

**WHO SPEAKS FOR ARIZONA:  
THE RESPECTIVE ROLES OF THE GOVERNOR  
AND ATTORNEY GENERAL  
WHEN THE STATE IS NAMED IN A LAWSUIT**

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*[T]he Governor alone, and not the Attorney General, is . . . obligated and empowered to protect the interests of the people and the State by taking care that the laws are faithfully executed.*

– Justice Bernstein of the Arizona Supreme Court, 1960

**INTRODUCTION**

On April 23, 2010, Arizona Governor Jan Brewer signed Senate Bill 1070 (SB 1070) into law and ignited a national debate on the issues of immigration policy, federal preemption, and states' rights. Within weeks, eight federal lawsuits were filed challenging the constitutionality of the new law. Not only did SB 1070 raise serious questions of federal constitutional law, it also raised serious questions regarding the powers and duties of the governor and the attorney general under the Arizona Constitution. Primarily, who speaks for the State of Arizona when the State is sued in federal and state court?

The State of Arizona is a sovereign entity within the United States' constitutional system of government. With some exceptions, it can sue and be sued.<sup>1</sup> In fact, the State of Arizona is routinely involved in litigation and has been

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1. The Eleventh Amendment of United States Constitution prohibits citizens from filing suit against a state in federal court. U.S. CONST. amend. XI. Arizona has waived this immunity in a number of areas. *E.g.*, ARIZ. REV. STAT. ANN. § 12-820.02 (2010)

named as a defendant in many federal and state lawsuits since statehood.<sup>2</sup> These issues range from liability matters to issues of constitutional sovereignty. The Arizona attorney general has historically represented the State in these cases, and the governor at times has disagreed with the position taken by the attorney general on behalf of the State.<sup>3</sup>

Given that these constitutional officers are separately elected and take the same oath,<sup>4</sup> the debate centers over who should decide the position of the State of Arizona in a legal proceeding where the state is named as a party.<sup>5</sup> The attorney general is the state's chief legal officer and attorney in most legal proceedings. However, the attorney general's duty to represent the state is not absolute. Rather, it is qualified by that officer's constitutional role in relation to the governor and the Arizona Legislature. As the chief executive, the governor is charged with faithfully executing the laws of the state<sup>6</sup> and must therefore have the authority to direct the position of the state when those laws are challenged in court.<sup>7</sup> In addition, the legislature is constitutionally empowered to prescribe the attorney general's powers and duties.<sup>8</sup> Thus, to the extent the attorney general desires to take a certain position on behalf of the state in a legal proceeding, the legislature may remove that authority from the attorney general if the legislature determines such removal to be in the best interest of the state.<sup>9</sup>

This Essay examines the law governing such disputes and the appropriate policy determination as to the governor's and attorney general's respective roles when the State of Arizona is sued in state and federal court. Part I briefly discusses the duties of the governor and attorney general. Part II examines three conflicts that arose between Governor Brewer and Attorney General Terry Goddard during their concurrent terms, which raised the issue of which officer was empowered to speak for the state in legal matters. Part III discusses the respective constitutional authority of each officer when such situations arise and the legal arguments that

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(qualified immunity; public employees are liable for intentional injuries and gross negligence). Public employees and public agencies may not be sued until all administrative claims processes and nonbinding dispute resolutions have been resolved. ARIZ. REV. STAT. ANN. § 12-821.01(C) (2010). The statute of limitations against public employees and public agencies is a mere 180 days. §12-821.01(A).

However, states are not immune from suit by the federal government. The United States may always sue Arizona—or any state—in federal court. *See West Virginia v. United States*, 479 U.S. 305, 311 (1987).

2. *E.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Woodard v. State*, 211 P. 1118 (Ariz. 1922).

3. *See infra* Part II.

4. ARIZ. REV. STAT. ANN. § 38-231(E)–(F) (2010) (setting forth the oath of office for state public officers and defining “officer or employee”).

5. Friction over who should decide the position of the state has occurred several times in recent years. *See infra* Part II. This situation is most likely to present itself when the governor and attorney general are of opposite political parties, as was the case with Governor Janice K. Brewer and Attorney General Terry Goddard. *See infra* Part II.

6. *See infra* Part I.A.

7. *See infra* Part III.A.

8. *See infra* Part I.B.

9. *See infra* Part III.B.3.

would have been made if the conflict had required judicial resolution. Finally, Part IV advocates that the Arizona Legislature resolve this issue by clearly delineating that the governor has the authority to speak for Arizona when the State is named in a lawsuit.

## I. THE POWERS AND DUTIES OF THE GOVERNOR AND ATTORNEY GENERAL

In order to properly analyze the question of who speaks for the State of Arizona in legal matters, it is first necessary to review the powers and duties of the governor and the attorney general as set forth in the Arizona Constitution and laws of the state.

### A. *The Governor*

Article 5 of the Arizona Constitution establishes the Executive Branch and sets forth the powers of the executive officers, including the governor and the attorney general. The office of the governor is established in article 5, section 1(A) of the Arizona Constitution<sup>10</sup> and the governor's primary power is set forth in article 5, section 4, which prescribes a duty to "take care that the laws be faithfully executed."<sup>11</sup> The governor is also tasked under the Arizona Constitution with "transact[ing] all executive business with the officers of the government, civil and military."<sup>12</sup> The governor is required to "perform such duties as are prescribed by the constitution and as may be provided by law,"<sup>13</sup> and "may require information in writing from the officers in the executive department upon any subject relating to the duties of their respective offices."<sup>14</sup>

The governor is commander-in-chief of the military forces of the state<sup>15</sup> and may also grant reprieves, pardons, and commutations after conviction.<sup>16</sup> The governor is further tasked with appointing superior court judges in counties with more than 250,000 citizens as well as all appellate judges.<sup>17</sup> The governor takes an oath to defend the constitution and laws of Arizona.<sup>18</sup>

The Arizona Supreme Court established that the governor is Arizona's supreme executive officer in *Arizona State Land Department v. McFate*.<sup>19</sup> In analyzing the governor's role in relation to the attorney general, the court held that "the Governor alone, and not the attorney general, is responsible for the

10. ARIZ. CONST. art. 5, § 1(A).

11. *Id.* § 4. The President of the United States also has the responsibility and power to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. The U.S. Supreme Court has called this the "Chief Executive's most important constitutional duty." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).

12. ARIZ. CONST. art. 5, § 4.

13. *Id.* § 1(C).

14. *Id.* § 4.

15. *Id.* § 3.

16. *Id.* § 5.

17. ARIZ. CONST. art. 6, § 37(B)–(C).

18. ARIZ. REV. STAT. ANN. § 38-231(E) (2010). The Attorney General takes the same oath. See *infra* note 33 and accompanying text.

19. 348 P.2d 912, 918 (Ariz. 1960).

supervision of the executive department and is obligated and empowered to protect the interests of the people and the State by taking care that the laws are faithfully executed.”<sup>20</sup>

The duties of the governor not specifically set forth in the Arizona Constitution are prescribed by the legislature.<sup>21</sup> The duties statutorily assigned to the governor include “supervis[ing] the official conduct of all executive and ministerial officers,”<sup>22</sup> “[seeing] that all offices are filled and the duties performed or, in default, invok[ing] such remedy as the law allows,”<sup>23</sup> “[appointing] all officers of this state not made elective, unless otherwise provided,”<sup>24</sup> serving as “the sole official means of communication between this state and the government of any other state or the United States,”<sup>25</sup> and approving any compromise or settlement in any action or claim by or against the state if no specific department or agency is named or otherwise involved.<sup>26</sup>

### ***B. The Attorney General***

The office of the attorney general is established in article 5, section 1(A) of the Arizona Constitution.<sup>27</sup> The attorney general’s powers are prescribed by the legislature, which includes serving as the state’s chief legal officer and defending the state in various legal matters in federal and state court.<sup>28</sup>

20. *Id.* In *McFate*, the attorney general had attempted to sue the Arizona State Land Department without statutory authority to do so. The Arizona Supreme Court held that the attorney general has no constitutional or statutory authority to sue a state department in furtherance of interests of the public. *See id.* at 914–16. The court also noted that the governor—not the attorney general—has the authority to oversee the state departments, including removal of officers. *Id.* at 918; *see also infra* Part III.A.

21. ARIZ. CONST. art. 5, § 1(C); ARIZ. REV. STAT. ANN. § 41-101(12) (2010) (providing that the governor “[h]as such powers and shall perform such other duties as devolve upon him by law”).

22. ARIZ. REV. STAT. ANN. § 41-101(1).

23. *Id.* § 41-101(2).

24. *Id.* § 41-101(3).

25. *Id.* § 41-101(4).

26. *Id.* § 41-192(B)(4). There are dozens of other powers prescribed to the governor throughout the Arizona Revised Statutes. *E.g.*, ARIZ. REV. STAT. ANN. § 26-303 (2010) (granting the governor broad powers during a state of emergency, including the power to mobilize the national guard); ARIZ. REV. STAT. ANN. § 41-101.01(A) (2010) (granting the governor the ability to spend federal grant money); ARIZ. REV. STAT. ANN. § 28-602(A) (2010) (granting the governor the ability to “contract and do all other things necessary to secure the full benefits” of federal highway safety programs).

27. ARIZ. CONST. art. 5, § 1(A). This article of the Arizona Constitution also establishes the offices of the Governor, Secretary of State, Treasurer, and Superintendent of Public Instruction.

28. The designation of the attorney general as the state’s “chief legal officer” is made in statute. ARIZ. REV. STAT. ANN. § 41-192(A) (2010). The attorney general also has many other duties prescribed by statute. *E.g.*, *id.* § 41-192(A)(1) (providing legal advice to most of the departments of the state); *id.* § 41-192(A)(4) (providing legal advice to school boards); *id.* § 41-192(A)(7) (running the civil rights division of the department of law); *id.* § 41-192(A)(8) (compiling the Arizona agency handbook at least every ten years).

Unlike the governor, whose primary powers are specifically stated in the Constitution, the Arizona Legislature prescribes the attorney general's powers and duties.<sup>29</sup> Article 5, section 1(C) provides that "[t]he officers of the executive department . . . shall perform such duties as are prescribed by the constitution and as may be provided by law."<sup>30</sup> This language is similarly stated in article 5, section 9, which provides that "the powers and duties of secretary of state, state treasurer, attorney-general, and superintendent of public instruction shall be as prescribed by law."<sup>31</sup> There are three other references to the attorney general in the Arizona Constitution, but none define that officer's powers or duties.<sup>32</sup> Thus, by constitutional design, the legislature has been tasked with establishing the attorney general's powers and duties. The attorney general usually decides the State's position in lawsuits because of that office's traditional role in representing the state in court.

It is expected that the attorney general will vigorously defend the constitution and laws of the state in accordance with the officer's sworn oath.<sup>33</sup> Many that assume the office of attorney general also believe that they possess an inherent constitutional power to serve as a guardian of the public interest,<sup>34</sup> which has on occasion put the attorney general at odds with the governor over the position the State should take in legal matters.

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29. All of the attorney general's powers are prescribed by statute, while many of the governor's powers are designated directly in the Arizona Constitution. The Arizona Supreme Court noted this distinction in *State ex rel. Frohmiller v. Hendrix*, 124 P.2d 768, 771 (1942) ("[T]he powers and duties of the governor are to a great extent set forth in the Constitution. Those of the attorney general . . . are in no way specified therein beyond the provision of art. 5, § 9 . . .").

