landscape.

> [I]f the attorney general's actions cause poor performance . . . or interference with implementation of the governor's policy objectives, the governor may nonetheless by held politically accountable as the leading political figure in the executive branch. "The fact is that people look to the governor to get the job done."[83]

Before becoming President, Woodrow Wilson wrote, "[t]here is no danger in power if only it be not irresponsible. If it be divided, dealt out in shares to many, it is obscured and if it be obscured, it is made irresponsible."[84] This quote can be easily applied to the concept that the public votes for elected officials but does not always have sufficient knowledge regarding down ballot candidates. "Public knowledge of the performance or even the identities of subgubernatorial statewide elected officials is 'shockingly low.'"[85] The implications of this nature of state-wide elections means that certain officials' actions will not always translate to negative political consequences for that relatively unknown position relative to a higher-profile candidate.[86]

Elected attorneys general, by their nature, pay more attention to their political base's preferences and needs than the "institutional or political interests of other

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81. *French*, 41 N.E. at 6.

82. Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty To Defend*, 124 YALE L.J. 2100, 2144-53 (2015).

83. Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL'Y 1, 16 (1993) (quoting former Governor Reubin Askew of Florida).

84. *Id.* at 18 (quoting Woodrow Wilson, *The Study of Administration*, 56 POL. SCI. QTRLY. 497-98 (1941) (reprinting 1887 article from volume 2 of same quarterly)).

85. *Id.* (quoting LARRY J. SABATO, GOOD-BYE TO GOOD-TIME CHARLIE 64 (2d ed. 1983)).

86. *Id.* at 18 (noting respondents to a 1990 survey who were asked to identify Virginia officials, seventy-six percent could name the governor while only thirty-seven percent were able to name the attorney general).

parts of the executive branch, including the governor."[87] Relating to their ability to choose what suits to bring on behalf of the state, attorneys general are conscious of expanding their base of support through the publicity of the legal challenges with which they choose to engage.[88] One example of such publicity includes the filing of amicus briefs to the United States Supreme Court.[89] A dilemma exists on what authority the attorney general is acting on when presenting Indiana's stance on a given issue when Indiana is not a named party in the matter.[90] The question becomes, should the governor be able to have any input in such official state action?

Thirty-seven percent of elected attorneys general seek higher office and twenty-six percent end up running for governor.[91] On average, during typical four-year election cycles, over eleven attorneys general run for governor of their state.[92]

There are differences of opinion on how much discretion the attorney general should have in the duty to defend the constitutionality of a statute as well as in the duty to enforce a statute.[93] Since 2008, attorneys general have increasingly refused to defend laws that do not align with their political base.[94] This inevitably results in attorneys general consciously choosing not to bring certain cases that they might otherwise be able to bring.

In some applications, the attorney general is the sole entity that can bring a case to court.[95] By choosing to bring or not bring certain cases, this effect could be a way of propping himself up for future political aspirations or attempting to hinder the governor's success. In other cases, the attorney general may not be the sole entity able to bring the case, but their involvement in favor or against one position could have the same effect.[96]

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87. Devins & Prakash, *supra* note 82, at 2143.

88. *Id.* at 2145.

89. *See* Greg Zoeller, *Indiana Has Important Interest in Court Case on Prayer*, INDYSTAR (Aug. 9, 2013, 3:17 P.M.), https://www.indystar.com/story/opinion/readers/1/01/01/indiana-has-important-interest-in-court-case-on-prayer/2636409/ [https://perma.cc/47X4-RMEY]; Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U. L. REV. 1229 (2015).

90. Zoeller, *supra* note 89 ("As Indiana's attorney general, I serve as lawyer for state government and argue on the side of state authority and in defense of state officials' actions.").

91. Devins & Prakash, *supra* note 82, at 2144 (noting elected attorneys general are twice as likely to seek higher office as compared to appointed attorneys general).

92. *Id.*

93. *See* Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 IND. L.J. 513, 519, 524-29 (2015) (differentiating the duty to *defend* and the duty to *enforce*).

94. Devins & Prakash, *supra* note 82, at 2138.

95. *See* IND. CODE § 24-5-0.5-4(c) (2022) (carving out enforcement of certain provisions of the Indiana Deceptive Consumer Sales Act pertaining to debt collection for only the attorney general).

