
APPOINTING STATE ATTORNEYS GENERAL: EVALUATING THE UNBUNDLED STATE EXECUTIVE

*"[A]t some point this series of watchdogs-watching-watchdogs-watch administrators has to terminate in the people being their own watchdog. They may just as well watch the governor directly"*¹

Imagine if in 2012 Americans had been faced with the question of whether to reelect not only President Barack Obama, but also Secretary of State Hillary Rodham Clinton, Attorney General Eric Holder, and Secretary of the Treasury Timothy Geithner. Would voters and the media have paid sufficient attention to each election? Would voters be skilled at evaluating candidate qualifications and incumbent performance? Even if the American people were well informed in casting their votes for several cabinet officials, a second set of questions arises: Would campaigning and electoral accountability result in better performance by the officials? Would the executive branch as a whole function more smoothly or would it be more fractured?

While scholars have extensively discussed the above questions in debates regarding the wisdom of a single elected federal executive,² for many years there has been virtually no discussion in legal scholarship regarding the wisdom of electing multiple state executives.³ Across the United States, voters face statewide election ballots that are substantially longer than their federal counterparts; indeed, states hold elections for an average of 6.7 state executive offices.⁴ While a broad political science argument could be made in favor of or against a completely unified state executive, this Note focuses solely on the se-

¹ BYRON R. ABERNETHY, *SOME PERSISTING QUESTIONS CONCERNING THE CONSTITUTIONAL STATE EXECUTIVE* 46 (1960).

² Compare Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008) [hereinafter Berry & Gersen, *Executive*] (arguing for the direct election of multiple federal executive officials), with Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696 (2009) [hereinafter Calabresi & Terrell, *Fatally Flawed*] (rebutting Berry & Gersen, *Executive*, *supra*). Professors Steven Calabresi and Christopher Yoo have claimed that "[t]he debate over the unitary executive is simultaneously one of our oldest, most venerable constitutional debates and one of our most modern." STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 10* (2008) [hereinafter CALABRESI & YOO, *UNITARY EXECUTIVE*].

³ The debate over whether a unified executive model is appropriate at the state level was more in vogue in the past. For example, President Woodrow Wilson was a famous proponent while he was at Princeton University. Notably he wrote that people are put in control of the government "only when we make only the chief, the really responsible offices elective," and "allow those whom we elect to appoint all minor officials, all executive agents." Woodrow Wilson, *Hide-and-Seek Politics*, 191 N. AM. REV. 585, 599 (1910).

⁴ Berry & Gersen, *Executive*, *supra* note 2, at 1434 tbl.5. This figure has increased: in 1977, the number of elected state executive officials on average was only 6.04. *Id.*

lection of state attorneys general because of the position's discretionary authority, broad enforcement power, and special expertise.⁵ In forty-three states the attorney general is directly elected.⁶ Only five states employ a gubernatorial-appointment process.⁷ Through a focused discussion on the implications of unified executive arguments for the selection of the state attorney general, this Note concludes that direct election of a state attorney general,⁸ while beneficial in certain respects, overall undermines an informed electorate, executive accountability, and executive branch coordination.

This Note proceeds in three parts. Part I summarizes common arguments made for and against a unitary executive at the national level. Part II introduces the status of the state attorney general in America today — the typical powers and duties of the state attorney general and the attorney general selection processes in the several states. Part III presents the central analysis of this Note. This Part applies different arguments for and against a unitary executive to the state attorney general. Specifically, Part III focuses on the implications of voter information, current campaign considerations, conflicts of interest, executive branch relations, and potential future campaigns for the current election system. Ultimately, this Note suggests that more states should adopt the federal model — currently used in five states — of executive nomination, legislative confirmation, and executive removal power.⁹

I. THE UNITARY EXECUTIVE DEBATE

Before discussing the arguments in favor of and against the unitary executive, the terminology of the debate should be clarified. A unitary executive system is one in which a single official presides over the entire executive branch. The United States federal government operates under a unitary executive system. A plural executive system, in its

⁵ With this approach, this Note is the first to apply contemporary unitary executive arguments to the case of the state attorney general. The last significant treatment of this issue was in 1974. See generally William N. Thompson, *Should We Elect or Appoint State Government Executives? Some New Data Concerning State Attorneys General*, 8 AM. REV. PUB. ADMIN. 17 (1974).

⁶ William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 n.3 (2006).

⁷ *Id.* All gubernatorial-appointment states require approval of the appointment by the state legislature except New Hampshire, which requires approval by the Executive Council. JEWELL CASS PHILLIPS, *STATE AND LOCAL GOVERNMENT IN AMERICA* 208 (1954). In Tennessee, the state supreme court appoints the attorney general, and in Maine, appointment is by the legislature. Marshall, *supra* note 6, at 2448 n.3.

⁸ This Note often refers to the state attorney general simply as the “attorney general.” To avoid ambiguity, the national officer will be styled consistently as the “Attorney General.”

⁹ For the purposes of simplicity, this Note does not focus on questions of removal authority, despite their importance, but simply assumes removal power as part of the proposed unitary state executive power. There is a vast scholarship on the constitutional and policy arguments regarding federal executive removal authority. *E.g.*, CALABRESI & YOO, *UNITARY EXECUTIVE*, *supra* note 2.

purest form, would feature multiple executives with concurrent authority, operating by committee. A middle path, followed by most states, is the “unbundled executive” system.¹⁰ An unbundled executive regime has multiple executive officials with nonoverlapping authority. In these states, while governors have general executive authority, there are separate, directly elected executive officials, such as attorneys general, secretaries of state, and treasurers, who have their own discrete authority and are not subordinate to the governor.¹¹ This Note focuses on the application of the debate between the unitary and the unbundled executive models to the case of the state attorney general.