30. ARIZ. CONST. art. 5, § 1(C).

31. *Id.* § 9. The Arizona Supreme Court has interpreted this to mean prescribed by statute and not common law. *Shute v. Frohmiller*, 90 P.2d 998, 1001 (1939); *see also* *Ariz. State Land Dep't v. McFate*, 348 P.2d 912, 914 (Ariz. 1960); *infra* Part III.B.1-2.

32. ARIZ. CONST. art. 4, pt. 2, § 1(20) (authorizing the Arizona Independent Redistricting Commission to determine whether the attorney general or counsel hired or selected by the Commission shall represent the people of Arizona in the legal defense of a redistricting plan); ARIZ. CONST. art. 5, § 6 (establishing the attorney general's position in the line of succession to the office of governor); ARIZ. CONST. art. 28, § 6(C) (requiring attorney general be notified before a private right of action is filed to enforce English only requirement). In contrast, the Arizona Constitution does assign specific duties to the other constitutional officers. *See, e.g.*, ARIZ. CONST. art. 5, § 10 (assigning the duty of canvassing election returns to the secretary of state); ARIZ. CONST. art. 10, § 7(A) (requiring the state treasurer to deposit proceeds from state lands into permanent funds); ARIZ. CONST. art. 11, § 2 (granting the superintendent of public education and others supervisory control of public school systems).

33. ARIZ. REV. STAT. ANN. § 38-231(E) (2010) (setting forth the oath of office for state public officers).

34. *See* *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206, 1209 (Cal. 1981) (judicially recognizing the California attorney general's role as a "guardian of the public interest"). However, the Arizona Supreme Court has repeatedly rejected this contention for Arizona's attorney general, who may only act when authorized by statute. *See infra* Part III.B.1-2.

## II. RECENT CONFLICT BETWEEN THE GOVERNOR AND ATTORNEY GENERAL

The line between law and politics can be thin and sometimes transparent. This point was illustrated in 2010 when Governor Brewer and Attorney General Goddard clashed over who should lead the defense of SB 1070. The dispute raised a legal question about each officer's respective constitutional powers, but also emerged as a major political issue during the 2010 campaign for governor.

At the time, Brewer and Goddard had each been involved in politics for almost three decades.<sup>35</sup> Neither was a stranger to the heated political rhetoric that often results from contentious legal matters. The dispute over who should speak for the State in legal matters began shortly after Jan Brewer was sworn in as governor on January 21, 2009, following the resignation of Governor Janet Napolitano to become the U.S. Secretary of Homeland Security.<sup>36</sup> Speculation began immediately that Brewer and Goddard would run against each other for governor in the November 2, 2010 general election, which proved to be true.<sup>37</sup> Therefore, it was not surprising when they differed on the position the State of Arizona should take in three high profile legal cases involving bilingual education, health care, and immigration reform. All three cases raised core constitutional questions about the powers and duties of each respective officer, and two of the cases became core campaign issues during the race for governor in 2010.<sup>38</sup>

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35. Jan Brewer was an Arizona State Representative from 1983 to 1986, an Arizona State Senator from 1987 to 1996, a member of the Maricopa County Board of Supervisors from 1996 to 2002, and the Arizona Secretary of State from 2003 to 2009. *Biography – Janice K. Brewer (Rep.)*, ARIZ. SEC'Y OF STATE (Dec. 2010) (on file with *Arizona Law Review*), available at [http://www.azsos.gov/public\\_services/Arizona\\_Blue\\_Book/2009-2010/Chapter02/statewide\\_elected\\_officials/governor/administration.htm](http://www.azsos.gov/public_services/Arizona_Blue_Book/2009-2010/Chapter02/statewide_elected_officials/governor/administration.htm). Brewer became Governor in January 2009 after the resignation of Governor Janet Napolitano, who became the U.S. Secretary of Homeland Security. Derek Quizon, *Brewer Sworn in as 22nd Governor*, STATE PRESS, Jan. 22, 2009, <http://www.statepress.com/archive/node/3691>. On November 2, 2010, Brewer was elected to a full four-year term as governor. Casey Newton, *SB 1070 Propels Brewer to Victory*, ARIZ. REPUBLIC, Nov. 3, 2010, at A16.

Terry Goddard was the Mayor of Phoenix from 1984 to 1990. *Biography - Terry Goddard (Dem.)*, ARIZ. SEC'Y OF STATE (Dec. 2010) (on file with *Arizona Law Review*), available at [http://www.azsos.gov/public\\_services/Arizona\\_Blue\\_Book/2009-2010/Chapter02/statewide\\_elected\\_officials/ag/administration.htm](http://www.azsos.gov/public_services/Arizona_Blue_Book/2009-2010/Chapter02/statewide_elected_officials/ag/administration.htm). He was the Arizona Director for the U.S. Department of Housing and Homeland Security from 1995 to 2002, and then the Arizona Attorney General from 2003 to 2011. *Id.* Goddard was a candidate for Governor in 1990 and 1994. STATE OF ARIZONA OFFICIAL CANVAS - GENERAL ELECTION - NOVEMBER 6, 1990, at 2, available at <http://www.azsos.gov/election/1990/General/Canvass1990GE.pdf>; STATE OF ARIZONA OFFICIAL CANVAS - PRIMARY ELECTION - SEPTEMBER 13, 1994, at 2, available at <http://www.azsos.gov/election/1994/Primary/Canvass1994PE.pdf>. He ran for Governor again in 2010, but lost to Brewer in the general election. Quizon, *supra*.

36. See Quizon, *supra* note 35.

37. See Newton, *supra* note 35.

38. SB 1070 and the Patient Protection and Affordable Care Act were issues raised by Governor Brewer during the 2010 Arizona gubernatorial campaign.

**A. Bilingual Education and the Flores Case**

Governor Brewer and Attorney General Goddard first clashed over the State's position in *Horne v. Flores*,<sup>39</sup> a federal case involving a challenge related to the funding and federal compliance of Arizona's bilingual education system. In *Flores*, a group of English-Language Learner (ELL) students and their parents filed a class action, alleging that Arizona was providing inadequate ELL instruction in the Nogales Unified School District in violation of the Equal Educational Opportunities Act of 1974 (EEOA),<sup>40</sup> which requires states to take "appropriate action to overcome language barriers" in schools.<sup>41</sup>

The challengers initially named the State of Arizona; the Arizona State Board of Education; and the Arizona Superintendent of Public Instruction, Tom Horne, as defendants.<sup>42</sup> The attorney general delegated the defense to outside counsel, who made it clear during various court proceedings that they were operating at the direction of then Governor Napolitano.<sup>43</sup> After concluding that counsel for the State was not offering what they believed to be the best defense, the Speaker of the Arizona House of Representatives and the President of the Arizona State Senate intervened in the case as representatives of their respective bodies.<sup>44</sup> The legislators and Superintendent Horne became joint petitioners to defend the laws.<sup>45</sup>

The divergent positions among the various government defendants in *Flores* created an awkward situation: the State of Arizona and Board of Education essentially sided with the plaintiffs in opposition to Arizona law and policy, and the legislative leaders and Superintendent Horne defended the law. The U.S. Supreme Court granted certiorari to hear the case shortly before Governor Brewer was sworn in as governor on January 21, 2009. On March 11, 2009, the Governor directed Attorney General Goddard to change the State's position in *Flores* and join the positions taken by the Superintendent of Public Instruction, the Speaker of the Arizona House of Representatives, and the President of the Arizona Senate.<sup>46</sup>

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39. 129 S.Ct. 2579 (2009).

40. 20 U.S.C. § 1703(f) (2006).

41. *Flores*, 129 S.Ct. at 2588–89.

42. *Id.* at 2589.

43. Letter from Governor Brewer to Attorney General Goddard (Mar. 31, 2009) (on file with *Arizona Law Review*). Although not noted in the letter, the attorney general is authorized to employ outside counsel for particular cases upon a fixed fee basis. ARIZ. REV. STAT. ANN. § 41-191(C) (2010).

44. *Flores*, 129 S.Ct. at 2591. In order to be granted intervenor status, the party requesting to intervene must establish, among other things, that its interests are not being represented by the current parties. *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). In *Flores*, the Arizona Legislature was allowed to intervene by court order after the attorney general did not oppose its motion for permissive intervention. 129 S.Ct. at 2591. By not opposing the motion, the attorney general was arguably acknowledging his opposition to the law and his inability to differentiate his position from that of the plaintiffs.

45. *Flores*, 129 S.Ct. at 2592.

46. Letter from Governor Brewer to Attorney General Goddard (Mar. 11, 2009) (on file with *Arizona Law Review*).

Attorney General Goddard refused, asserting his constitutional independence to speak for the State in court, including his posited ability to decide what position the State will or will not take.<sup>47</sup> Specifically, he said, “Arizona law makes it clear that as the chief legal officer for the State, the Attorney General is responsible for representing the State and rendering such legal services as the State requires, which includes determining the appropriate legal positions to be taken on behalf of the State.”<sup>48</sup> Goddard was apparently referring to an Arizona statute, § 41-192(A), which provides that “[t]he attorney general shall have charge of and direct the department of law and shall serve as *chief legal officer of the state*.”<sup>49</sup>

A few months later, the U.S. Supreme Court issued its opinion in favor of the Arizona Legislators and Superintendent. The Court noted the disagreement among the State defendants as a factor informing its holding that a broader standard of review should apply when state officials seek to revisit judgments agreed to by prior elected officials in institutional reform cases.<sup>50</sup> The Court also referred to former Attorney General Janet Napolitano’s decision to stipulate to a statewide injunction that intruded deeply into the State’s budgetary processes rather than appeal the district court’s ruling against the State as a justification for its holding that a statewide injunction was inappropriate when only one school district challenged the State’s compliance with the EEOA.<sup>51</sup>

Governor Brewer asserted that Attorney General Goddard had usurped her authority by refusing to change positions in *Flores* as directed,<sup>52</sup> but she did not challenge his action at that time. That challenge came later, during a fight over the State’s position on the constitutionality of the newly passed federal health care law.

### **B. Federal Health Care Lawsuit**

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act.<sup>53</sup> Several states, led by the Florida Attorney General, jointly filed a constitutional challenge to the law in the Federal District Court in the Northern District of Florida.<sup>54</sup> Governor Brewer asked Attorney

47. Letter from Attorney General Goddard to Governor Brewer (Mar. 16, 2009) (on file with *Arizona Law Review*).

48. *Id.*

49. ARIZ. REV. STAT. ANN. § 41-192(A) (2010) (emphasis added); *see infra* Part III.B.3.

50. *Flores*, 129 S.Ct. at 2596 (2009).

51. *Id.* at 2607.

52. Letter from Governor Brewer to Attorney General Goddard, *supra* note 43.

53. Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

54. *Florida v. U.S. Dep’t of Health & Human Servs.*, No. 3:10-CV-00091-RV-EMT (N.D. Fla. Mar. 23, 2010). A total of twenty-six states had joined the complaint as of January 31, 2011. Order Granting Summary Judgment, No. 3:10-CV-00091-RV-EMT (N.D. Fla. Jan. 31, 2011). District Judge Vinson granted summary judgment for the plaintiffs on January 31, 2011. *Id.* The order granting summary judgment has been appealed by the defendants. Notice of Appeal, No. 3:10-CV-00091-RV-EMT (N.D. Fla. Mar. 8, 2011).