96. *See id.* § 5-11-5.5-3 (granting attorney general jurisdiction to investigate and bring civil actions for violations of Indiana Code section 5-11-5.5-2 concerning persons making false claims or

This discretion in choosing whether or not to prosecute particular cases, vested solely in the attorney general, is a precise example of the policymaking the Indiana Supreme Court, in *Sendak*, indicated would not stand.[97] Attorneys general have "wide-ranging policymaking discretion stemming from their ability to sue on behalf of the state."[98] Consequently, because of the ability to "sue state instrumentalities and . . . private parties, [they] increasingly function as an omnicompetent regulatory agency."[99] This implication clearly goes against what the *Sendak* court recognized would require different consideration.[100]

IV. THE UNITARY VS. UNBUNDLED EXECUTIVE

A. Unitary Executive

The issue of defining the attorney general's authority within the executive branch invariably rests on the debate between the unitary and unbundled executive models.

The unitary executive, in its clearest sense, is the structure found in the federal executive branch.[101] Under a strictly unitary system, there is no emphasis placed on giving officers independence. A strict unitary model also will involve all ultimate power and authority going to the head executive that oversees the entire branch and appoints each position within it.[102]

Arguments in favor of the unitary theory point to energy of action, accountability, and separation of powers.[103] Energy refers to a steady administration of laws and protecting its citizens in an active and nimble way.[104] Unity helps avoid "'the most bitter dissentions' which 'lessen the respectability, weaken the authority, and distract the plans and operations of those whom they divide.'"[105]

As indicated in *The Federalist No. 70*, the framers consciously "swept the hereditary and plural executive forms into the ash bin of history" and the system has increasingly been adopted by many other countries in the world.[106] In confirming the unitary system, there was no concern for one person wielding such power because that individual would be elected and accountable to the public.

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attempting to defraud the state).

97. *See* discussion *supra* Section II.C.

98. Devins & Prakash, *supra* note 82, at 2145.

99. *Id.*

100. *See supra* text accompanying notes 77-79.

101. Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696 (2009); Calabresi, *supra* note 12, at 25-26.

102. Note, *Appointing State Attorneys General: Evaluating the Unbundled State Executive*, 127 HARV. L. REV. 973 (2014).

103. Calabresi, *supra* note 12, at 37.

104. *Id.* at 37-42.

105. *Id.* at 41.

106. *Id.* at 25-26.

"[T]he whole Nation has a part, making him the focus of public hopes and expectations."[107]

B. Unbundled Executive

The unbundled executive distributes power to the officials which comprise the executive department membership and typically involve each official operating independently from the others; they do not answer to the chief executive, nor are they appointed by it.[108] Proponents of the unbundled executive contend that the "unbundled executive outperforms the single unitary executive" due to it resulting in outcomes closer to the general will of the people and enhancing accountability of officers.[109] However, the issues discussed *supra* in Part III strongly relate to the issues of the unbundled system.

This assumption of achieving outcomes closer to the will of the public presupposes that a particular official can determine that will in the first place and then achieve it through action. "There is no reason to assume that the attorney general can ascertain the public interest better than the governor . . . ."[110] It also presupposes the general public will be aware of the official's actions. The governor attracts more interest and people are typically more knowledgeable about the governor and his policies than the attorney general's.[111]

The California Supreme Court solidified to resolve this conflict when it provided a state constitutional interpretation that "over the faithful execution of the laws of this state, the Governor retains the 'supreme executive power' to determine the public interest."[112]

Unbundled executives are meant to "check gubernatorial power and diffuse executive authority among elected state house" officers.[113] One major counter to executive officers providing a check on the chief executive is that the Indiana Constitution already provides a check on the chief executive in the form of article III, section 1 and whereby the *other branches* can check any overreaches of executive power.[114]

An independent attorney general, with no allegiance or accountability to the governor, purportedly serves as a check, or "watchdog," on the executive to curb unlawful conduct.[115] This accepts that the attorney general himself is immune to such conduct that he does not need a similar type of "watchdog."[116]

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107. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

108. *See* Berry & Gersen, *supra* note 10, at 1387.

109. *Id.*

110. Matheson, *supra* note 83, at 15.

111. *Id.*

112. *Id.* (quoting People *ex rel.* Deukmejian v. Brown, 624 P.2d 1206, 1209 (Cal. 1981)).

113. McGinley, *supra* note 36, at 724.

114. Matheson, *supra* note 83, at 11.

115. *Id.* at 10-11.

116. *Id.* at 11.

Hamilton noted in *The Federalist No. 70* that executive plurality creates an accountability problem as it "tends to conceal faults and destroy responsibility. . . . It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall."[117]

Many proponents of the unbundled executive, however, "agree that the President enjoys such control over subordinate personnel who assist the President in performing specific constitutionally enumerated tasks."[118] This supports the notion that, even in an unbundled executive system, any attorney general's action performed in supporting an express constitutional grant of the *governor's* power should be met with governor control and where such control should cease when the "subordinate personnel" act is not related to such express constitutional grant.[119]

Some express a view that Indiana's government, as well as most state governments, is structured under that of a clear plural (unbundled) executive.[120] However, it is difficult to support this notion with any express constitutional application.[121]

V. STATE JURISDICTIONAL ANALYSIS

States vary on how their attorney general positions are structured. Forty-three states have an elected attorney general, five are governor-appointed, one is legislature-appointed, and one is supreme-court-appointed.[122] This Part explores the similar structures in Georgia, Wisconsin, Oklahoma, Virginia, and Montana, while Texas provides a contrasting example.