A. The Design and Defense of the Unitary Executive at the Founding

The debate over the virtues and vices of a unified executive in the United States has strong roots in the Founding and the Constitutional Convention of 1787.¹² The design of a unitary executive for the federal government was vigorously contested when the Constitution was drafted, with delegates “concerned that a single executive would trend towards monarchy but that a plural executive would lack sufficient energy and authority.”¹³ Ultimately, a majority of states voted in favor of James Wilson’s proposal for a single national executive, rejecting a plural executive and an executive council.¹⁴ The ratified Constitution embodies the principles of unitary executive government, particularly in Article II’s Vesting Clause.¹⁵

Upon designing a unified executive in the Constitution, the Founders faced the daunting task of convincing the public to accept a more powerful and unified executive than was typically employed by the several states at the time.¹⁶ Alexander Hamilton, in the *Federalist Papers*, provides a thorough defense of the Founders’ unified executive structure — effectively defining the grounds of the modern debate. First, Hamilton argued that a single executive would be a vigorous

¹⁰ See generally Berry & Gersen, *Executive*, *supra* note 2.

¹¹ See *id.* at 1386 (“The unbundled executive is a plural executive regime in which discrete authority is taken from the president and given exclusively to a directly elected executive official. Imagine a directly elected war executive, education executive, or agriculture executive.”).

¹² See, e.g., CALABRESI & YOO, UNITARY EXECUTIVE, *supra* note 2, at 30–36.

¹³ Berry & Gersen, *Executive*, *supra* note 2, at 1385 n.2.

¹⁴ See CALABRESI & YOO, UNITARY EXECUTIVE, *supra* note 2, at 33–34.

¹⁵ U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”); see also CALABRESI & YOO, UNITARY EXECUTIVE, *supra* note 2, at 3, 34. Commentators similarly rely on the Take Care Clause in justifying the federal unitary executive. U.S. CONST. art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed . . .”); see also CALABRESI & YOO, UNITARY EXECUTIVE, *supra* note 2, at 3–4.

¹⁶ Calabresi & Terrell, *Fatally Flawed*, *supra* note 2, at 1696.

one, whose energy would be essential to effective governance.¹⁷ He explained that energy is “most applicable to power in a single hand.”¹⁸ Second, Hamilton warned of the “danger of difference of opinion” in a plural executive regime.¹⁹ When multiple executives “are clothed with equal dignity and authority, there is peculiar danger of personal emulation and even animosity,” which Hamilton feared “might split the community into the most violent and irreconcilable factions.”²⁰ Hamilton’s third contention was that a plural executive “tends to conceal faults and destroy responsibility”²¹ — it is difficult for the public to know exactly who is responsible for disfavored or failed policies.²² Conversely, with a unified executive, a single individual is responsible for the executive branch, so all responsibility is on his shoulders.²³ Finally, Hamilton explained that, regarding appointments, the “undivided responsibility” of a single executive will lead to a “livelier sense of duty and a more exact regard to reputation,” giving the president a built-in incentive to choose the most qualified person for the job.²⁴

B. The Modern Unitary Executive Debate

The modern debate regarding the unitary executive draws on many of the arguments put forth in the *Federalist Papers*. Professors Christopher Berry and Jacob Gersen have recently argued against the unitary executive, proposing instead a federal unbundled executive.²⁵ They contend that “[u]nbundling executive authority enhances democratic accountability and government performance.”²⁶ The four principal lines of argument in the unitary executive debate focus on voter information and preferences, accountability, energy, and coordination.

There is significant disagreement regarding the democratic implications of a unitary executive system. Berry and Gersen argue that an

¹⁷ THE FEDERALIST NO. 70, at 421–22 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“[Energy] is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws . . . [or] to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.”).

¹⁸ *Id.* at 422 (“Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.” *Id.* at 423.).

¹⁹ *Id.* at 424.

²⁰ *Id.*

²¹ *Id.* at 426.

²² *See id.*

²³ *See id.*

²⁴ THE FEDERALIST NO. 76 (Alexander Hamilton), *supra* note 17, at 454.

²⁵ *See generally* Berry & Gersen, *Executive*, *supra* note 2. This Note relies on the arguments of Berry and Gersen and responses of Professor Steven Calabresi and Terrell in framing the debate — not only because they have provided the most thorough discussion of the issues recently, but also because the theory of an unbundled executive differs from other traditional unitary executive arguments.

²⁶ *Id.* at 1387.

unbundled executive allows greater democratic input because voters will be evaluating executives on single issue areas, rather than on a menu of policies and proposals: “[B]ecause elections require voters to make a single elect-reject decision, the crudeness of the electoral sanction is a weak way for voters to control the single executive on any particular policy dimension.”²⁷ However, an unbundled executive means “citizens need not aggregate judgments across multiple policy issues at election time.”²⁸ Moreover, in an unbundled executive system voters may select officials with specific expertise for the task at hand. Voters are able “to better match expertise, ability, and other characteristics that make for government performance to the underlying jurisdiction of government offices.”²⁹ Accordingly, an unbundled executive may lead to a greater reflection of public preferences in government.

Supporters of the unitary executive argue, conversely, that a single general executive better reflects the popular will. Professor Steven Calabresi and Nicholas Terrell claim that under Berry and Gersen’s unbundled executive model, “voters would face more choices and so they would, of necessity, be less informed on each and all of them.”³⁰ There are two reasons an unbundled executive is less reflective of public preferences: it “rais[es] the costs of gathering information” and “lower[s] the value of the information gathered.”³¹ Calabresi and Terrell argue that an unbundled executive has higher information-gathering costs because “overlap among the powers of the coexecutives grows” over time and voters are left to sort out where responsibility lies for any given policy.³² The value of any given vote is also diminished because the stakes are lower in elections for officials with narrower portfolios.³³ Under an unbundled system, it is likely voters will be particularly disconnected from elections for less prestigious or powerful positions.³⁴ Finally, because of the increased costs of participation, voters are more likely to use proxies, such as party affiliation, “to give them a very rough sense of where the candidates stand on the issues.”³⁵

A second, and related, question is that of accountability. Proponents of the unbundled executive argue that unbundled executives will

²⁷ *Id.* at 1393.

²⁸ *Id.* at 1394.

²⁹ *Id.*

³⁰ Calabresi & Terrell, *Fatally Flawed*, *supra* note 2, at 1705.

³¹ *Id.*

³² *Id.* at 1706. Interestingly, Calabresi and Terrell concede that information-gathering costs would not necessarily be higher under a “perfectly” unbundled executive system. However, they reject the likelihood of such a system developing. *See id.* at 1706–07.

³³ *Id.* at 1708.