General Goddard to join the other states' attorneys general, but he declined to do so.<sup>55</sup> Goddard's refusal to follow Governor Brewer's directive led to special session legislation removing the attorney general's authority to speak on behalf of the State for the federal health care law and empowering Governor Brewer to join the multistate suit on behalf of the State of Arizona.<sup>56</sup> The legislation provided that:

Notwithstanding title 41, chapter 1, Arizona Revised Statutes, and any other law, the governor may direct counsel other than the attorney general to initiate a legal proceeding or appear on behalf of this state to enforce the public policy prescribed in this act. This subsection applies to any action filed in a federal court on or before December 31, 2010.<sup>57</sup>

Attorney General Goddard opposed this legislation, but it ultimately passed and, at the direction of Governor Brewer, the State of Arizona (represented by Author Joseph Kanefield) joined the multistate challenge to the federal health care law on May 14, 2010.<sup>58</sup>

Goddard did not challenge the legislation removing his authority to speak for the State in the matter, nor did he attempt to prevent the Governor's counsel from appearing on behalf of the State. When SB 1070 passed months later with nearly identical language, Attorney General Goddard argued—for the first time—that the provision was unconstitutional.<sup>59</sup>

### C. *Arizona's Immigration Law—SB 1070*

There are few Arizona laws that have garnered more attention and controversy than SB 1070, which was signed into law by Governor Brewer on

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Other states have filed their own suits against the federal government over the Patient Protection and Affordable Care Act. *See, e.g.*, *Virginia v. Sebelius*, No. 3:10-CV-188 (E.D. Va. Mar. 23, 2010); *Oklahoma v. Sebelius* (E.D. Okla. Jan. 21, 2011).

55. Press Release, Office of Attorney General Terry Goddard, Terry Goddard Declines to Join Lawsuits Against Federal Health Care Law (Mar. 24, 2010), available at [http://www.azag.gov/press\\_releases/march/2010/Immediate%20Release-%20Terry%20Goddard%20Declines%20to%20Join%20Lawsuits%20Against%20Federal%20Health%20Care%20Law.html](http://www.azag.gov/press_releases/march/2010/Immediate%20Release-%20Terry%20Goddard%20Declines%20to%20Join%20Lawsuits%20Against%20Federal%20Health%20Care%20Law.html).

56. An Act Relating to Health Care Services Freedom of Choice, 2010 Ariz. Sess. Laws 8th Spec. Sess. ch. 1, § 2(B).

57. *Id.* The legislature also empowered the speaker of the Arizona House of Representatives and the president of the Arizona Senate to direct counsel to initiate a legal proceeding or appear on behalf of their respective chambers or on behalf of the legislature to enforce the public policy prescribed in the act and the constitutional authority of the legislature. *Id.* § 2(C).

58. Amended Complaint, *Florida v. U.S. Dep't of Health & Human Servs.*, No. 3:10-CV-00091-RV-EMT (N.D. Fla. May 14, 2010); Press Release, Office of the Governor, Governor Jan Brewer Announces Arizona Has Officially Joined the Multistate, Bipartisan Health Care Lawsuit (May 14, 2010), available at [http://azgovernor.gov/dms/upload/PR\\_051410\\_BrewerAnnouncesAZJoinedMultistateBipartisanHealthCareLawsuit.pdf](http://azgovernor.gov/dms/upload/PR_051410_BrewerAnnouncesAZJoinedMultistateBipartisanHealthCareLawsuit.pdf).

59. *See infra* Part II.C.

April 23, 2010.<sup>60</sup> SB 1070, also known as the Support Our Law Enforcement and Safe Neighborhoods Act, is a set of immigration laws intended to discourage and deter the unlawful entry, presence, and economic activity of individuals unlawfully present in the United States.<sup>61</sup> On April 30, 2010, the Arizona Legislature passed House Bill 2162 (HB 2162), which amended certain provisions of SB 1070.<sup>62</sup> The bill's proponents argued that the law was necessary because the federal government had failed to address the problem of illegal immigration in Arizona for decades,<sup>63</sup> and the bill's opponents charged that the law is preempted by federal law and legalizes racial profiling by local law enforcement.<sup>64</sup>

During the legislative debate over SB 1070, several legislators, including SB 1070's sponsor, Senator Russell Pearce, became concerned with Attorney General Goddard's willingness to defend the law in court.<sup>65</sup> This was not based merely on speculation, but rather on Goddard's prior opposition to similar legislation and comments made to the media expressing his opposition to SB 1070 while the legislation was pending.

On February 24, 2010, Goddard, through his legislative liaison, opposed House Bill 2632, a bill similar to SB 1070 in the Arizona House of Representatives, when that bill was heard before the House Committee on Military Affairs and Public Safety.<sup>66</sup> Prior to its passage he referred to SB 1070 as "troubling"<sup>67</sup> and called it a "tragic mistake."<sup>68</sup> He also said "it may have civil-

60. 2010 Ariz. Sess. Laws 2d Reg. Sess. ch. 113.

61. *Id.* § 1.

62. 2010 Ariz. Sess. Laws 2d Reg. Sess. ch. 211. The two bills together are commonly referred to as simply "SB 1070." *See infra* text accompanying notes 71–72.

Both bills became effective on July 29, 2010, which was the ninetieth day following the April 29, 2010 adjournment of the Second Regular Session of the Forty-Ninth Legislature. ARIZ. CONST. art IV, pt. 1, § 1(3) (requiring that ordinary acts of the legislature not become effective for ninety days after the close of the session).

63. *See, e.g.*, Press Release, Office of the Governor, Statement by Governor Jan Brewer on S.B. 1070 (Apr. 23, 2010) (citing decades of federal inaction and misguided policy as necessitating Arizona's action), available at [http://azgovernor.gov/dms/upload/PR\\_042310\\_StatementByGovernorOnSB1070.pdf](http://azgovernor.gov/dms/upload/PR_042310_StatementByGovernorOnSB1070.pdf).

64. *See, e.g.*, Press Release, ACLU, ACLU and Civil Rights Groups File Legal Challenge to Arizona Racial Profiling Law (May 17, 2010) (arguing that SB 1070 invites racial profiling), available at <http://www.aclu.org/immigrants-rights-racial-justice/aclu-and-civil-rights-groups-file-legal-challenge-arizona-racial-pr>.

65. E-mail from Russell Pearce, President of the Ariz. State Senate, to Joseph Kanefield, Gen. Counsel, Office of Governor Janice K. Brewer (Feb. 15, 2011 19:05 MST) (on file with *Arizona Law Review*).

66. *See Minutes of House Comm. on Mil. Aff. & Pub. Safety, H.B. 2632*, 49th Ariz. Leg., 2d Reg. Sess., at 8 (Feb. 24, 2010). Greg Stanton of Attorney General Goddard's office appeared in opposition to the bill. *See id.*

67. *The Hotline: Only Joe Knows*, NAT'L J., Apr. 19, 2010.

68. Goddard referred to SB 1070 as a "tragic mistake" shortly after Brewer signed it. John Schwartz & Randal C. Archibold, *News Analysis – A Law Facing a Tough Road Through the Courts*, N.Y. TIMES, Apr. 27, 2010, at A17. A month later, he reiterated his opposition. Jonathan Clark, *Despite Personal Opposition, Goddard Set to Defend SB 1070*, NOGALES INT., May 21, 2010. Goddard even said he would have vetoed SB 1070 had

rights implications,”<sup>69</sup> and in referring to a potential lawsuit, Goddard said, “I will be screened because of my personal opposition to it,” and that he would abstain from all involvement and delegate his authority to other attorneys in his office.<sup>70</sup>

The legislature concluded that Attorney General Goddard had a conflict of interest and therefore directed Governor Brewer to lead any defense of SB 1070. This was accomplished by HB 2162, which was signed by the governor a week after SB 1070 and clarified who would represent Arizona in its legal defense.<sup>71</sup> Section 8 of HB 2162 provided that:

A. Notwithstanding title 41, chapter 1, Arizona Revised Statutes, and any other law, through December 31, 2010, the attorney general shall act at the direction of the governor in any challenge in a state or federal court to Laws 2010, chapter 113 [SB 1070] and any amendments to that law.

B. Notwithstanding title 41, chapter 1, Arizona Revised Statutes, and any other law, through December 31, 2010, the governor may direct counsel other than the attorney general to appear on behalf of this state to defend any challenge to Laws 2010, chapter 113 [SB 1070] and any amendments to that law.<sup>72</sup>

The “notwithstanding title 41, chapter 1” language refers to the laws generally prescribing the powers and duties of the attorney general. Thus, this law superseded any powers already provided the attorney general by the legislature. Section A obligated the attorney general to act at the direction of the governor in any lawsuit challenging SB 1070, and section B authorized the governor to hire counsel other than the attorney general to defend the State in any challenge to SB 1070. Section A left open the possibility for the attorney general to defend SB

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he been governor. Mary K. Reinhart, *Goddard Fights to Defend Immigration Law He Opposes*, ARIZ. GUARDIAN, June 6, 2010.

69. *The Hotline: Only Joe Knows*, *supra* note 67.

70. *Building the Wall*, ARIZ. CAPITOL R.: YELLOW SHEET R., Apr. 22, 2010. Shortly after SB 1070 passed, Deputy Attorney General Greg Stanton stated, “[Goddard] will likely not be involved in the litigation because of his position in opposition to the bill.” Alia Beard Rau & Ginger Rough, *3 Lawsuits Challenge Legality of New Law*, ARIZ. REPUBLIC, Apr. 30, 2010, at B1. According to the *New York Times*, Goddard also said “he would probably recuse himself, and enlist [outside counsel] for the defense.” Schwartz & Archibold, *supra* note 68.

Although the attorney general hires assistants, he is ultimately responsible for the representation of state agencies. ARIZ. REV. STAT. ANN. § 41-192(A)(1), (B)(3) (2010). Case law suggests he may remove himself from a case when a conflict arises and appoint a subordinate to appear instead. *Arizona Together v. Brewer*, 149 P.3d 742, 743 n.1 (Ariz. 2007) (noting Attorney General Goddard’s recusal and appointment of his Chief Assistant Attorney General to serve as “Acting Attorney General”). State law, however, requires that the attorney general inform the agency in writing of his disqualification and then allows the agency to obtain outside counsel at its own expense. ARIZ. REV. STAT. ANN. § 41-192(F).

71. HB 2162 also added language making clear that SB 1070 would be implemented without racial profiling. 2010 Ariz. Sess. Laws 2d Reg. Sess. ch. 211, § 4–6.

72. *Id.* § 8.