A. Georgia

The Georgia attorney general is a constitutional officer.[123] Through statute, Georgia expressly limits the attorney general's power by giving the governor "the power to direct the Department of Law, through the Attorney General as head thereof, to institute and prosecute in the name of the state such matters" deemed to be in the state's best interest.[124] One notable section allows the governor "at any time" to direct the attorney general on conducting investigations and filing

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117. *Id.* at 17 (citing THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 1, at 427-28); *see also supra* Part III.

118. Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 324 (2016).

119. *Id.*

120. *See, e.g.*, WILLIAMS, *supra* note 20, at 303.

121. *See supra* Part I.

122. *Attorney General Office Comparison*, BALLOTPEDIA, https://ballotpedia.org/Attorney_General_office_comparison [https://perma.cc/7X55-287A] (last visited Oct. 22, 2021).

123. GA. CONST. art. V, § 3.

124. GA. CODE ANN. § 45-15-35 (2022); *see also* GA. CONST. art. V, § 3, ¶ IV.

and prosecuting actions.[125] However, "[i]n the event the Attorney General refuses to take or file such action within a reasonable time after having been directed by the Governor to do so, the Governor is authorized to appoint a special attorney general . . . ."[126]

Georgia Supreme Court case *Perdue v. Baker* provides an important distinction with which to view a governor's acts with respect to an attorney general.

> [T]he executive branch generally has the power and authority to control litigation as part of its power to execute the laws, and a law that removes from the executive branch sufficient control of litigation may well violate separation of powers. However, the executive branch does not have the authority to decline to execute a law under the guise of executing the laws . . . . Thus, even though the executive branch generally has the power and authority to control litigation, it cannot exercise this power in order to prevent the execution of a law.[127]

This ensures a level of independence for the attorney general and discretion to bring certain prosecutions or defend the state against certain actions; the governor will not, and should not, have power to *stop* such litigation, only the power to oversee its execution.

B. Wisconsin

The Wisconsin attorney general is a constitutional officer, and the state's Constitution holds "[t]he powers, duties and compensation of the . . . attorney general shall be prescribed by law."[128] Wisconsin courts have ruled the attorney general does not have "inherent power to initiate and prosecute litigation intended to protect or promote the interests of the state."[129] In *Oak Creek*, the Wisconsin Supreme Court recognized the constitutional provision granting only such powers as prescribed by law meant there is no common law authority.[130] "[T]he powers of the attorney general are strictly limited" to what is found by statute.[131]

C. Oklahoma

Oklahoma recognizes its attorney general as the "chief law officer of the state" and the state's Constitution includes the position as an officer vested with "executive authority" (although providing no detail on the nature of that

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125. GA. CODE ANN. § 45-15-18.

126. *Id.*

127. Perdue v. Baker, 586 S.E.2d 606, 615-16 (Ga. 2003).

128. WIS. CONST. art. VI, § 3.

129. State v. City of Oak Creek, 605 N.W.2d 526, 533, 540 (Wis. 2000) (quoting *In re* Est. of Sharp, 217 N.W.2d 258, 262 (1974)).

130. *City of Oak Creek*, 605 N.W.2d at 532-33.

131. *Id.* at 532 (quoting State v. Milwaukee Elec. Ry. & Light Co., 116 N.W. 900 (1908)).

authority), while the governor is vested with "[t]he Supreme Executive power."[132] As such, the governor is given express permission, through a statute enacted in 1910, to "employ counsel to protect the rights or interest of the state."[133] Thus, the governor could appoint a special counsel in the event the governor saw fit, such as "[i]f personal disqualification prevent[ed] the attorney general from fulfilling the duties of his office . . . ."[134] There is nothing limiting the governor's discretion in this area.