³⁴ *See id.* at 1709 (citing the attorney general as a less powerful and prestigious position than the governor).

³⁵ *Id.* at 1706.

be more accountable, because they will have responsibility for specific policy areas. In contrast to general executives who can obscure lines of responsibility, a specialized unbundled executive will be the master of his domain. Accordingly, the unbundled system “facilitates rather than undermines the democratic process.”³⁶ Proponents contend that the vote for a general executive is “remarkably crude,”³⁷ because a single executive “can enact special interest–friendly policies in some dimensions, as long as she enacts voter-friendly policies on a sufficient number of dimensions to secure reelection.”³⁸ Conversely, a specialized executive “will not be able to placate voters with voter-friendly policies on other issues.”³⁹ Ultimately, in an unbundled regime more decisions are electorally accountable than under a unitary regime.

The common response to the accountability argument by proponents of the unitary executive echoes Hamilton’s warning that a plural executive would obscure responsibility: “Each coexecutive would have powerful incentives to blur accountability so that he could claim credit for policy successes and avoid blame for policy failures.”⁴⁰ Accountability in an unbundled regime requires that the executive retain exclusive control over his policy dimension and that voters be informed of the executive’s performance. Calabresi and Terrell argue that neither of these conditions would be met in reality. Because “voter[s] will be less informed in an unbundled system with respect to each election,” it is less likely that officials will be held accountable for failures.⁴¹ Additionally, they argue that “coexecutives would have every incentive to blur the boundaries of their power to escape accountability, and they would succeed in doing so.”⁴² Thus, while Berry and Gersen may be correct that, in theory, executives could be held accountable for more decisions, in practice, lower voter information and blurred lines of responsibility may ultimately lead to less accountability.

A third argument concerns what Alexander Hamilton referred to as “[e]nergy in the executive.”⁴³ Berry and Gersen reject the common argument that only unitary executives are energetic: “[T]here is slippage between the claim that one individual with control over one policy will be optimally energetic and the conclusion that one individual with control over all relevant policies will be optimally energetic.”⁴⁴ They contend that there is no reason to believe a single executive will be

³⁶ Berry & Gersen, *Executive*, *supra* note 2, at 1405.

³⁷ *Id.*

³⁸ *Id.* at 1393–94.

³⁹ *Id.* at 1394.

⁴⁰ Calabresi & Terrell, *Fatally Flawed*, *supra* note 2, at 1712.

⁴¹ *Id.*

⁴² *Id.* at 1713 (noting that multiple executives can “veil responsibility”).

⁴³ THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 17, at 421.

⁴⁴ Berry & Gersen, *Executive*, *supra* note 2, at 1407.

more energetic than an unbundled executive, with each executive holding exclusive responsibility for his policy dimension. Berry and Gersen use the claim that state governments have been effective to support their contention that either regime would be energetic.⁴⁵

Calabresi and Terrell see energy as a unique benefit of the unitary executive and contend that an unbundled executive would in fact “fatally sap” energy from the government.⁴⁶ They cite two problems with an unbundled executive regime that prevent the exercise of good judgment in using executive power. First, a narrow focus on a specific policy area may blind executives to the impacts that decisions within that policy area have beyond their specific area of expertise: “Coexecutives might act optimally with respect to one policy dimension but in a way that would still be detrimental overall because of its impact on the efficacy of other policies controlled by other coexecutives.”⁴⁷ An unbundled system thus “saps the strength of the executive branch by eliminating its ability to act as one cohesive unit” — a simple task when there is a single executive overseeing the entire branch.⁴⁸ The second problem is that rather than being motivated to act quickly, as a single executive would be, an unbundled executive has incentives not to be aggressive in policymaking, since an unbundled executive “who fail[s] to act will be able to blame [his] coexecutive colleagues for any resulting harm.”⁴⁹ Conversely, unitary executives are “blamed both for acting or failing to act because they are more accountable.”⁵⁰ Finally, Calabresi and Terrell dispute the claim of state government efficiency, explaining that “the experience [of unbundled government] in the states has been far from universally positive.”⁵¹

The final common argument regarding the unitary executive pertains to whether an unbundled executive can effectively coordinate executive actions across departments. Coordination is critical to effective

⁴⁵ See *id.* (“[A]ny general criticism of plural or unbundled executives must somewhat reconcile dire predictions about government failure that would derive from a plural executive and the reality of successful state governments in the United States.” *Id.* at 1402.).

⁴⁶ Calabresi & Terrell, *Fatally Flawed*, *supra* note 2, at 1721.

⁴⁷ *Id.* at 1722.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1724.

⁵⁰ *Id.*

⁵¹ *Id.* at 1738. In fact, some believe that state government on the whole has been “uncoordinated, unconsolidated, and uncontrolled.” THE EXECUTIVE BRANCH OF STATE GOVERNMENT: PEOPLE, PROCESS, AND POLITICS 122 (Margaret R. Ferguson ed., 2006) (quoting Cynthia J. Bowling, *State Government Administration, Impacts of Reform Movements*, in THE ENCYCLOPEDIA OF PUBLIC ADMINISTRATION AND PUBLIC POLICY 1127, 1127 (Jack Rabin ed., 2003)) (internal quotation marks omitted). Regardless, even if there is not “debilitating conflict,” Berry & Gersen, *Executive*, *supra* note 2, at 1386 n.8 (quoting Marshall, *supra* note 6, at 2454), in practice, “[i]t is possible that state . . . governments would be even better without unbundled authority,” *id.* at 1402.

government because it reduces waste and ensures uniformity in the execution of the laws.⁵² Calabresi and Terrell argue that an unbundled executive leads to “higher coordination costs.”⁵³ Coordination costs are low for a unitary executive, because a single official “rarely has difficulty sharing information with himself.”⁵⁴ However, “the cost of providing and receiving such information rises exponentially” as the number of executive officials grows.⁵⁵ In an unbundled regime, multiple officials will need to share information with each other — increasing information costs — and will have to bargain among themselves to ensure they establish executive branch policies that may be employed uniformly.⁵⁶