1070 if the governor permitted, but any such defense would require the attorney general to treat the governor as his client.<sup>73</sup>

Section B further empowered the governor to bypass the attorney general and hire other counsel to defend SB 1070 if the governor believed such a move to be in the best interest of the State.<sup>74</sup> The legislature, in essence, exercised its judgment and determined that the best interests of the state required that Governor Brewer have the option to hire counsel other than Attorney General Goddard to defend the State of Arizona. HB 2162 thus precluded Attorney General Goddard from taking the position he took in *Horne v. Flores*, where he maintained that he alone, and not the governor, speaks for the State in any lawsuit naming Arizona as a defendant.<sup>75</sup>

Several federal lawsuits were filed in Arizona challenging the constitutionality of SB 1070, including a lawsuit filed against the state by the United States Department of Justice (“DOJ case”).<sup>76</sup> The lawsuits named various

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73. Requiring the attorney general to act at the governor’s direction is not a new proposition under Arizona law. The attorney general must obtain the governor’s approval to compromise or settle any action or claim by or against the State or any department unless a specific department or agency is named or otherwise materially involved. ARIZ. REV. STAT. ANN. § 41-192(B)(4). The attorney general must also, at the direction of the governor or when deemed necessary by the attorney general himself, “prosecute and defend any proceeding in a state court other than the supreme court in which the state or an officer thereof is a party or has an interest.” *Id.* § 41-193(A)(2). If directed by the governor, the attorney general must assist the county attorney of any county in the discharge of the county attorney’s duties. *Id.* § 41-193(A)(5). At the direction of the governor, the attorney general shall purchase property offered for sale under execution issued upon a judgment in favor of or for the use of the state, and shall enter satisfaction, wholly or in part, of such judgment as consideration for the purchase. *Id.* § 41-193(B).

74. The original law empowering the governor to direct the defense of SB 1070 expired on December 31, 2010. 2010 Ariz. Sess. Laws 2d Reg. Sess. ch. 211, § 8. However, the law was extended indefinitely in 2011. 2011 Ariz. Sess. Laws 1st Reg. Sess. ch. 3, § 1(A)–(B). Governor Brewer then invited newly elected Attorney General Tom Horne to work with the Governor’s counsel to defend Arizona in the SB 1070 cases. Letter from Governor Jan Brewer to Attorney General Tom Horne (Jan. 6, 2011) (on file with *Arizona Law Review*); Press Release, Office of Attorney General Tom Horne, New Era at Attorney General’s Office as Horne Officially Joins State Effort to Defend S.B. 1070 Against Obama Administration’s Legal Challenge (Jan. 20, 2011), available at [http://www.azag.gov/press\\_releases/jan/2011/1070%20DEFENCE.html](http://www.azag.gov/press_releases/jan/2011/1070%20DEFENCE.html).

The 2011 amendment also authorized the Speaker of the Arizona House of Representatives and the President of the Arizona State Senate to defend any challenge to SB 1070. 2011 Ariz. Sess. Laws 1st Reg. Sess. ch. 3, § 1(C). The Legislature subsequently intervened as defendants in the DOJ case. Order Granting Arizona Legislature’s Motion to Intervene, *United States v. Arizona*, No. 10-CV-01413-PHX-NVW (D. Ariz. Apr. 5, 2011).

75. See *supra* Part II.A.

76. *United States v. Arizona*, No. 10-CV-01413-PHX-NVW (D. Ariz. filed July 6, 2010). Six other SB 1070 cases filed in Arizona were *Frisancho v. Brewer*, No. 10-CV-00926-PHX-SRB (D. Ariz. filed Apr. 27, 2009, dismissed Aug. 24, 2010); *Escobar v. Brewer*, No. 10-CV-00249-TUC-DCB (D. Ariz. filed Apr. 29, 2010, dismissed Aug. 31, 2010); *Salgado v. Brewer*, No. 10-CV-00951-PHX-ROS (D. Ariz. filed Apr. 29, 2010, dismissed Jan. 13, 2011); *Friendly House v. Whiting*, No. 10-CV-01061-PHX-MEA, (D. Ariz. filed May 17, 2010); *National Coalition of Latino Clergy and Christian Leaders v.*

parties as defendants, including Governor Brewer, Attorney General Goddard, county attorneys, county sheriffs, municipalities, and the State of Arizona.<sup>77</sup> Despite Goddard's public statements against SB 1070,<sup>78</sup> Governor Brewer was not initially averse to allowing Attorney General Goddard to defend SB 1070, provided that he treat her as the client and act at her direction, as would be the case in any attorney–client relationship.<sup>79</sup>

One case to raise the issue of defense and representation was filed by Roberto Frisancho, a self-represented litigant from Washington, D.C., who sought an order enjoining enforcement of the law claiming standing because of his plan to visit Arizona after SB 1070's effective date to conduct academic research.<sup>80</sup> Brewer and Goddard were named as the only defendants.<sup>81</sup> Given Mr. Frisancho's questionable standing to bring the suit, Brewer approached Goddard through counsel to ask if he would file a motion to dismiss on behalf of the Governor.<sup>82</sup> Goddard refused and suggested the Governor seek her own counsel.<sup>83</sup> In explaining his refusal to represent Brewer, Goddard said that he and the Governor “might have divergent opinions about how best to enter a defense” in the lawsuits

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*Arizona*, No. CV10-00943-PHX-SRB (D. Ariz. filed Apr. 29, 2010, voluntarily dismissed by plaintiffs on Jan. 7, 2011); and *League of United Latin American Citizens v. Arizona*, No. 10-CV-01453-PHX-NVW (D. Ariz. filed July 9, 2010). A lawsuit challenging SB 1070 was also filed by a pro se plaintiff in the federal court in the Western District of Virginia. *Complaint, Rutledge v. Town of Chatham*, No. 10-CV-00035-JLK (W.D. Va. Aug. 10, 2010). The district court granted the defendants' motions to dismiss shortly after the filing. *Order Granting Motions to Dismiss, Rutledge*, No. 10-CV-00035-JLK (Sept. 30, 2010).

77. The United States named only the State of Arizona and Governor Brewer as defendants. *Complaint at 1, United States v. Arizona*, No. 10-CV-01413-PHX-NVW. *Frisancho* named only Brewer and Goddard. *First Amended Complaint at 1, No. 10-CV-00926-PHX-SRB* (June 18, 2010). *Escobar* initially named Brewer, Goddard, Pima County Attorney Barbara LaWall, and the City of Tucson, *Complaint at 1, No. 10-CV-00249-TUC-DCB*, but later dropped Goddard as a defendant, *First Amended Complaint at 1, No. 10-CV-00249-TUC-DCB* (May 18, 2010). *Salgado* named Brewer and the City of Phoenix. *Amended Complaint at 1, No. 10-CV-00951-PHX-ROS* (May 17, 2010). *Friendly House* named all of Arizona's county attorneys and county sheriffs. *Complaint at 2–3, No. 10-10-01061-PHX-MEA. National Coalition of Latino Clergy and Christian Leaders* named Arizona, Brewer, Goddard, Maricopa County Sheriff Joe Arpaio, and Maricopa County Attorney Rick Romley. *Amended Complaint at 1–2, No. 10-CV-00943-PHX-SRB* (June 9, 2010). *League of United Latin American Citizens* named Brewer, the Maricopa and Pima County Sheriffs and Attorneys, and the Executive Director of the Arizona Department of Public Safety. *Amended Complaint at 1–2, No. 10-CV-01453-PHX-SRB* (Jan. 24, 2011).

78. See *supra* notes 66–70 and accompanying text.

79. E-mail from Richard Bark, Deputy Chief of Staff for Policy, Office of Governor Janice K. Brewer, to Joseph Kanefield, Gen. Counsel, Office of Governor Janice K. Brewer (Feb. 15, 2011 21:50 MST) (on file with *Arizona Law Review*).

80. *First Amended Complaint at 3–4, Frisancho*, No. 10-CV-00926-PHX-SRB (June 18, 2010).

81. *Id.* at 1.

82. E-mail from Richard Bark to Joseph Kanefield, *supra* note 79.

83. Howard Fischer, *Governor Creates Legal Defense Fund for SB 1070*, VERDE INDEP., May 27, 2010 (quoting Goddard as saying “I am not counsel for the governor by law” and “it was probably best to start with separate counsel” but arguing that his actions did not constitute “a rejection”).

challenging SB 1070.<sup>84</sup> Subsequently, the Governor hired outside counsel and proceeded to take the lead in defending the law.<sup>85</sup>

The second case to raise the issue of representation was *Friendly House v. Whiting*, in which a number of organizations, represented by the American Civil Liberties Union, sued all of Arizona's county sheriffs and county attorneys alleging that SB 1070 was unconstitutional. On May 28, 2010, Attorney General Goddard intervened in the case on behalf of the State.<sup>86</sup> Goddard did so pursuant to Federal Rule of Civil Procedure 5.1(a)(1)(B) and 28 U.S.C. § 2403.<sup>87</sup> The Attorney General had not consulted with the Governor before filing his motion to intervene, and the Governor determined that he had usurped her constitutional duty to speak for the State and had also violated section 8 of HB 2162.<sup>88</sup> On June 1, 2010, Governor Brewer filed her own motion to intervene, both in her official capacity as governor and on behalf of the State of Arizona, pursuant to the authority granted to her by the Arizona Constitution and section 8 of HB 2162.<sup>89</sup> On June 14, 2010, Brewer sent a letter to Goddard asking him to immediately withdraw his motion to intervene, which set the stage for a legal conflict between the two constitutional officers.<sup>90</sup>

Goddard stridently asserted that, by empowering the governor to direct the defense of SB 1070 and removing his authority to speak for the State in the matter, the legislature unconstitutionally usurped his fundamental duty to defend

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84. *Id.* In *Frischano*, Brewer and Goddard filed separate motions to dismiss that raised nearly identical arguments regarding standing. Compare Governor Brewer's Motion to Dismiss, No. 10-CV-00926-PHX-SRB (June 11, 2010), with Defendant Attorney General Terry Goddard's Motion to Dismiss, No. 10-CV-00926-PHX-SRB (June 11, 2010). Judge Bolton eventually granted both motions. Order Granting Motions to Dismiss, No. 10-CV-00926-PHX-SRB (Aug. 24, 2010).

85. The Governor established a legal defense fund under title 41, section 1105(A) of the Arizona Revised Statutes. Arizona Governor Jan Brewer, Executive Order 2010-11 (May 26, 2010). The fund raised over \$3.6 million from more than 42,000 contributors in all fifty states to pay for the legal defense of SB 1070. Miriam Jordan, *Donors Send Millions to Defend Arizona Law*, WALL ST. J., Oct. 26, 2010.

86. State of Arizona's Motion to Intervene as a Defendant and Request for Status Conference, *Friendly House v. Whiting*, No. 10-CV-01061-PHX-MEA (D. Ariz. May 28, 2010) (filed by Attorney General Goddard).

87. *Id.* at 1-2; see *infra* Part III.B.4 (discussing these provisions in more detail).

88. Letter from Governor Brewer to Attorney General Goddard (June 14, 2010) (on file with *Arizona Law Review*). Section 8 of HB 2162 did not go into effect until July 29, 2010, see *supra* note 62, an argument that Goddard raised to the Governor in his response letter. Letter from Attorney General Goddard to Governor Brewer (June 18, 2010) (on file with *Arizona Law Review*). Nevertheless, the Governor arguably already had authority to speak for the State. See *infra* Part III.A. Further, the Attorney General's intervention would have been retroactively nullified when section 8 became effective, making the intervention at a minimum inappropriate, if not illegal.

89. Motion to Intervene as Defendant by Governor Janice K. Brewer in Her Official Capacity and on Behalf of the State of Arizona, *Friendly House v. Whiting*, No. 10-CV-01061-PHX-MEA, (June 1, 2010).