D. Virginia

Virginia expressly mentions the attorney general in its Constitution while also vesting executive power in the governor.[135] Virginia also has a statutory provision allowing the governor, for himself or any other state entity under certain circumstances, to employ special counsel "[w]hen the Governor determines that, because of the nature of the legal service to be performed, the Attorney General's office is unable to render such service . . . ."[136] As noted in *Wilder v. Attorney General of Virginia*, the presence of an enacted statute granting the power to appoint special counsel is both constitutional and applicable in allowing the governor to appoint counsel at "the Governor's judgment."[137]

E. Montana

Montana is an example of broad construction providing executive discretion to employ outside counsel; it has recognized this ability for both the governor as well as other governing bodies.[138] Like Oklahoma, Montana's attorney general is a member of the "executive department" under its Constitution but does not have its specific duties defined; and, the governor is likewise recognized with "supreme executive power."[139] The Supreme Court of Montana in *Woodahl* explained their rationale in finding of broad governor authority when it recognized "the governor with his constitutional supreme executive powers, his statutory powers . . . and the lack of constitutionally enumerated duties of the attorney general, has the power to either direct the attorney or may himself employ additional counsel."[140] This reasoning also presents an interesting perspective with which to compare Indiana's constitutional and statutory provisions and view Indiana's governor and attorney general.

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132. OKLA. STAT. tit. 74, § 18 (2022); OKLA. CONST. art. VI, §§ 1-2.

133. OKLA. STAT. tit. 74, § 6 (section titled "May employ counsel for state").

134. Teleco, Inc. v. Corp. Comm'n of Okla., 649 P.2d 772, 775 (Okla. 1982).

135. VA. CONST. art. V, §§ 1, 15.

136. VA. CODE ANN. § 2.2-510 (2022).

137. 439 S.E.2d 398, 401-02 (Va. 1994).

138. MONT. CODE ANN. § 2-15-201(4) (West 2022); *see also* Woodahl v. State Highway Comm'n, 465 P.2d 818 (Mont. 1970).

139. MONT. CONST. art. VI, §§ 1, 4; *see also Woodahl*, 465 P.2d at 819-20 (quoting MONT. CONST. art. VII, § 5, *repealed by* MONT. CONST. art. VI, § 4).

140. *Woodahl*, 465 P.2d at 820-21.

F. Texas

Conversely, Texas is a state where the plural executive is particularly endorsed and outlined in the state's Constitution.[141] Not only is the attorney general listed in the Constitution as a member of the executive, but it also has a dedicated section outlining the attorney general's general duties and powers.[142] The Texas Court of Appeals has recognized the plural nature of Texas's executive branch.[143] "Texas is the classic example of a plural executive setup, where executive power is not vested in a single person but is divided among six separately elected officials . . . . This structural arrangement was not an accident, but rather a deliberate attempt to decentralize government power . . . ."[144] Predictably, there is no statutory provision granting the governor any power to employ outside counsel in place of the attorney general.

It should be emphasized that certain states allowing for the governor to appoint special counsels have provisions in the attorney general statutes noting it is the duty of the attorney general to act when directed by the governor, at the governor's request, or from the governor's direct power to direct the office.[145] Of course, Indiana has a similar provision in the attorney general statute for the attorney general to act whenever the governor puts forth a request in writing.[146]

As discussed in this Part, there are many states with attorneys general as constitutional officers, and with statutory status as the state's "chief legal officer," like Indiana's, that allow outside counsel to be appointed without the attorney general's consent. The presence of this multitude of states allowing for some process of governor involvement is this area provides clear examples of how such statutory schemes could work in Indiana.

VI. RECOMMENDATIONS FOR REFORM

Allowing the governor to appoint the attorney general is the most direct way to arrive at providing the governor supreme executive authority in this area. However, it is clear among the vast majority of states that this is not the desired method for picking this position.[147] Absent appointment power, statutory parameters must be clarified to fully comply with the Indiana Constitution, reverse the negative policy implications of the current structure, and keep unnecessary governmental disputes out of the courts.

The ultimate goal in reform is to move away from the attorney general asserting his or "her vision of the 'state's legal interests."[148] The state models

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141. TEX. CONST. art. IV, § 1.

142. TEX. CONST. art. IV, § 22.

143. State v. El Paso Cnty., 618 S.W.3d 812, 830 (Tex. App. 2020).

144. *Id.*

145. *See* OKLA. STAT. tit. 51, § 94 (2022); GA. CODE ANN. § 45-15-35 (2022).

146. IND. CODE § 4-6-2-1 (2022); s*ee also* discussion *supra* Section II.B.

147. *See supra* Part V.

148. Chun v. Bd. of Trs., 952 P.2d 1215, 1234 (Haw. 1998).

discussed *supra* in Part VI follow a "hybrid" model whereby the governor can exercise statutory or constitutional control over the attorney general while the attorney general retains certain power that still gives it some independence when carrying out its duties.[149] Indeed, even states with attorneys general as constitutional officers have held for statutory limitations to attorney general discretion through governor involvement. The retained flexibility, along with their elected status, ensures that the attorney general has the necessary amount of impartiality to ensure a functional office. While this structure is not a traditional "unitary," this option adopts some of the benefits not found in a strictly unbundled system.