II. STATE ATTORNEYS GENERAL TODAY

A. Powers and Responsibilities

Every state has an attorney general, whose responsibility it is to represent the state, state agencies, and the public in a variety of circumstances. The exact duties and responsibilities of the attorney general differ across states, but there are some traditional powers that attorneys general hold. States typically charge their attorney general with three major duties. First, the attorney general provides legal counsel to state government officials.⁵⁷ The most traditional recipients include the governor and other executive officials, but in some states also include the state legislature and judiciary.⁵⁸ In this respect, while the attorney general is generally seen as an executive branch official, his responsibilities are “quasi-legislative and quasi-judicial.”⁵⁹ Second, the attorney general must represent the state, its agencies, and its officers in litigation brought either by citizens or by other states.⁶⁰ Finally, the attorney general is ultimately in charge of enforcing state civil and criminal law.⁶¹ In practice, much of the criminal law enforcement work is done by popularly elected local district attorneys.⁶² Nevertheless, the attorney general has a formal supervisory role, and, while it is

⁵² See, e.g., Calabresi & Terrell, *Fatally Flawed*, *supra* note 2, at 1717.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See *id.* at 1717–18. Berry and Gersen concede that coordination is stronger in a unitary executive system. See Berry & Gersen, *Executive*, *supra* note 2, at 1410.

⁵⁷ Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL’Y 1, 3 (1993).

⁵⁸ See *id.* at 8.

⁵⁹ *Id.* Additionally, in several states, the attorneys general draft bills for the state legislatures. See PHILLIPS, *supra* note 7, at 208.

⁶⁰ See Matheson, *supra* note 57, at 3; see also PHILLIPS, *supra* note 7, at 208.

⁶¹ Matheson, *supra* note 57, at 3.

⁶² See PHILLIPS, *supra* note 7, at 208.

rare, he can take control of individual cases and prosecute them through the attorney general's office.⁶³ The attorney general has significant authority to investigate government misconduct, as well as nongovernment misconduct.⁶⁴ Over time, as part of his litigation and legislative responsibilities, the attorney general's policy portfolio has expanded to include, among other issues, advocacy and litigation regarding antitrust enforcement, child support enforcement, consumer protection, environmental protection, and utility rate intervention.⁶⁵ In addition to the responsibility of representing the state, attorneys general also are tasked with representing the public interest.⁶⁶ Due to this representation authority, many states recognize the attorney general's common law authority to bring suits not authorized explicitly by state constitutional or statutory provisions.⁶⁷

Unsurprisingly, the independence of the state attorney general and his dual responsibilities of representing both state officials and the public raise complex issues about who is the attorney general's client. Many circumstances are clear, but the difficulty of "simultaneously represent[ing] both the state agency and the public interest"⁶⁸ arises when the attorney general's client — typically a state executive agency or the governor — holds views that are contrary to the beliefs of the attorney general. While some contend that the attorney general should act strictly as a faithful representative of the state agency or actor he represents, courts have generally not favored this interpretation.⁶⁹ Rather than adhering steadfastly to an attorney-client model, attorneys general typically consider the wishes of the state actor alongside the public interest.⁷⁰ When the agenda of the state actor and the attorney general's interpretation of the public interest conflict, the attorney gen-

⁶³ *Id.*; see, e.g., MASS. GEN. LAWS ANN. ch. 12, § 27 (West 2011) ("[T]he attorney general, when present, shall have the control of [cases in which the Commonwealth is a party]."); *Commonwealth v. Kozlowsky*, 131 N.E. 207, 212 (Mass. 1921) (recognizing the "supremacy of the Attorney General").

⁶⁴ See, e.g., *Marshall*, *supra* note 6, at 2452.

⁶⁵ See, e.g., *Matheson*, *supra* note 57, at 3.

⁶⁶ *Id.* at 4.

⁶⁷ See, e.g., *id.*; *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 270 (5th Cir. 1976) ("[T]he existence of the Attorney General's common law powers . . . is echoed in case after case."); *Mem'l Hosp. Ass'n v. Knutson*, 722 P.2d 1093, 1097 (Kan. 1986); *Sec'y of Admin. & Fin. v. Att'y Gen.*, 326 N.E.2d 334, 338 (Mass. 1975); *State ex rel. Allain v. Miss. Pub. Serv. Comm'n*, 418 So. 2d 779, 782 (Miss. 1982). In many states, the constitutional or statutory provisions concerning the attorney general "simply restate common law principles." *Matheson*, *supra* note 57, at 4.

⁶⁸ Lacy H. Thornburg, *Changes in the State's Law Firm: The Powers, Duties and Operations of the Office of the Attorney General*, 12 CAMPBELL L. REV. 343, 359 (1990).

⁶⁹ See, e.g., *Superintendent of Ins. v. Att'y Gen.*, 558 A.2d 1197, 1200 (Me. 1989); *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1266–67 (Mass. 1977); *Allain*, 418 So. 2d at 783.

⁷⁰ See, e.g., *Sec'y of Admin. & Fin.*, 326 N.E.2d at 338 ("[T]he Attorney General must consider the ramifications . . . on the interests of the Commonwealth and the public generally, as well as on the official himself and his agency.").

eral may refuse to represent the party or may represent the party nominally but deviate from that party's position on the legal issue.⁷¹

B. Selection Methods and Politics

Today, forty-three states elect their attorneys general.⁷² The remaining seven states appoint their attorneys general: appointment is by the governor in five (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming), the state legislature in one (Maine), and the state supreme court in the last (Tennessee).⁷³ Critically, even in states using appointment processes, the attorney general is typically independent from the governor; only Alaska and Wyoming permit to governor the remove the attorney general at will.⁷⁴ Given the common argument that attorney general elections are essential to allow the attorney general to serve as a check on the abuses of power by other executive actors,⁷⁵ it is unsurprising that, in forty-eight states, the attorney general does not serve at the governor's will.⁷⁶

The popular election of the vast majority of state attorneys general is a peculiarly American practice.⁷⁷ The transition to the popular election of state attorneys general began in earnest as part of a broader populist movement led by Jacksonian Democrats.⁷⁸ This transition largely occurred at the same time as the shift to the direct election of district attorneys, judges, and other state executive officers such as the state treasurer and secretary of state.⁷⁹ While some states have made the transition to an elected attorney general more recently, the selection processes have generally remained stable since the nineteenth century, and no state has moved back to an appointment system.⁸⁰

Understanding the elected attorney general in a broader political context is also important. From 1989 through 2012, elected attorneys general had an incumbency rate of approximately eighty-three per-

⁷¹ See, e.g., *Feeney*, 366 N.E.2d at 1267 (holding that the Attorney General may present a view not in accordance with the views of the state actor represented); *Sec'y of Admin. & Fin.*, 326 N.E.2d at 338–39 (holding that the Attorney General may refuse to represent the views of the Secretary of Administration and Finance on appeal).