90. Letter from Governor Brewer to Attorney General Goddard, *supra* note 88.

Arizona in legal matters.<sup>91</sup> Nevertheless, after raising “grave concerns” about the law removing his powers in this instance, Goddard chose not to challenge that law or the Governor’s action and removed himself from the proceedings.<sup>92</sup> Stating that a constitutional dispute between him and Brewer “is definitely not in the best interest of Arizona” and would “distract from, and potentially damage, the legal defense of SB 1070/HB 2162,” Goddard withdrew from the cases and as counsel for the State.<sup>93</sup>

Thus, the issue involving who speaks for the State of Arizona in litigation of this kind has never been fully resolved. The issue was days away from being raised in court but became moot when Goddard withdrew from representing the State in *Friendly House*. The question remains: where the governor and attorney general disagree on the State’s position in litigation, who—constitutionally—speaks for Arizona? The legal issues that would have been raised in court are the topic of Part III.

### III. THE GOVERNOR SPEAKS FOR THE STATE, INSIDE AND OUTSIDE THE COURTROOM

Governor Brewer and Attorney General Goddard both claimed authority to speak for the State in the bilingual education, health care, and immigration lawsuits. Although the Arizona Legislature resolved the matter through session law in the health care and immigration matters, Attorney General Goddard insisted that one of these laws was unconstitutional. This Part analyzes the legal issues that likely would have been raised had the dispute between Brewer and Goddard proceeded to court.

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91. Letter from Attorney General Goddard to Governor Brewer, *supra* note 88. The Attorney General asserted in his letter that section 8 of HB 2162 is unconstitutional because it

usurp[s] one of the most fundamental duties of another publicly elected constitutional officer [which] is contrary to our constitutional system of government. Doing so threatens to set a precedent whereby the Legislature could seize and distribute the powers of any constitutional officer it dislikes or disagrees with. Such power grabs, if unchecked, also mean that future Secretaries of State, Treasurers, and State School Superintendents, could have their authority revoked and redistributed at the whim of the legislature.

*Id.* The case law, however, clearly establishes the outer limits on the legislature’s authority, which prohibits the legislature from effectively destroying an office, transferring the powers of one branch to another, or placing constitutional powers and functions in the hands of an unelected official. *See infra* Section III.B.2. Moreover, Goddard’s argument ignores a fundamental canon of constitutional interpretation: courts will focus solely on the question presented and not speculate about the potential for abuse in the future or rule based on its own desirability of the measure. *See Earhart v. Frohmler*, 178 P.2d 436, 439 (Ariz. 1947) (“[E]ven if the law were one without safeguards and the threat of abuse seemed imminent, this Court has neither the power nor the authority to decide upon the desirability of the measure. We are confined solely to the question of its constitutionality.”).

92. Letter from Attorney General Goddard to Governor Brewer, *supra* note 88.

93. *Id.*

### A. Governor as Chief Executive

Even without legislation like section 8 of HB 2162, the governor, as the highest executive in the state, has the authority to determine the position of the State when it is named a party in litigation. The governor is tasked under the Arizona Constitution with ensuring that Arizona's laws are "faithfully executed."<sup>94</sup> Governor Brewer argued during her dispute with Attorney General Goddard that this authority empowers her to set the legal course for the State of Arizona in any litigation and that the Attorney General must act at her direction.<sup>95</sup>

This position is supported by the Arizona Supreme Court's decision in *Arizona State Land Department v. McFate*,<sup>96</sup> which held that "the Governor alone, and not the Attorney General, is responsible for the supervision of the executive department and is obligated and empowered to protect the interests of the people and the State by taking care that the laws are faithfully executed."<sup>97</sup>

In *McFate*, the issue was whether the attorney general had standing to sue on behalf of the State of Arizona to enjoin the State Land Commissioner from selling certain parcels of state land.<sup>98</sup> The court determined that the attorney general's assertion of a position in conflict with a state department was inconsistent with his duty as the department's legal advisor.<sup>99</sup> Further, the initiation of litigation in furtherance of the interests of the public in general, as distinguished from the policies or practices of a particular department, was not part of the attorney general's statutory role.<sup>100</sup> The court held that the attorney general may only initiate proceedings on behalf of the State pursuant to a specific statutory grant of power.<sup>101</sup>

The California Supreme Court relied on *McFate* when it held that the California attorney general must yield to the governor's constitutional authority in disputes between the two officers.<sup>102</sup> In *People ex rel. Deukmejian v. Brown*, the court addressed a conflict that arose when the attorney general sued the governor and state personnel board in an action challenging the constitutionality of the recently passed State Employer–Employee Relations Act after previously advising the defendants on the scope of the new law.<sup>103</sup> The governor moved to disqualify the attorney general based on his violation of California's rule of professional conduct, which prohibited an attorney from representing interests adverse to a former client without the client's consent.<sup>104</sup> The attorney general argued that he was not bound by the state's ethical rules because his common law role as a

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94. ARIZ. CONST. art. 5, § 4.

95. See Letter from Governor Brewer to Attorney General Goddard, *supra* note 43.

96. 348 P.2d 912 (Ariz. 1960).

97. *Id.* at 918.

98. *Id.* at 912–13.

99. *Id.* at 915.

100. *Id.*

101. *Id.* at 918.

102. *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206, 1210 (Cal. 1981).

103. *Id.* at 1207.

104. *Id.* at 1208, 1210, 1213.



“guardian of the public interest” and “the People’s legal counsel” empowered him to act in the best interest of the state even if that meant taking a position contrary to the governor.<sup>105</sup>

In citing constitutional language similar to Arizona’s, the court held that “if a conflict between the Governor and the Attorney General develops over the faithful execution of the laws of this state, the Governor retains the ‘supreme executive power’ to determine the public interest.”<sup>106</sup>

In citing *McFate*, the California Supreme Court observed that, like California’s constitution, the Arizona Constitution declares that its governor “shall take care that the laws be faithfully executed” and that these powers are not vested in the attorney general.<sup>107</sup> The court went on to quote the relevant language in *McFate*, declaring that the governor alone is responsible for the supervision of the executive department and therefore “is obligated and empowered to protect the interests of the people and the State by taking care that the laws are faithfully executed.”<sup>108</sup>

Notably, the court’s holding in *Brown* was reached over the dissent of one justice, whose minority view seems to mirror Attorney General Goddard’s position. In his dissent, Justice Richardson took issue with the majority’s conclusion that the attorney general is bound by the rules of professional conduct in matters involving the interests of the state and that the attorney general must act at the direction of the governor in such matters.<sup>109</sup> Justice Richardson found that the attorney general’s powers are grounded in common law and that the attorney general serves in a dual role as representative of the state agency and guardian of the public interest.<sup>110</sup> However, Richardson believed the attorney general’s “paramount duty [is] to represent the public interest,” even if that means withdrawing as counsel to the governor or state agency.<sup>111</sup> Although the dissent cited courts from other states reaching similar conclusions, most of those courts had found that the attorney general possessed common law powers inherent in the office.<sup>112</sup>

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105. *Id.* at 1209.

106. *Id.* The faithful execution language of the California Constitution differs slightly from the Arizona Constitution in that it provides, “The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed.” CAL. CONST. art. 5, § 1.

107. 624 P.2d at 1210.

108. *Id.* (quoting *Ariz. State Land Dep’t v. McFate*, 348 P.2d 912, 918 (Ariz. 1960)).

109. *Id.* at 1212, 1215 (Richardson, J., dissenting).

110. *Id.*

111. *Id.* at 1215.

112. *Id.* The dissent cited courts in Massachusetts, Kentucky, and Illinois holding that their state attorneys general do have common law powers. *Id.* The dissent similarly cited a Connecticut case, *Conn. Comm’n on Special Revenue v. Conn. Freedom of Information Comm’n*, 387 A.2d 533 (Conn. 1978), which did not expressly discuss the common law powers of its attorney general. Other Connecticut case law makes clear, however, that the attorney general does not have common law powers. The old state’s attorneys did have common law powers which were codified into the office of attorney

The Arizona Supreme Court has held, however, that Arizona's attorney general possesses no such common law powers,<sup>113</sup> and therefore these cases are inapplicable in Arizona. Thus, under the logic of *Brown*, any dispute between the governor and attorney general over who determines the position of Arizona in litigation would likely be resolved in favor of the governor. Although *McFate* settles the question with respect to the authority of the attorney general to initiate legal proceedings in the name of the State, it left unresolved the question of who should speak for the State when the State is named a defendant.

**B. Attorney General's Lack of Inherent Authority**

Attorney General Goddard suggested that the attorney general possesses inherent constitutional powers by virtue of the office's designation in the Arizona Constitution and that such powers cannot be abolished or diminished by the Arizona Legislature. He made this point when he asserted that the legislation empowering the Governor to speak for the State in the SB 1070 lawsuits was unconstitutional because it usurped one of his "most fundamental duties."<sup>114</sup> He referred to the legislation as setting "a potentially dangerous and undemocratic precedent" and expressed his belief that the legislation "threatens to set a precedent whereby the Legislature could seize and distribute the powers of any constitutional officer it dislikes or disagrees with."<sup>115</sup> Goddard, however, cited no authority for his position.

Although Goddard's letter did not provide legal analysis regarding what he believed to be the attorney general's "most fundamental duty," he had elaborated on this opinion previously. In a letter to Brewer during their dispute over the State's position in the bilingual education case, *Flores v. Horne*,<sup>116</sup> he stated, "Arizona law makes it clear that as the *chief legal officer for the State*, the Attorney General is responsible for representing the State and rendering such legal services as the State requires, which includes determining the appropriate legal positions to be taken on behalf of the State."<sup>117</sup> Thus, it appears Goddard believed speaking for the State in legal matters to be among the inherent fundamental duties of the office, which is beyond the reach of the governor or the Arizona Legislature.<sup>118</sup>

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general when it was created. See *Blumenthal v. Barnes*, 804 A.2d 152, 165 (Conn. 2008) ("[T]he common-law authority heretofore vested in the state's attorneys . . . was codified and transferred to the office of the attorney general upon establishment of that office . . .").

113. See *infra* Part III.B.1.

114. Letter from Attorney General Goddard to Governor Brewer, *supra* note 88.

115. *Id.*

116. See *supra* Part II.A.

117. Letter from Attorney General Goddard to Governor Brewer, *supra* note 47 (emphasis added).

118. Goddard's position appears to be in line with former Arizona Attorney General Grant Woods. In *State ex rel. Woods v. Block*, Woods argued that the statute creating the Constitutional Defense Council (CDC) violated article 5 of the Arizona Constitution by giving away a core function of the Attorney General's Office to the CDC. 942 P.2d 428, 437 (Ariz. 1997). The CDC was controlled by legislative appointments and empowered in the name of the State to initiate and pursue "any action concerning a law,

Goddard chose to withdraw from representing the State in the SB 1070 cases despite his objection to the legislation empowering Governor Brewer to direct the State's defense.<sup>119</sup> Consequently, his legal position was never fleshed out as it would have been had Governor Brewer filed a motion to disqualify him as counsel for the State from the SB 1070 cases.<sup>120</sup> A review of Arizona precedent establishes that Goddard's position would have been difficult to sustain.