To provide for a more effective and constitutional attorney general structure, this Note proposes a two-part amendment to the Indiana Code. First, the General Assembly should repeal the attorney general consent statute for employing outside counsel.[150] Second, there should be a replacement provision allowing for the governor to employ outside counsel at his discretion, for either himself or another executive agency. This addition will interact with the attorney general's duty to act when required to do so by the governor.[151]

These two changes will ensure a level of governor oversight while both limiting attorney general discretion and retaining ultimate attorney general independence regarding the actions in which he wants to represent the state. Not only will this reform allow the governor more power to ensure faithful execution of the laws, but it will also bring the attorney general closer to being less of a "policymaker" in the *Sendak* view (where the attorney general would be exercising executive power) and more of a defender of the state and representative of its legal interests.[152]

A. Repeal the Consent Statute

As discussed throughout this Note, providing a limit on the governor's power to direct actions within the executive branch is both constitutionally and practically unsound. The most immediate and direct remedy comes from repealing the language found in Indiana Code section 4-6-5-3(a), which states no agency may "name, appoint, employ, or hire any attorney or special" counsel for representation without the attorney general's written consent.[153]

However, once this specific provision is repealed, there should still be a statutory scheme in place in the instance the governor needs to appoint outside counsel for himself or an agency. The absence of this additional provision could potentially lead to ambiguity and unnecessary litigation. There still needs to be a safeguard to ensure the attorney general is still effective in carrying out the duties of the office.

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149. *See supra* Part V.

150. IND. CODE § 4-6-5-3(a).

151. *See id.* § 4-6-2-1.

152. *See supra* Part II.

153. IND. CODE § 4-6-5-3(a).

B. Enact a Statute Outlining a Process for Governor-Appointed Counsel

After a repeal of Indiana Code section 4-6-5-3(a), a provision should be added to allow for a process the governor could take in order to appoint outside counsel for himself or another executive agency in the event the governor determined the attorney general would not be able to properly appear in that instance. A necessary aspect of this statutory provision would include the attorney general's inability to interfere or otherwise disrupt litigation pursued by special counsel.[154]

This can take the form of one of two directions. The first is to adopt a broad version similar to Oklahoma, Virginia, or Montana where the governor would have extreme discretion to appoint counsel as he sees fit.[155] The second option would provide for a more structured approach aimed at proactively preventing any potential abuse and subverting the attorney general completely.

Two interesting corollaries with which to reference both come from the legislature. The first is the current Indiana statutes applying to legislature-appointed counsel; this corollary would provide the broad structure for governor-appointed action. The second is 2022 Senate Bill 165; this corollary would provide an example of a more limiting process.[156]

Indiana Code section 2-3-8-1 expressly allows the legislature to "employ attorneys other than the Attorney General."[157] Similarly, Indiana Code sections 2-3-9-2 and 2-3-9-3, for the house and senate respectively, expressly state the ability of the speaker to employ attorneys "without obtaining the consent of the attorney general."[158] Applying the language already used for the legislature, [159] the reformed provision applying to the executive branch would read:

> (a) This section applies if any of the following occurs:
>
> (1) An individual is sued in the individual's capacity as an executive officer.
>
> (2) An agency is sued as a body.
>
> (b) The governor may employ one (1) or more attorneys necessary to defend a lawsuit described in subsection (a) without obtaining the consent of the attorney general.

If more bounds are needed, although by no means constitutionally required, a more structured provision could include a compulsory process whereby the attorney general could petition the governor's action to appoint counsel; there would be a rebuttable presumption that the governor's acts and judgment are

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154. *See* Riley v. Cornerstone Cmty. Outreach, Inc., 57 So.3d 704, 739, 741 (Ala. 2010) (holding the state attorney general cannot interfere with litigation pursued by officers acting under the governor's directions).

155. *See supra* Part V.

156. *See infra* notes 160-63 and accompanying text.

157. IND. CODE § 2-3-8-1.

158. *Id.* §§ 2-3-9-2, -3.

159. *See id.*

proper.

The introduction and Senate approval of SB 165 in early 2022[160] creates precedent for legislative acceptance of this very solution: for an executive branch officer (the attorney general) to replace an elected position (a county prosecutor) in the event of noncompliance by that elected official.[161] Here, like the attorney general in SB 165, the governor would have similar discretion in determining if the attorney general is either "noncompliant" on a particular issue or otherwise finds good cause that outside counsel should be appointed in that instance.[162]

A process with more safeguards against abuse could very much mirror that which SB 165 holds for allowing the attorney general to appoint a special prosecuting attorney.[163] Generally, upon the governor's determination that outside counsel should be appointed for a particular action, the attorney general would have the ability to file a petition in an attempt to enjoin such appointment. In the petition, the attorney general would set forth reasons for his decision including why there is a belief that the attorney general should be the state's representative in this instance and why it is in the state's best interest that the court grant the petition. The governor would be able to file an answer to this petition, although he would have no burden of proof in the action as the burden would rest on the attorney general to prove the governor's appointment is improper. Upon review, the court can either (1) deny the attorney general's petition and accept the governor's choice for appointment of counsel, (2) accept the petition and deny appointment, or (3) assign counsel directly.