⁷² Marshall, *supra* note 6, at 2448 n.3.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See Matheson, *supra* note 57, at 10 (“Elected attorneys general contend that an important aspect of their jobs is to serve as a watchdog over the executive branch . . .”).

⁷⁶ Marshall, *supra* note 6, at 2448.

⁷⁷ See Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 (2012).

⁷⁸ See, e.g., Matheson, *supra* note 57, at 6; Ellis, *supra* note 77, at 1531.

⁷⁹ See, e.g., Matheson, *supra* note 57, at 6; Ellis, *supra* note 77, at 1531.

⁸⁰ Matheson, *supra* note 57, at 28 & n.148. Indiana and Pennsylvania switched to elective systems in the 1940s and 1980s respectively. *Id.* at 28 n.148.

cent.⁸¹ Attorneys general are term limited in sixteen states, though half of these limits are on consecutive terms, without a cap on the absolute number of terms an individual can serve.⁸² Many attorneys general go on to seek higher office, frequently that of governor. In fact, between 2009 and 2012, in states with elected attorneys general, sixteen of the forty-three gubernatorial contests featured an attorney general campaigning for the corner office.⁸³ Taking into account that attorneys general also go on to contest congressional, senatorial, and other campaigns, it is clear that elected attorneys general are active political forces in their states. Regardless of their success in future campaigns, attorney general elections tend not to be high profile, at least not compared to gubernatorial or senatorial elections. Polls in recent attorney general elections frequently showed over thirty percent of constituents undecided between the two candidates.⁸⁴

III. EVALUATING STATE ATTORNEY GENERAL SELECTION

In evaluating whether the attorney general should be subordinate to the governor or be an elected coexecutive official, the standard arguments for and against the unitary executive should be analyzed. While there has been little recent scholarship discussing reform of the state executive branch, prior scholarship in this area has found the un-bundled state executive troubling.⁸⁵ In beginning this conversation again, this Part analyzes three important areas of the unitary executive debate: voter information, accountability, and coordination.⁸⁶

⁸¹ This figure was calculated based on publicly available election results, through the electronic database “Our Campaigns.” OUR CAMPAIGNS, <http://www.ourcampaigns.com/home.html> (last visited Nov. 24, 2013). When an incumbent did not seek reelection, incumbency was calculated by looking at whether the incumbent’s party retained control.

⁸² This information was collected state-by-state from various webpages through Ballotpedia, and confirmed through review of state constitutions and statutes. BALLOTPEDIA, <http://ballotpedia.org> (last visited Nov. 24, 2013).

⁸³ This statistic was calculated based on election results, available through “Our Campaigns.” OUR CAMPAIGNS, <http://www.ourcampaigns.com/StateOfficeList.html> (last visited Nov. 24, 2013). In this four-year period, attorney general candidates for governor had an impressive 56.25% success rate. *See id.*

⁸⁴ *See Polls, 2010 State Attorney General Elections*, BALLOTPEDIA, http://ballotpedia.org/wiki/index.php/Polls_2010_State_Attorney_General_elections (last modified May 20, 2011).

⁸⁵ *See, e.g., ABERNETHY, supra* note 1, at 34 (“[P]olitical scientists and students of state administration generally continue to urge that for purposes of administrative efficiency and public responsibility . . . the attorney general should be appointed by, removable by, and responsible to the governor.”); JAMES R. BELL & EARL L. DARRAH, *STATE EXECUTIVE REORGANIZATION* 20 (1961); COMM. FOR ECON. DEV., *MODERNIZING STATE GOVERNMENT* 20 (1967); PHILLIPS, *supra* note 7, at 208.

⁸⁶ Section I.B includes a discussion of “energy” of the executive branch. Because the primary lines of any argument regarding the “energy” are effectively included in the accountability and coordination discussions, I do not discuss energy separately here.

A. Voter Information

The first question is whether voters can make an informed decision between candidates for the office of attorney general. The traditional unitary executive arguments apply with full force here. On the one hand, attorney general elections may ensure that the people select a representative individual to preside over the state's legal apparatus. On the other hand, elections may reflect inadequate voter information and may decrease democratic involvement across the board by spreading voters too thin with so many elections. On balance, the deficit of voter information and the voters' inability to evaluate performance suggest that directly electing state attorneys general is not beneficial.

There are several reasons to be concerned that the elections for state attorneys general are not effective at capturing the public will. To begin with, there is substantial evidence that, on the whole, voters are not very familiar with their attorneys general and do not pay close attention to attorney general elections. As mentioned in Section II.B, competitive attorney general elections often see polling with over thirty percent of voters undecided between the two candidates.⁸⁷ Moreover, attorneys general are simply less well known than governors.⁸⁸ A 1990 poll asked Virginians to name their attorney general of almost six years — only thirty-seven percent could.⁸⁹ In contrast, over three-quarters of Virginians in the same poll correctly identified the governor.⁹⁰ This evidence is damaging, because if voters do not follow the elections and are not familiar with the candidates, there is little chance they are effectively exercising democratic control over the officials.

One might contend that the criticism that voters are uninformed may prove too much. Indeed, if voter ignorance were enough to reject elections, then few if any elected positions would remain in the United States.⁹¹ “Overall, close to a third of Americans can be categorized as ‘know-nothings’ who are almost completely ignorant of relevant politi-

⁸⁷ See *supra* note 84 and accompanying text. A month ahead of the 2013 Virginia gubernatorial and attorney general elections, 16% of voters were undecided on the gubernatorial election, while 26% were undecided on the attorney general's race. *RC Poll: McAuliffe Holds Slim Lead over Cuccinelli; Down-Ticket Races Also Tight*, ROANOKE COLLEGE (Oct. 8, 2013), http://roanoke.edu/News_and_Events/News_Archive/RC_Poll_Oct_8_2013.htm.