### *1. Attorney General Has No Common Law Powers*

In referring to a “fundamental duty” of the office, Attorney General Goddard was presumably referring to the common law power of the office to defend the State. The office of attorney general that existed under the laws of the Territory of Arizona had powers and duties derived from the common law of England, where for centuries the attorney general had been the crown's chief legal representative in the courts in both criminal and civil matters.<sup>121</sup>

In *Hudson v. Kelly*, the Arizona Supreme Court noted, “from the organization of the colonies and the states under our federal constitution, the

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regulation, order, policy or decision of the United States or any agency of the United States, including court rulings, that the council determines will further its purposes.” ARIZ. REV. STAT. ANN. § 41-401(F) (1996). The court, however, declined to address the “core function” argument because it found the statute to be unconstitutional under the separation of powers provision in article 3 of the Arizona Constitution. *State ex rel. Woods*, 942 P.2d at 437.

119. Letter from Attorney General Goddard to Governor Brewer, *supra* note 88. The attorney general could have challenged section 8 of HB 2162 pursuant to ARIZ. REV. STAT. ANN. § 35-212(A) (2010), which authorizes the attorney general to bring an action in the name of the State to enjoin the illegal payment of public monies. *See Fund Manager v. Corbin*, 778 P.2d 1244, 1250 (1988) (the attorney general may use “any ethically permissible argument” to prevent the illegal payment of public monies, including the argument that the statute granting the power to spend the money is unconstitutional). The attorney general's challenge would have likely argued that paying outside counsel with public monies pursuant to an unconstitutional statute amounted to an illegal payment of public monies. Although the legal fees were paid entirely from a legal defense fund established by the governor in accordance with her protocol authority under title 41, section 1105 of the Arizona Revised Statutes, private monies donated to the fund became public monies once deposited in the fund. *See* ARIZ. REV. STAT. ANN. § 35-212(B) (2010); *see also* *State v. Mecham*, 844 P.2d 641, 648 (Ariz. Ct. App. 1992) (finding the term “public money” includes private money held by state officials pursuant to title 41, section 1105 of the Arizona Revised Statutes). Goddard may not have pursued this challenge because the existing case law, discussed in this Part, indicates that section 8 is constitutional and, therefore, the suit would have been difficult for Goddard to win.

120. In her letter to Goddard demanding withdrawal of his motion to intervene on behalf of the State, Brewer threatened to “pursue all legal remedies available to me to have you removed as counsel for the State of Arizona to ensure the State a true and proper defense.” Letter from Governor Brewer to Attorney General Goddard, *supra* note 88.

121. *Shute v. Frohmiller*, 90 P.2d 998, 1002 (Ariz. 1939), *overruled in part by Hudson v. Kelly*, 263 P.2d 362, 367 (Ariz. 1953) (*Hudson* overruled *Shute* only to a limited extent; *Shute* said that the only implied restriction on the legislature's ability to remove powers from an executive officer was a breach of the separation of powers doctrine under article 3 of the Arizona Constitution, and *Hudson* added that the legislature also cannot effectively destroy an executive office by the removal of powers).

offices of governor, secretary of state, state auditor, state treasurer and attorney general, have had a well-understood meaning and statute.”<sup>122</sup> The court found these words to be “of long antiquity and in reference to officers of a government refer to offices occupied by these officers at common law.”<sup>123</sup> The framers of the Arizona Constitution, however, empowered the legislature to prescribe the powers and duties of the attorney general and authorized the legislature to alter or repeal any powers and duties prescribed to the attorney general under the laws of the Territory of Arizona.<sup>124</sup> When the Arizona Constitution empowers the legislature to prescribe the powers and duties of the office “by law,” the common law authority of the officer may be changed, modified, or abolished.<sup>125</sup>

Had there been no reference to specific duties of the office in the Arizona Constitution, the attorney general’s powers and duties would be determined by looking to the “duties and powers as were usually incident to the office of Attorney General in England under the common law, when not locally inapplicable.”<sup>126</sup> Thus, although the attorney general possessed common law powers and duties, those duties existed only to the extent they were not altered or repealed by the legislature.<sup>127</sup>

In *Shute v. Frohmiller*, the Arizona Supreme Court rejected the argument that there is any kind of implied restriction upon the legislature to create other and appointive officers for the discharge of the “well-known functions of the [attorney general].”<sup>128</sup> The court rejected the argument that the people had a constitutional right to “have the well-known functions of [the attorney general] discharged by a person elected to [that office],”<sup>129</sup> and held that the legislature could authorize a state agency to hire counsel other than the attorney general.<sup>130</sup>

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122. *Hudson*, 263 P.2d at 365.

123. *Id.*

124. *Shute*, 90 P.2d at 1003–04 (citing ARIZ. CONST. art. 22, § 2). In *Shute*, the court interpreted article 22, section 2 of the Arizona Constitution, which adopted the territorial laws of the state at statehood, to permit the legislature to alter or repeal any common law duties the attorney general may have had during the territorial period. *Id.* at 1003–04.

125. *Id.* at 1001. The Arizona Constitution also directs the courts to follow the laws in existence during the territorial period prior to statehood until they expire by their own limitations or are altered or repealed by law or repugnant to the Constitution. ARIZ. CONST. art. 22, § 2. All territorial powers possessed by the attorney general were superseded by the powers and duties prescribed to the office by the legislature in accordance with article 5, section 9 of the Arizona Constitution. *Shute*, 90 P.2d at 1001.

126. *Shute*, 90 P.2d at 1000 (quoting *State v. Huston*, 97 P. 982, 992 (Okla. 1908)).

127. ARIZ. REV. STAT. ANN. § 1-201 (2010) (“The common law only so far as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, and not repugnant to or inconsistent with the Constitution of the United States or the constitution or laws of this state, or established customs of the people of this state, is adopted and shall be the rule of decision in all courts of this state.”).

128. *Shute*, 90 P.2d at 1003.

129. *Id.* at 1002.

130. *Id.* at 1004.

In *Shute*, the attorney general had challenged the constitutionality of a law that empowered the Colorado River Commission to obtain outside counsel to represent the State of Arizona in civil and legal matters relating to the Colorado River.<sup>131</sup> The court held that the legislature acted within its constitutional power and expressly rejected the attorney general's argument that he had common law powers and duties that included an implied restriction upon the legislature in limiting the functions he must perform.<sup>132</sup> The court noted both that the members of the Arizona Constitutional Convention understood the roles of the executive officers and that the Arizona Legislature could remove responsibilities of an officer "to the extent its judgment should suggest the best interests of the state demanded it."<sup>133</sup>

*Shute* put to rest the argument that the attorney general has inherent or common law powers beyond the reach of the Arizona Legislature. Thus, the Arizona Supreme Court would have most likely rejected an argument asserting the attorney general's common law authority to speak for the State in defense of SB 1070, especially in light of the legislature's specific directive empowering Governor Brewer to speak for the State on this issue.

2. *The Legislature Is (Mostly) Free to Reassign the Attorney General's Powers*

An attorney general is likely to counterargue that implied restrictions on the legislature prevent it from usurping certain powers of the attorney general, including representing and establishing the position of the State in legal proceedings. Presumably, Goddard would have made this argument had the SB 1070 representation gone to court. The courts, however, would likely reject this argument as well.

As just established, the Arizona Constitution empowers the legislature to assign the attorney general his powers and duties. In *Shute*, the court held that the legislature was free to remove traditional non-constitutional powers of an executive officer.<sup>134</sup> Notwithstanding the unrestricted constitutional authority of the legislature to prescribe the powers and duties of the attorney general, the Arizona Supreme Court has held that there are *implied* restrictions against the legislature in exercising this authority. One implied restriction is a prohibition on imposing duties that would interfere with other branches.<sup>135</sup> However, the more

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131. *Id.* at 999–1000.

132. *Id.* at 1004.

133. *Id.* at 1004. In 2000, the Arizona voters agreed with the holding of *Shute* by establishing that the newly created independent redistricting commission could choose counsel other than the attorney general to represent the people of Arizona in the legal defense of a redistricting plan. ARIZ. CONST. art. 4, pt. 2, § 1(20); *see also* STATE OF ARIZONA, OFFICIAL CANVASS FOR 2000 GENERAL ELECTION – NOVEMBER 7, 2000, at 16 (2000), *available at* <http://www.azsos.gov/election/2000/General/Canvass2000GE.pdf> (showing that Proposition 106, establishing the Independent Redistricting Committee, passed by more than 170,000 votes).

134. *Shute*, 90 P.2d at 1004.

135. *Id.* at 1003 ("Any act of the legislature imposing upon an executive officer duties properly belonging to one of the other two branches would necessarily be invalid,

relevant implied restriction established by the court, and one that an attorney general might use to argue he or she should have the ability to decide the State's position in litigation, is the prohibition on de facto abolition of a constitutional office.<sup>136</sup>

In *Hudson v. Kelly*, the court addressed the legislature's powers to prescribe the duties of the state auditor under article 5, section 9.<sup>137</sup> The court held there was an implied mandate not to abolish the office "in fact, if not in name,"<sup>138</sup> by prescribing away all of the office's powers or transferring the duties to some appointive officer "not elected by the people."<sup>139</sup> In making this point, the court said the constitutional drafters "knew full well that the legislature would not attempt, for instance, to transfer the duties of the secretary of state to the superintendent of public instruction or to impose those of the state treasurer on the attorney general."<sup>140</sup>

*Hudson* involved a suit by Hudson Tire Company (Hudson) against the State Treasurer after he refused to honor a warrant issued by the state auditor to pay Hudson for tires purchased by the State Highway Department.<sup>141</sup> The Treasurer denied the warrant as a result of a newly passed Financial Administration Act of 1953, which created the Department of Finance.<sup>142</sup> The law required all state purchases to be made by the state purchasing agent under the authority of the Commissioner of Finance.<sup>143</sup> The appointed Commissioner's duties included oversight of the state auditor, whose duties became subject to approval by the Commissioner to such an extent that the court found "that it cannot be said that the [state] auditor is a free and independent officer."<sup>144</sup> The court held

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even if enacted pursuant to the constitutional provision empowering it to prescribe what the functions of that office should be.").

136. *Hudson v. Kelly*, 263 P.2d 362, 369 (Ariz. 1953) ("A constitutional office cannot be destroyed nor an incumbent legislated out of it in the absence of express constitutional authority . . ."); *see also Shute*, 90 P.2d at 1004 (speculating that Arizona's constitutional framers did not expressly limit the legislature's ability to destroy an office by removing its powers because it was "so unlikely and remote").

137. The office of the state auditor was included in the list of executive officers in article 5, section 1(A) of the Arizona Constitution until 1968, when the voters eliminated the office through a ballot referendum. H.C.R. 1, § 1, 28th Leg., 2d Sess. (Ariz. 1968) (passed the legislature on March 13, 1968 and approved by voters November 5, 1968). The state auditor's powers were delegated to the legislature in the same constitutional provision as the attorney general's—i.e., article 5, section 9—and thus, *Hudson* is equally applicable to the attorney general.

138. *Hudson*, 263 P.2d at 367.

139. *Id.* at 369.

140. *Id.* at 368 (quoting *Shute*, 90 P.2d at 1004). This is the same concern raised by Goddard in his letter to Brewer when questioning the constitutionality of the legislature's removal of his authority to defend the State in the SB 1070 lawsuits. *See supra* note 91 and accompanying text. The court's dicta in *Hudson* suggest this concern may be unfounded in Arizona law.

141. *Id.* at 363.

142. *Id.*

143. *Id.* at 364.