Certain limits or bounds to an appointment statute have precedent. Relating to Virginia's special counsel statute, the Virginia Supreme Court noted, "[t]he scope of the appointment of special counsel must, however, be limited by objective parameters specified within the Governor's exemption order . . . [and] the scope of the appointment is limited in duration until such time that the

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160. A version of this bill was passed in early 2021 as SB 200. *See* Olivia Covington, *Bill Challenging 'Noncompliant' Prosecutors Clears Indiana Senate*, IND. LAW. (Feb. 23, 2021), https://www.theindianalawyer.com/articles/bill-challenging-noncompliant-prosecutors-clears-indiana-senate [https://perma.cc/BC6B-K3VC] [hereinafter Covington, *Challenging*] (noting references to Marion County Prosecutor Ryan Mears's policy of not prosecuting for possession of small amounts of marijuana).

161. S. 165, 122d Gen. Assemb., 2d Reg. Sess. (Ind. 2022), http://iga.in.gov/legislative/2022/bills/senate/165#document-c2904cd1 [https://perma.cc/F938-3AJL] (SB 165 "[p]ermits the attorney general to request the appointment of a special prosecuting attorney if a prosecuting attorney is categorically refusing to prosecute certain crimes, and establishes a procedure for the appointment of a person to serve as a special prosecuting attorney to prosecute cases that the county prosecuting attorney is refusing to prosecute." As of the authoring of this Note, the Indiana House of Representatives has not acted further on its enactment.).

162. Covington, *Challenging*, *supra* note 160; Olivia Covington, *Bill Aims to Prevent Social Justice Prosecuting*, IND. LAW. (Mar. 3, 2021), https://www.theindianalawyer.com/articles/bill-aims-to-prevent-social-justice-prosecuting [https://perma.cc/ZH3Q-9S7V].

163. *See* Ind. S. 165.

purported conflict of interests abates."[164]

The knowledge that the governor may step in to take action would ensure the attorney general is attentive to all potential matters needing attention as he would rather take the action himself than have someone else step in in the event of his inaction. Without such incentive, and with the inability of the governor to become involved, necessary actions on important matters may not be taken at all.

As explored *supra* in Part III, the policy reasons for reform include scenarios in which the attorney general potentially chooses not to bring a case, or is not fit to bring a particular case, that may be integral to the governor's agenda and necessary for public confidence in his continued future prospect as chief executive. The dissenting opinion in *Perdue* explained the continuous dilemma under the current structure.

> On the other hand, when the Governor and Attorney General do disagree, there is no longer any incentive for mutual consultation and possible compromise. The Attorney General can flatly refuse to consider implementing the Governor's decision, thereby leaving the head of the executive branch completely without legal representation. Each intra-executive branch stalemate over policy will then escalate into a political contest, with each constitutional officer seeking the General Assembly's enactment of a statute validating his or her position.[165]

Former Attorney General Zoeller's recognition that outside counsel could undoubtedly benefit the State in certain circumstances, and "ensure that [a] state statute will receive a stronger defense," does not take into account a scenario where the attorney general might deny the State this benefit (whether consciously or subconsciously).[166] This level of discretion seems too great to place in the hands of a non-constitutional executive officer.

C. In Relation to the Governor's Written Request to Act

The attorney general's "powers and duties" includes the requirement for the attorney general to "prosecute and defend all suits . . . whenever the governor . . . require[s] the attorney general in writing."[167] As noted in Part II, once the governor makes this request, there is currently no provision allowing the governor further action in the event the attorney general fails to act or takes a position that would render him ineffective in acting.

The recommendation allowing for governor-appointed outside counsel would address certain circumstances where the attorney general does not adequately respond to the request—particularly needed in matters where the attorney general has exclusive jurisdiction to bring actions.[168] Thus, in the event the governor

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164. Wilder v. Att'y Gen., 439 S.E.2d 398, 402 (Va. 1994).