⁸⁸ In another poll ahead of the 2013 Virginia elections, 22% and 30% voters were “not sure” if they had a favorable or unfavorable opinion of the two candidates for governor, while 67% and 72% were unsure of their opinion on the candidates for attorney general. Press Release, Public Policy Polling, *Tight Races Brewing in Virginia, Though Dems Have the Edge* (July 16, 2013), available at http://www.publicpolicypolling.com/pdf/2011/PPP_Release_VA_716.pdf.

⁸⁹ Matheson, *supra* note 57, at 18.

⁹⁰ *Id.*

⁹¹ See generally Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 CRITICAL REV. 413 (1998) (“[T]he sheer depth of most individual voters' ignorance is shocking to those who are unfamiliar with these research results.” *Id.* at 416.).

cal information.”⁹² However, there may be a few reasons to be less concerned about voter ignorance going into elections. The first is that voters tend to rely on proxies — such as political parties and opinion leaders — which help make their votes less random.⁹³ Additionally, some argue, while many voters are uninformed, these voters likely offset each other. Under this view, elections will tend to be decided by the ballots of informed voters.⁹⁴

However, even if one accepts that elections are decided by informed voters, the traditional argument against the unbundled executive still applies. These so-called informed voters will also be spread thin by a longer ballot, which harms not only the election for the attorney general, but also the election for the governor.⁹⁵ “In effect the voters are disenfranchised because they are required to vote too much.”⁹⁶ The result of these long ballots is that voters face “an impossible task . . . beyond the capacity of the most intelligent who do not make a business of politics.”⁹⁷ The alternative, then, is a unitary executive system, in which the democratic will is channeled through the governor’s popular election.⁹⁸

A second criticism is that even if the voters *were* informed regarding the candidates, they would be poorly prepared to evaluate the candidates’ performance. Elections are “far too hazardous and fortuitous a method for obtaining expertise.”⁹⁹ The work of the attorney general requires not only general administrative skills, but also legal exper-

⁹² *Id.* at 417 (citation omitted). Alarming, evidence suggests that even the order of candidates’ names on a ballot “can be determinative in close contests.” Jonathan G.S. Koppell & Jennifer A. Steen, *The Effects of Ballot Position on Election Outcomes*, 66 J. POL. 267, 279 (2004).

⁹³ See Somin, *supra* note 91, at 421–26; F.A. BLAND, PLANNING THE MODERN STATE 86 (1934); NAT’L MUN. LEAGUE, MODEL STATE CONSTITUTION 28 (1933) (“[V]oters usually do not discriminate between candidates for the less important offices and vote on the basis of a party ticket.”); Brian F. Schaffner & Matthew J. Streb, *The Partisan Heuristic in Low-Information Elections*, 66 PUB. OPINION Q. 559, 559 (2002) (finding that when polls do not provide party affiliation, significantly fewer voters express a preference for a candidate).

⁹⁴ See Somin, *supra* note 91, at 429–31; see also Jay K. Dow, *Political Knowledge and Electoral Choice in the 1992–2004 United States Presidential Elections: Are More and Less Informed Citizens Distinguishable?*, 21 J. ELECTIONS, PUB. OPINION & PARTIES 381 (2011) (arguing that increased voter information would generally not alter election results). *But see* Somin, *supra* note 91, at 430–31 (arguing that uninformed votes are “nonrandomly distributed” because uninformed voters “use several . . . other information shortcuts” such as “inferences about economic conditions,” and because “uncertainty about a candidate’s policy stance creates a systematic bias in favor of incumbents whose positions are generally better known,” *id.* at 430).

⁹⁵ See NAT’L MUN. LEAGUE, *supra* note 93, at 28.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See, e.g., *id.* (“A responsible system of appointment should make more effective public opinion as registered in the election of the governor.”).

⁹⁹ BLAND, *supra* note 93, at 86 (emphasis omitted) (“[I]t may be a very useful method for electing representatives of the people, but it cannot be used with precision for selecting expert administrators.”).

tise.¹⁰⁰ Many voters tend to be unfamiliar with the legal work and skills required of an attorney general, who should be both an administrator and an expert, and they are thus unable to make intelligent evaluations of the candidates.¹⁰¹ The complexity of the position increases information costs for voters who try to educate themselves on the policies at stake in the election.

Defenders of the unbundled executive would likely contend that actual expertise is not required — attorneys general may simply hire great lawyers to staff their offices. Under this view, the election of an attorney general is not an election for the state's best lawyer, but rather for the representative in court of the state and the public. This argument is unconvincing. As a practical matter, some significant expertise is required to run a legal department and to hire skilled attorneys to staff the office. Of course, the attorney general need not be the state's top lawyer, but the selection of the attorney general involves considerations of both policy preferences and expertise.

The troubling impact of voters' lack of information and specialized knowledge is that less qualified candidates may ultimately enter the position. One possible explanation for this problem is that voters simply fail to choose the most qualified candidate. An alternate explanation is that the quality of candidates seeking the post is lower, because the additional public scrutiny associated with a campaign eliminates certain unwilling individuals. It is not surprising that the data suggests that appointed attorneys general appear better credentialed than their elected counterparts. A study collecting data on attorneys general from 1930 to 1970 revealed that appointed attorneys general were better educated than elected attorneys general.¹⁰² It is similarly unsurprising that appointees were "more closely tied to the profession of law."¹⁰³ For example, appointed attorneys general were more likely to go on to become judges, while elected attorneys general were more likely to seek higher political office.¹⁰⁴

B. Accountability

The next question to address is what impact election of state attorneys general has on the executive branch's accountability to the public. As discussed in section I.B, proponents of an unbundled executive ar-

¹⁰⁰ See NAT'L MUN. LEAGUE, *supra* note 93, at 28.

¹⁰¹ This problem is frequently cited as a reason against judicial elections, as judges should be legal experts, and it is "completely unrealistic to think that the average voter will ever know enough about judicial performance to be able to evaluate judicial candidates." Richard A. Posner, Lecture, *Judicial Autonomy in a Political Environment*, 38 ARIZ. ST. L.J. 1, 5 (2006).