144. *Id.* at 368.

that “this Act constitutes an abortive attempt to destroy the independent constitutional office of auditor and to such extent is unconstitutional.”<sup>145</sup>

By holding the act unconstitutional, the court overruled its prior holding in *Shute*, but only to the extent *Shute* said that the only implied restriction on the Legislature’s ability to remove powers from an executive officer was a breach of the separation of powers doctrine under article 3 of the Arizona Constitution.<sup>146</sup> *Hudson*, however, clouded the question regarding the scope of the legislature’s powers when prescribing powers and duties of constitutional officers because it is inconsistent with the court’s prior precedent establishing that the constitutional officers have no common law powers. On the one hand, the court says that these officers have only powers given to them by the legislature, but then says at least one constitutional officer, the state auditor, has some inherent powers that cannot be diminished by the legislature.

In 1957, four years after *Hudson*, Justice Struckmeyer emphasized the confusion caused by *Hudson* in his dissenting opinion in *Giss v. Jordan*.<sup>147</sup> *Giss* involved an attempt by the legislature to allow its members to be exempt from statutory provisions requiring all state expenditures, including legislators’ personal expenses, be presented to and approved by the state auditor.<sup>148</sup> Instead, the legislature provided by statute that the President of the Senate and the Speaker of the House have the same power to approve a legislator’s personal expense reimbursements.<sup>149</sup> The majority of the Arizona Supreme Court held that the statute violated the separation of powers enumerated in the Arizona Constitution and therefore was unconstitutional.<sup>150</sup>

Justice Struckmeyer rejected the rationale of *Hudson* (partially relied upon by the majority) and asserted that *Shute* was correct in holding that there are no implied restrictions on the legislature in prescribing the duties of executive officers under the Arizona Constitution,<sup>151</sup> other than the separation of powers. He stated:

Either it was contemplated by the framers of the Constitution that the duties of the offices enumerated in Article V, Section 9, were to be prescribed by the legislature or it was contemplated that the duties of these offices would be construed into the Constitution by

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145. *Id.* at 369.

146. The *Hudson* court noted its prior language in *Shute*, where it opined that the probability of the legislature taking all of the powers and duties of one officer and giving them to another “was so unlikely and remote that no limitation in this respect was placed upon it.” *Id.* at 368.

147. 309 P.2d 779, 788–89 (1957) (Struckmeyer, J., dissenting).

148. *Id.* at 780–81 (majority opinion).

149. *Id.* at 780–82.

150. *Id.* at 787 (“The [attempt] to withdraw from the state auditor and to place with a member of the legislature the right to ‘audit’ the expense claims of the legislative department—one of the co-ordinate and equal branches of government—destroys, to that extent at least, this system of checks and balances.”). *Giss* has no direct bearing on the dispute between the governor and attorney general, as both are part of the executive branch of government.

151. *Id.* at 788–89 (Struckmeyer, J., dissenting).

the interpretations of the members of this court. I choose the former. If it is the latter, then the plain, simple language of the Constitution, that the powers and duties ‘shall be as prescribed by law’, [sic] does not mean what it says.<sup>152</sup>

Notably, no Arizona court has cited *Hudson* for the principle that the constitutional officers possess certain inherent and undiminishable powers, and the Arizona Supreme Court made no reference to *Hudson* in the two most recent cases interpreting the scope of the attorney general’s powers and duties as prescribed by the legislature.<sup>153</sup> In fact, both of these cases reemphasized the holding that the attorney general has no common law powers.<sup>154</sup>

Further, the holding of *Hudson* is inapplicable to the debate between the respective roles and powers of the governor and attorney general when the State of Arizona is a party in a lawsuit. The court made clear that it was concerned with the Arizona Legislature removing the duties of a constitutional officer elected by the citizens and placing those duties in the hands of an *appointed* official not directly accountable to the voters.<sup>155</sup> In the legislation empowering Governor Brewer to speak for the State in the multistate lawsuit challenging the Patient Protection and Affordable Care Act and in the defense of SB 1070, the Arizona Legislature removed the duties from one elected constitutional officer, the attorney general, and placed them in another elected constitutional officer, the governor. Thus, the core concern of the court in *Hudson* does not arise when the legislature empowers the governor to speak for the State of Arizona in litigation.

Notwithstanding the implied restrictions on the legislature in prescribing a constitutional officer’s powers and duties that were established in *Hudson*, the holding of *Shute* remains the law of the state with respect to the attorney general’s powers. The legislature may add and remove powers of the attorney general, provided the changes are reasonable and do not effectively destroy the office, transfer the powers of one branch to another, or place constitutional powers and functions in the hands of an unelected official.<sup>156</sup> While *Shute* makes clear that the legislature may not assign powers and duties traditionally exercised by the attorney general to itself or the judicial branch, it is silent on the question of whether the legislature may assign traditional powers and duties of the attorney general to the governor or another constitutional officer. The same is true of *Hudson*, which held only that it is unconstitutional for the legislature to relegate a constitutional officer (i.e., the state auditor) to the “dictates, review and approval of some *appointive* officer.”<sup>157</sup>

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152. *Id.* at 789.

153. *State ex rel. Woods v. Block*, 942 P.2d 428 (Ariz. 1997); *Ariz. State Land Dep’t v. McFate*, 348 P.2d 912 (Ariz. 1960).

154. *State ex rel. Woods*, 942 P.2d at 431; *McFate*, 348 P.2d at 914.

155. *Hudson v. Kelly*, 263 P.2d 362, 369 (Ariz. 1953).

156. *See McFate*, 348 P.2d at 914 (citing and reaffirming holding of *Shute* without reference to *Hudson*).

157. 263 P.2d at 368 (emphasis added).



3. *State Law Does Not Grant the Attorney General a Broad Power to Speak for the State*

State law designates the attorney general as the state's "chief legal officer"<sup>158</sup> and provides the attorney general standing to challenge the constitutionality of a state law, but it does not authorize the attorney general to ignore the governor in legal matters involving the State or to supersede other more specific statutory provisions involving the scope of the attorney general's powers and duties.

Although "chief legal officer" is not defined, in *Fund Manager v. Corbin* the Arizona Court of Appeals held that, as the state's chief legal officer, the attorney general has standing to challenge the constitutionality of a statute in the name of the State.<sup>159</sup> The court, however, also held that the attorney general may only challenge the constitutionality of an Arizona law in the process of exercising one of the attorney general's specific statutory powers.<sup>160</sup> Importantly, the court did not read any powers or duties inherent in this term, given the numerous powers and duties assigned to the attorney general by law.<sup>161</sup>

In *State ex rel. Woods v. Block*, the Arizona Supreme Court cited *Fund Manager* in reaching its holding that the Arizona Constitution does not provide the attorney general any standing to bring an action in the name of the State absent some statutory authority.<sup>162</sup> Thus, the law is now settled that the attorney general has no independent authority to speak for the State of Arizona by virtue of his legislative designation as Arizona's chief legal officer.<sup>163</sup>

4. *Federal Law Does Not Provide the Attorney General the Authority to Speak for the State*

Federal law provides no support for an attorney general seeking to argue that he alone speaks for the State in legal matters. When Attorney General Goddard filed his motion to intervene in *Friendly House v. Whiting*, one of the SB 1070 cases, he cited 28 U.S.C. § 2403 as authority to intervene on behalf of the State of Arizona in the case.<sup>164</sup> That statute provides that when the constitutionality

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158. The designation of the Attorney General as the State's "chief legal officer" is made in statute. ARIZ. REV. STAT. ANN. § 41-192 (2010); *see also supra* Part I.B.

159. 778 P.2d 1244, 1250 (Ariz. Ct. App. 1988).

160. *Id.*

161. There are numerous powers and duties assigned to the attorney general by law. *See supra* note 28 and accompanying text. One such duty requires the attorney general to obtain the governor's approval before compromising or settling any action or claim by or against the State. ARIZ. REV. STAT. ANN. § 41-192(B)(4).

162. *State ex rel. Woods v. Block*, 942 P.2d 428, 432 (1997).

163. Justice Martone dissented in *Woods*, noting his belief that title 41, section 192 of the Arizona Revised Statutes, as well as section 193, which prescribe the powers and duties of the office, provide the attorney general standing to bring suit alleging a statute unconstitutional in the name of his office, but not in the name of the State. 942 P.2d at 438-39 (Martone, J., dissenting). But like the majority, he did not believe that the attorney general had an inherent constitutional authority to challenge a statute's constitutionality. *See id.* at 439 ("In all other respects, I concur in the opinion and the judgment of the court.").

164. Motion to Intervene, *supra* note 86, at 2.

of a state statute is challenged in federal court, “the court shall certify such fact to the attorney general of the State, and shall permit *the State* to intervene for presentation of evidence . . . and for argument on the question of constitutionality.”<sup>165</sup>

This statute establishes a procedure to ensure that the state executive branch receives notice that the constitutionality of a state law is being challenged in federal court and designates the attorney general as the recipient of that notice. Although there are occasions when an attorney general is authorized to intervene in a case pursuant to § 2403, the statute does not provide the attorney general a substantive right to intervene in the name of the State of Arizona where state law says otherwise.<sup>166</sup>

Notably, the plain wording of § 2403 obligates the court to notify the attorney general when the constitutionality of a state statute is at issue and permits “the State to intervene,” but is silent on the question of whether the attorney general may intervene in the name of the State of Arizona without the consent of the governor. This question can only be resolved by referencing state law,<sup>167</sup> which, as previously discussed, requires the attorney general to act at the direction of the governor in any federal action challenging SB 1070.

Federal Rule of Civil Procedure 5.1, also cited by Attorney General Goddard,<sup>168</sup> does not provide the attorney general a substantive right to intervene on behalf of the State without the governor’s consent. The plaintiffs in *Friendly House* properly served Attorney General Goddard with a notice of constitutional challenge to a state statute pursuant to Rule 5.1(a)(1)(B).<sup>169</sup> Like § 2403(b), however, Rule 5.1(a) merely provides a procedural mechanism to notify the State that its law is being challenged in a federal action and to enable the State to appear and defend the law.<sup>170</sup> It does not create a substantive right that empowers the

165. 28 U.S.C. § 2403(b) (2006) (emphasis added).

166. See Tonya K. *ex rel.* Diane K. v. Bd. of Educ. of Chicago, 847 F.2d 1243, 1247 (7th Cir. 1988) (stating that § 2403 “is designed to give the *Executive Branch* both the time to make its views known and the opportunity to intervene in order to take a direct appeal to the Supreme Court if the decision should be adverse to the statute’s constitutionality”) (emphasis added).

167. Cf. Moore v. Sims, 442 U.S. 415, 428–29 (1979); Blake v. Pallan, 554 F.2d 947, 954 (9th Cir. 1977) (reaffirming that state courts have the final word on the meaning of state law).

168. Motion to Intervene, *supra* note 86, at 1.

169. Notice of Constitutional Challenge to a State Statute Pursuant to Fed. R. Civ. P. 5.1(a)(1)(B), *Friendly House v. Whiting*, No. 10CV-01061-PHX-MEA, (D. Ariz. May 18, 2010).

170. Rule 5.1(a) provides:

A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly: (1) file a notice of constitutional question stating the question and identifying the paper that raises it, if: . . . (B) a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity; and (2) serve the notice and paper . . . on the state attorney general if a state statute is questioned . . .