165. Perdue v. Baker, 586 S.E.2d 606, 623 (Ga. 2003) (Carley, J., dissenting).

166. Zoeller, *supra* note 93, at 551.

167. IND. CODE § 4-6-2-1 (2022).

168. *See supra* Part III.

invokes a request for action, the appointment recommendation would then become increasingly relevant.[169] Broad discretion would be granted to the governor in this instance when the attorney general fails to file within a reasonable time or act at all relating to the governor's request.

Certain circumstances may arise where the attorney general may be willing to participate in an action but is subject to a conflict of interest or is otherwise unable to adequately serve the state's interests.[170] While the governor may have the power to request the attorney general to act in a certain matter, the situation could arise where the governor would need another option.[171] The governor's judgment in these circumstances would dictate invoking outside appointment.

This proposal aims to ensure that the governor has further proper authority within the executive branch; the attorney general retains the ability to bring the cases he wants to initiate and, as long as there is genuine action on those cases enough to withstand judicial scrutiny, the attorney general would retain independence in his actions. Current statutory language maintaining the attorney general's status as representing the state and ability to initiate investigations at will ensure a proper level of independence to carry out official duties.[172]

The ultimate intent and main reason behind allowing for the governor to employ outside counsel are two-fold: its closer adherence to the Indiana Constitution—for both the governor's vested power and separation of powers between executive and legislative branches—and to strengthen the outcomes of our government. Under the *Sendak* aim of limiting the attorney general from dictating policy, the repeal and replacement of the consent statute better ensures the governor's involvement in policy decisions regarding what matters can be prosecuted or defended rather than leaving him no say at all.

D. Rebuttal to Arguments Against Reform

An argument against giving the governor oversight authority over the attorney general, and thus limiting attorney general independence, is that conflicts would ensue as a result of the elected attorney general wanting to assert his discretion and maintain his political future. A reason why more bounded attorney general authority would not lead to increased conflict is the attorney general's incentive to not want to be seen as defying the popularly elected governor on a statutory rule. While the attorney general could still have political aspirations, the risks of "expending political capital by appearing reckless, if not lawless" are ever present.[173]

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169. *See* Zoeller, *supra* note 93, at 552 (citing 71 PA. CONS. STAT. ANN. § 732-303(a)-(b) (2012) ("If the attorney general refuses to give authorization [after the governor's request], the governor may intervene as of right.")).

170. *See id.* at 551 (recognizing "the attorney general's office may encounter a conflict of interest or a statute that falls outside its area of expertise").

171. *See supra* INTRODUCTION.

172. *See supra* Part II.

173. William P. Marshall, *Break up the Presidency? Governors, State Attorneys General, and*

Another significant argument against reform is that it would place too much of a political nature around the attorney general if its "independence" is to be replaced with interference from the executive. The counter to this is that the Constitution allows for three departments of government, each with designated duties not to be exercised by any of the others.[174] It cannot stand to reason that a statutorily created officer can be able to exist in performing any of its duties as if it were one of these "three separate departments" itself and bypassing Article III of the Indiana Constitution; neither can it stand for the legislative branch to define and outline the scope of an official while leaving the chief executive no power over it.[175] The United States Supreme Court considered this very possibility in *Myers v. United States*: "It could never have been intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it."[176]

A safeguard to the attorney general's overall independence, as explored in *Perdue* in Part V *supra*, rightfully prevents the governor from compelling the attorney general to dismiss an action once he brings it.[177] The governor's interjection would only apply to employing outside counsel for cases the attorney general has *not yet* brought. The attorney general has an incentive to not simply bring a case without serious intent to vigorously pursue its ends simply to prevent the governor's involvement. The attorney general would not want to be seen as ineffective by not prevailing in all suits his office is involved; this would damage either his prospects at reelection or future higher political aspirations.

Concerning the constitutionality of a statute allowing the governor to employ special counsel, the Virginia Supreme Court provides an explanation. In *Wilder*, the Virginia attorney general contended the special counsel statute was unconstitutional, but the court responded that there was simply no specific identification of any constitutional provision that could be implicated as being violated.[178] Concerning Indiana, there is likewise no constitutional provision implicated that would indicate a violation; on the contrary, the statute requiring the attorney general's consent for outside counsel does clearly violate multiple provisions of the Indiana Constitution.[179]

Lessons from the Divided Executive, 115 YALE L.J. 2446, 2454 (2006). Marshall expressed this as to why cooperation rather than conflict has been the rule regarding governor and attorney general interaction in a divided executive. However, in a structure comporting more with the Constitution and separation of powers, conflict that even *does* arise under this structure will be more tolerable than if the governor had no statutorily available response. *See id*.

174. IND. CONST. art. III, § 1.

175. *See id*.

176. 272 U.S. 52, 127 (1926).

177. *See supra* note 127 and accompanying text.

178. Wilder v. Att'y Gen., 439 S.E.2d 398, 403 (Va. 1994).

179. *See supra* Part I.