¹⁰² Thompson, *supra* note 5, at 26 tbl.1.

¹⁰³ *Id.* at 31.

¹⁰⁴ *Id.* at 30 tbl.3.

gue that electing attorneys general increases executive branch accountability because the public is able to evaluate each attorney general's performance on a single policy dimension and the governor's on one fewer policy dimension. Conversely, unitary executive supporters argue that splitting executive authority between the governor and attorney general, in the words of Alexander Hamilton, "tends to conceal faults and destroy responsibility."¹⁰⁵ Ultimately, appointing state attorneys general would be a valuable reform because it would clarify and simplify lines of responsibility for voters.

There are reasons to believe that electing the attorney general specifically could lessen executive branch accountability. An independent attorney general seems particularly likely to blur lines of responsibility among executive branch officials for multiple reasons. First, the attorney general is empowered to enforce state civil and criminal law. If the attorney general has divergent enforcement priorities or approaches, he could frustrate policy goals of the governor. For example, imagine that a governor is elected promising to offer tax incentives to businesses coming into the state to stimulate a lagging economy and create jobs. The state's attorney general, who is popular for his tough enforcement of consumer protection laws, may also have a record of bringing vigorous antitrust and environmental protection lawsuits. Businesses, while attracted by the prospect of the state's lower taxes may ultimately decide not to move into the state for fear that they would face litigation from the attorney general. Who is ultimately responsible for the failure to attract new businesses into the state? The governor can claim the attorney general's enforcement actions were the reason that the businesses did not enter the market, but the attorney general could argue that the tax incentives were not sufficiently generous. The governor blames the attorney general and the attorney general blames the governor. When the attorney general does not have the same enforcement priorities as the governor — particularly when the dispute involves an issue, such as economic development, typically thought to be the realm of the governor — it will not be clear who should be held accountable.

The example illustrates another issue. Proponents of unbundling claim that an unbundled executive is more accountable because each official focuses on a single policy area. In reality, these divisions are not so neatly discrete. The attorney general's authority in particular is broad enough that the benefits of unbundling are muted, if not eliminated. The attorney general's portfolio can include, among other things, enforcement of criminal, antitrust, corruption, environmental protection, and consumer protection laws. Berry and Gersen argue

¹⁰⁵ THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 17, at 426.

that an unbundled executive will not be able to “enact special interest-friendly policies in some dimensions, as long as she enacts voter-friendly policies on a sufficient number of dimensions to ensure reelection.”¹⁰⁶ But consider the example above. Voters will be forced to “aggregate judgments across multiple policy issues at election time.”¹⁰⁷ The attorney general may be popular for his consumer protection enforcement, which gets significant press attention, but she may deviate from public wishes on economic development or environmental matters. Because of the vast portfolio attorneys general have, the voters’ analysis is not straightforward.

Accountability may also be difficult with an unbundled attorney general because it is often not clear who the attorney general’s client is in a given case. The attorney general may represent various executive officials — including the governor — without faithfully representing the views of those officials, if he does not believe those views are in the public interest.¹⁰⁸ If the attorney general diverges from the views of the governor, for example, and the outcome, win or lose, is politically unpopular, there would be some ambiguity regarding accountability. While the governor would likely blame the attorney general for the unpopular outcome, the public would more likely blame the governor because he is a better-known figure, and the public generally believes the attorney general is subordinate to him.¹⁰⁹ But “[t]he Governor cannot reasonably be, though he commonly is, held responsible and accountable for functions of government over which he has little or no control.”¹¹⁰

The solution is to allow for gubernatorial appointment of and control over the attorney general, so that “[t]he responsibility for administration is thus more definitely vested in the governor.”¹¹¹ The governor therefore will be more accountable for the executive branch as a whole and for the enforcement of the law through the court system, traditionally the function of the attorney general. Under a unitary executive system at the state level, “the governor as its responsible head will under such a plan be so conspicuous that inefficiency or corruption can not hide itself.”¹¹² This argument is not necessarily to suggest, as others have, that it would be wise “to vest complete power to ap-

¹⁰⁶ Berry & Gersen, *Executive*, *supra* note 2, at 1393–94.

¹⁰⁷ *Id.* at 1394.

¹⁰⁸ See cases cited *supra* note 71 and accompanying text.

¹⁰⁹ BELL & DARRAH, *supra* note 85, at 20 (“While it is usual to think of these other officers . . . as subordinates to the Governor, in reality they hold coordinate powers specified, quite often, in the constitution.”).

¹¹⁰ *Id.*

¹¹¹ WALTER F. DODD, *STATE GOVERNMENT* 253 (2d ed. 1928).

¹¹² *Id.*

point the heads of departments in the governor.”¹¹³ Because of the attorney general’s authority to enforce the laws across all policy dimensions, electing the attorney general particularly hinders accountability.

There is some evidence, however, that elections prompt attorneys general to be more accountable. Elected attorneys general are more likely to shade their positions closer to the public view. While an “appointee is more likely to perceive his role . . . as a servant of state agencies,” elected attorneys general are “more likely to perceive their role as the people’s attorney.”¹¹⁴ It is certainly reasonable that elected attorneys general act in this manner to ensure reelection. It is also likely that they see accountability not only through reelection campaigns, but also through an eventual campaign for the corner office. “[T]he Office of the Attorney General has long been seen by many of its occupants as a stepping stone to the Governor’s office”¹¹⁵ Accordingly, an elected attorney general will likely be constrained by his ambition for higher office. In addition, state governments benefit from independent elections that establish a class of experienced executive officials who can be effectively evaluated and groomed for higher office.

Despite the benefits of democratic accountability, the office of the attorney general may be better suited to insularity. By selecting the state attorney general through a popular election, the state exposes him to political influences in his decisionmaking. Even state attorneys general acknowledge that such influences pose a serious risk. One attorney general expressed his support for appointive processes by saying: “[T]he Attorney General is or should be primarily interested in the administration of justice and not in political accomplishment. . . . [T]he decision in opinion writing and in handling of cases for the State should be entirely free from political pressures.”¹¹⁶ Another attorney general defended appointment systems by arguing that “appointed Attorneys General who serve for a term of years are freer generally in the expression of opinions on controversial issues and perhaps freer to express their true inner opinions as distinct from the growing fear that if this [is] done it may cost votes.”¹¹⁷ Because statewide elective positions tend with some consistency to be occupied by career politicians seeking higher office, popular elections “weaken[] the professionalism of the office, and cause[] the attorney general always to be cognizant of the political significance of his opinions and law enforcement activi-

¹¹³ *Id.*

¹¹⁴ Thompson, *supra* note 5, at 41.