FED. R. CIV. P. 5.1(a).

attorney general to intervene without the consent of the governor contrary to state law.<sup>171</sup> Rule 5.1(c), a similar provision to (a), also does not create a substantive right that empowers the attorney general to intervene contrary to state law.<sup>172</sup>

The closest case on point interpreting the procedural process by which a state may intervene in a federal action supports the position that the governor speaks for Arizona when the state is sued. In *Yniguez v. Arizona*, a lawsuit challenging the constitutionality of Arizona's "English only" law adopted by voters at the 1988 general election, the Ninth Circuit allowed the Arizona attorney general to intervene—in a limited manner—on behalf of the State on appeal.<sup>173</sup> The court's holding, however, was contingent on the presence of the ballot measure's proponents, who also intervened on appeal,<sup>174</sup> and the choice of the governor, the only defendant not dismissed by the district court, not to appeal that court's ruling striking the law down.<sup>175</sup> Moreover, the court only allowed the attorney general to appear as a *non-party* to argue the constitutionality of the law and the attorney general's appearance on behalf of the State was made with the governor's blessing.<sup>176</sup> *Yniguez's* narrow holding does not give an Arizona attorney general standing to intervene in the name of the State when the governor is willing to speak on the state's behalf and has appointed counsel other than the attorney general to do so.

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171. See Rules Enabling Act, 28 U.S.C. § 2072(b) (2006) (declaring that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right"); *Transwestern Pipeline Co. v. 17.19 Acres of Property*, 550 F.3d 770, 776 (9th Cir. 2008) ("[P]rocedural rules cannot provide the basis for new *substantive* rights."); *All Underwriters v. Weisberg*, 222 F.3d 1309, 1314 (11th Cir. 2000) (stating that a federal procedural rule cannot displace state substantive law).

172. Rule 5.1(c) provides:

Unless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

FED. R. CIV. P. 5.1(c). While the normal presumption is that a state attorney general may speak for the state, this procedural rule does not trump the state's constitution or state law.

173. 939 F.2d 727, 739 (9th Cir. 1991), *vacated by* 520 U.S. 43 (1997). Despite the U.S. Supreme Court's order to vacate and remand the Ninth Circuit's opinion based on its holding that the case was mooted by the plaintiff's resignation from state service, the Court did not disagree with the cited assertions in regards to the status of the Attorney General in the case. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 70 (1997) ("[W]e do not rule on the propriety of the Ninth Circuit's exclusion of the State as a party . . .").

174. In *Arizonans for Official English*, the Supreme Court expressed grave doubt whether the ballot measure proponent had Article III standing to pursue appellate review but did not definitely resolve the question. See 520 U.S. at 66.

175. *Yniguez*, 939 F.2d at 739.

176. *Id.* Although Arizona Governor Mofford did not wish to appeal, she had no objection to the attorney general's intervention to pursue an appeal on behalf of the State. *Arizonans for Official English*, 520 U.S. at 56.

#### IV. APPLYING THE “SEPARATION OF DUTIES” DOCTRINE TO DISPUTES AMONG ARIZONA’S CONSTITUTIONAL OFFICERS

The separation of powers doctrine embedded in article 3 of the Arizona Constitution has served our state and democracy well by drawing a clear constitutional line between the branches of government. The concept of “separation of duties” is not expressly stated in the Arizona Constitution but certainly applies to the various constitutional officers. The governor is the supreme executive officer charged with faithfully executing the laws of the state. In order for state government to function in an orderly and consistent manner, it is critical that the attorney general not encroach upon or usurp the duties of the governor. This is what occurs when the attorney general takes a position on behalf of the State in a lawsuit that is contrary to the wishes of the governor. Although the legislature already requires the attorney general to obtain the governor’s approval before compromising or settling any action or claim by or against the State, the legislature should resolve this issue definitively by firmly and expressly delegating the power to direct all lawsuits involving the State to the governor as the state’s chief executive.

The Arizona Legislature has the authority to prescribe both the governor’s and the attorney general’s powers.<sup>177</sup> The Arizona Supreme Court has repeatedly held that, provided the legislature does not violate the separation of powers or dismantle the office, it can redefine the governor’s and attorney general’s duties and authority.<sup>178</sup> The legislature should insert a provision into title 41, section 101(A) of the Arizona Revised Statutes, the section that defines the duties of the governor, stating that the governor may direct the attorney general in all lawsuits where the State is a party, except where other statutes authorize the attorney general to bring an action in the State’s name. A similar provision could be inserted into title 41, section 192(A) of the Arizona Revised Statutes, the section that defines the duties of the attorney general, stating that the attorney general should defer to the governor in these situations. The clause excepting the attorney general from complying with the governor’s direction when another statute authorizes him to bring a suit protects the attorney general’s traditional role as a prosecutor. Further, the legislature should make clear that the attorney general must not unilaterally take a position on behalf of the State of Arizona in a separate civil lawsuit without consulting the governor.<sup>179</sup>

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177. *See supra* Part I.

178. *See supra* Part III.B.1–2 (explaining that the attorney general or any of the other state executive officers do not have powers beyond what is prescribed by the Arizona constitution and state statute). This excludes the governor’s constitutional powers and duties. *See supra* Part I.A.

179. For example, on January 22, 2010, Goddard intervened on behalf of the State of Arizona in three separate cases supporting the federal Environmental Protection Agency’s new rules and “endangerment” finding, which concluded that greenhouse gas emissions are a threat to human health and welfare. Motion for Leave to Intervene as Respondents, *Coal. for Responsible Regulation v. U.S. Env’tl. Prot. Agency*, No. 09-1322 (D.C. Cir. Jan. 22, 2010); Unopposed Motion for Leave to Intervene as Respondents, *Chamber of Commerce of the U.S. of Am. v. U.S. Env’tl. Prot. Agency*, No. 09-1237 (D.C.

If the legislature is unwilling to delegate this permanent power to the governor as chief executive, then the legislature should continue to make case-by-case determinations. If the legislature determines that the attorney general has a conflict of interest in a legal matter involving the State, then the legislature may conclude that allowing the attorney general to appear in the matter is not in the best interest of the State and pass session law to prevent the attorney general from doing so. The legislature could then certify that the governor may appear in the matter, even though such authorization is arguably not necessary. This is precisely what occurred in the health care and immigration lawsuits. In the health care lawsuit, the attorney general refused to challenge the law at the direction of the governor, and in the SB 1070 cases, the attorney general openly opposed the law that he was soon to be called upon to defend. The legislature felt it was in the State's best interest to remove the attorney general's authority in both matters to ensure the State received the best legal counsel.<sup>180</sup>

Regardless of which option it selects, the legislature's decision to grant the governor the right to speak for the State should be treated as a nonjusticiable political question by the courts if challenged.<sup>181</sup> The legislature is constitutionally empowered to prescribe the duties of the attorney general and may remove powers from the attorney general if it determines that the attorney general has a conflict. Further, there are no judicially manageable standards a court could apply to determine whether the legislature has abused its authority in determining that a conflict exists. The courts would be asked to second-guess the judgment of a coequal branch of government in exercising a constitutional power specifically prescribed to that branch.

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Cir. Oct. 8, 2010); Motion for Leave to Intervene as Respondents, *Am. Chemistry Council v. Env'tl. Prot. Agency*, No. 09-1325 (D.C. Cir. Jan. 27, 2010). This decision was made without consulting the governor or the Arizona Department of Environmental Quality, whose director raised serious doubts about the federal government's position. Gabriel Nelson, *Ariz. Pulls Support for EPA's Endangerment Finding*, E&E PUBLISHING (Jan. 28, 2011), <http://www.eenews.net/public/Greenwire/2011/01/28/3>. Goddard's intervention in these cases demonstrates the need for the State to speak with one consistent voice, led by its highest executive office, the governor.

With Governor Brewer's support, newly elected Attorney General Tom Horne removed the State of Arizona from all three cases on January 27, 2011, as one of his first official acts. State of Arizona's Motion to Withdraw, *Am. Chemistry Council*, No. 09-1325 (Jan. 27, 2011); State of Arizona's Motion to Withdraw (Corrected), *Chamber of Commerce of the U.S. of Am.*, No. 09-1237 (Jan. 27, 2011); State of Arizona's Motion to Withdraw, *Coal. for Responsible Regulation*, No. 09-1322 (Jan. 27, 2011).

180. In *Florida v. United States*, the district court granted Arizona and the other twenty-five states summary judgment on the claim that the federal health care law exceeded Congress's authority under the Commerce Clause. Order Granting Summary Judgment, No. 3:10-CV-00091-RV-EMT (N.D. Fla. Jan. 31, 2011). As of the publication of this Essay, the order granting summary judgment has been appealed by the defendants. Notice of Appeal, *Florida v. United States*, No. 3:10-CV-00091-RV-EMT (Mar. 8, 2011).

181. *Kromko v. Ariz. Bd. of Regents*, 165 P.3d 168, 170 (Ariz. 2007) ("A controversy is nonjusticiable—i.e., involves a political question—where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . .'" (citations omitted)).

At the very least, the courts should give substantial deference to the legislature in exercising its collective judgment as to whether the attorney general should speak for the State.<sup>182</sup> If the legislature empowers the governor to speak for the State, then such decisions should be accorded even greater deference, as the governor is the chief executive who is ultimately accountable to the citizens during the course of the State's representation.

### CONCLUSION

In cases of great importance, Arizona must be able to speak with one, consistent voice. The Arizona Constitution limits the attorney general's powers to those prescribed by the Arizona Legislature, which stands in stark contrast to the broad authority given to the governor. The governor is the chief executive of the state and should determine the position of Arizona when the State is named in a lawsuit, except where other statutes authorize the attorney general to bring an action in the State's name.

The Arizona Supreme Court has established that the attorney general has no common law powers and the constitutional power of the legislature to prescribe the attorney general's powers and duties is very broad with few exceptions. The legislature may add and remove powers of the attorney general, provided the changes are reasonable and do not effectively destroy the office, transfer the powers of one branch to another, or place constitutional powers and functions in the hands of an unelected official. The attorney general must have a client state agency or be specifically empowered by law to act in the name of the State of Arizona.<sup>183</sup> In all other situations, the attorney general must act at the direction of the governor in legal matters involving the State of Arizona as set forth in the Arizona Constitution and state law.

Arizona case law holds that the governor is the superior executive officer. Thus, should a dispute between the two officers in a lawsuit involving the State ever require judicial intervention, courts should order the attorney general to act at the direction of the governor and uphold any reasonable law requiring the attorney general to do so.

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182. See *Ariz. Minority Coal. v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676, 684 (Ariz. 2009) (en banc) ("Courts generally afford substantial deference to legislative enactments.").

183. See *State ex rel. Woods v. Block*, 942 P.2d 428, 432 (Ariz. 1997) (the Arizona Constitution does not grant the attorney general independent standing to bring a lawsuit in the name of the State of Arizona); *Ariz. State Land Dep't v. McFate*, 348 P.2d 912, 918 (1960) (stating that the attorney general may not initiate an original action in superior court contrary to his client agency); *Fund Manager v. Corbin*, 778 P.2d 1244, 1250 (Ariz. Ct. App. 1988), *affirmed by* 778 P.2d 1260 (1989) (the attorney general has standing to attack the constitutionality of an Arizona statute only "*in the process of exercising his specific statutory powers*") (emphasis added).