CONCLUSION

Following the Marion County Civil Court's denial of Attorney General Rokita's procedural objections relating to the Governor's employing outside counsel,[180] the Indiana Supreme Court first denied the emergency petition to rule on the matter[181] and then ultimately affirmed the trial court's ruling on the procedural matters.[182] The Indiana Supreme Court supported its ruling by recognizing "[t]he Attorney General's authority, statutorily granted by the General Assembly, simply cannot trump the Governor's implied power to litigate in executing his enumerated power under the take-care clause without violating our Constitution's careful distribution of powers."[183] This reasoning naturally and logically extends to all other instances involving an attorney general's authority over the governor in bringing cases concerning the executive branch and the State of Indiana.

As previously discussed, however, the issue the Indiana Supreme Court decided specifically related to the governor's ability to employ counsel for himself in litigation he initiated and would not necessarily control in other instances; these other instances would likely lead to additional adjudication in same manner as the *Holcomb* case.[184] The time spent on these proceedings, past and future, cannot be considered an effective use of court and government resources when the constitutional implications are clear and could be resolved by a simple statutory change.

As the attorney general has certain functions that could be considered to fall under different branches of government, the position does not always "fit neatly within the framework described by the doctrine of separation of powers."[185] Like the duty to defend the constitutionality of legislation, some of the attorney

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180. Order Denying Motion to Strike and for Alternative Relief, Holcomb v. Bray, No. 49D12-2104-PL-014068 (Marion Co. Super. Ct. July 3, 2021); *see also* Tom Davies, *Judge Letting Indiana's Governor Sue to Block Emergency Law*, AP NEWS (July 6, 2021), https://apnews.com/article/in-state-wire-indiana-health-coronavirus-pandemic-laws-8f08c574df2950ac1ab845d48e1c7252 [https://perma.cc/ZF4T-G2BH].

181. Order Denying Request for Emergency Writ, Holcomb v. Bray, No. 21S-OR-00354 (Ind. Sup. Ct. Aug. 3, 2021); *see also* Marilyn Odendahl, *Rokita Loses First Attempt at Indiana Supreme Court to Stop Governor's Lawsuit Against General Assembly*, IND. LAW. (Aug. 3, 2021), https://www.theindianalawyer.com/articles/rokita-loses-first-attempt-at-indiana-supreme-court-to-stop-governors-lawsuit-against-general-assembly [https://perma.cc/TQ3X-PWDU].

182. Holcomb v. Bray, 187 N.E.3d 1268, 1288-90 (Ind. 2022).

183. *Id*. at 1289 (citing Dye v. State *ex rel.* Hale, 507 So.2d 332, 338 (Miss. 1987) (en banc) ("We refuse to relegate to the Attorney General either the exclusive authority to bring a suit such as this or the discretion whether and how that authority should be exercised.")).

184. *Id.* ("[The attorney general] cannot prevent the Governor from bringing a suit and hiring outside counsel to do so."); *see also supra* INTRODUCTION.

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

general's responsibilities will creep outside of the executive branch.[186] "A part of neither the executive nor the legislative branch, he is a legal advisor to both."[187] This makes it somewhat difficult to ultimately evaluate what is best for the position relative to the entire structure of government. However, addressing the position regarding its specific relation and duties to the executive branch can be done. The statutory scheme itself should squarely address the solution; the judiciary cannot be the sole source of reconciliation to deal with issues between the constitution and a statutory officer.

An attorney general's blanket discretion to allow or deny the head of the executive branch to bring a particular suit by way of outside counsel is the kind of policymaking decried in *Sendak*.[188] Ultimately, this is an issue of both constitutionality and practicality. Constitutional provisions should inform and control the structure that exists within a given branch of government; it is hard to interpret any aspect of the Indiana Constitution as meaning for there to be a limit on the chief executive's actions *within* the executive branch itself. Outside any express provisions to the contrary, it is also noteworthy to consider what the founders of the United States Constitution envisioned as a sustainable system of government when considering how a state system should be structured. The practical aspects of the unitary executive, the Indiana Constitutional, and Indiana Supreme Court precedent nonetheless make statutory reform most effective in ensuring a functional and effective configuration for the attorney general within the executive branch.

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186. *See* Zoeller, *supra* note 93, at 517.

187. Myers, *Status in State Government*, *supra* note 52, at 53 (quoting Arlen C. Christenson, *The State Attorney General*, 1970 Wis. L. Rev. 300). "It may be questioned whether the Attorney General can be an officer of a branch other than the executive branch under any state constitution based upon a separation of powers structure." *Id.* at 53 n.6.

188. *See* discussion *supra* Section II.C.