¹¹⁵ Marshall, *supra* note 6, at 2453.

¹¹⁶ ABERNETHY, *supra* note 1, at 35.

¹¹⁷ *Id.*

ties.”¹¹⁸ Elected attorneys general face pressures to appear tough on crime, both through high conviction rates and harsh sentences.¹¹⁹ Moreover, in criminal prosecutions, they tend to look for high-profile cases in order to be portrayed favorably in the press.¹²⁰

Proponents of elections contend that there is a flip side to this argument: appointed attorneys general may feel increased loyalty to the governor and his party, and thus may face political pressure in this respect.¹²¹ Nevertheless, even if the appointed attorney general does face this type of political pressure, he remains “at least one step removed from interest group politics,” unlike the elected attorney general.¹²² Further insulating appointed attorneys general from political pressure is that they are less likely to have elective political ambitions. One study, collecting data from 1930 to 1970, found that appointed attorneys general were less likely to have held major party office before they were appointed to the post¹²³ and less likely to seek higher office thereafter.¹²⁴ In fact, 36.8% of elected attorneys general went on to seek higher political office, while less than 20% of appointed attorneys general did so.¹²⁵ Not only does an appointment system avoid political pressure, but appointed attorneys general tend to see themselves more as lawyers than as politicians, as opposed to elected attorneys general, who regard their position as primarily political.¹²⁶ Accordingly, “direct popular election would appear to offer little advantage over gubernatorial appointment as a device for avoiding political influence in the work of the office.”¹²⁷

There is another tangential harm of electoral accountability worth mentioning. When faced with elections, officials may be unduly influenced by campaign contributions.¹²⁸ The need for the attorney general to campaign actively and solicit campaign contributions may present

¹¹⁸ *Id.* at 43; *see also id.* at 47 (“If citizens are fearful of political forces exerting undesirable influence on the state’s chief legal officer, it would seem that they would have more reason to be concerned with the popularly elected, politically ambitious attorney general who has his eye on the governor’s chair.”).

¹¹⁹ *See Ellis, supra* note 77, at 1532.

¹²⁰ *See id.* (“The ‘responsibility to the people’ contemplated by the system of frequent elections does not so much require that the work of the prosecutor be carried out efficiently as that it be carried out conspicuously.” *Id.* at 1532 n.14 (quoting NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON PROSECUTION 15 (1931)).

¹²¹ *See, e.g., Matheson, supra* note 57, at 23.

¹²² *Id.*

¹²³ Thompson, *supra* note 5, at 27 tbl.2.

¹²⁴ *Id.* at 30 tbl.3.

¹²⁵ *Id.*

¹²⁶ *See id.* at 31.

¹²⁷ ABERNETHY, *supra* note 1, at 47.

¹²⁸ *See, e.g., Dan Frosch, Under Investigation, Utah Attorney General Resigns*, N.Y. TIMES, Nov. 22, 2013, at A20.

conflicts of interest after the election.¹²⁹ For example, an attorney general could solicit and receive campaign contributions from a variety of industries and businesses, many of which may end up facing litigation from the state during the attorney general's term. A similar problem is presented if a supporter or contributor is the subject of a criminal investigation. While there have not been extensive studies on the conflicts of interest of attorneys general, it is clear that elections "have the potential to corrupt prosecutors with campaign contributions."¹³⁰ Elections may also serve as a check on corruption, but the risks seem particularly acute for attorneys general. Unlike most politicians, upon being elected to office, the attorney general "may owe his election to . . . men whom it is his duty to bring to justice."¹³¹

C. Coordination

The final question is whether an executive branch as a whole would coordinate its activities more effectively if the governor could appoint the attorney general. Berry and Gersen essentially concede that coordination concerns favor the unitary executive, though they claim other considerations outweigh this factor.¹³² The theory of the unitary executive is that the "[g]overnors should become chief executives in fact as well as name."¹³³ A separately elected attorney general not only obscures responsibility, but also prevents the governor from coordinating activities across the executive branch. Accordingly, appointing state attorneys general would lead to increased executive branch coordination.

The elected state attorney general is a significant hindrance to executive branch coordination. More than that of other elected state constitutional officers, the election of the attorney general is particularly disruptive because of his broad authority to enforce civil and criminal laws.¹³⁴ When an agency enacts a regulation or the legislature passes a statute and the governor signs it, they rely on the enforcement activities of the attorney general. Moreover, the attorney general also

¹²⁹ Joseph E. Kennedy, *Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System*, 24 HASTINGS CONST. L.Q. 665, 680 n.55 (1997) ("[M]oney, in the form of campaign contributions, can influence elected prosecutors.").

¹³⁰ Ellis, *supra* note 77, at 1532.

¹³¹ *Id.* at 1562 n.191 (quoting REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF MICHIGAN 87 (Lansing, R.W. Ingals 1850) (statement of Del. Joseph R. Williams)) (internal quotation mark omitted).

¹³² See Berry & Gersen, *Executive*, *supra* note 2, at 1396.

¹³³ COMM. FOR ECON. DEV., *supra* note 85, at 20.

¹³⁴ See NAT'L MUN. LEAGUE, *supra* note 93, at 29 ("[D]uties to aid in the enforcement of the laws and to give legal advice to other state officers are essentially part of the executive power, and . . . should be exercised by one in agreement with the chief executive . . .").

represents state agencies and actors in court, but has the liberty to reject an agency's position if he believes it is not in the public interest. These two powers endow the attorney general with the ability to act according to his own preferences. If these preferences differ from those of the governor — as they often do, particularly if the two officers are political rivals — coordination of the executive branch's activities is undermined. The example in the preceding section, of a governor's economic policy conflicting with the attorney general's enforcement priorities, highlights this problem. Such divergent interests are common under an unbundled model.¹³⁵ However, if the attorney general were appointed, the governor could better coordinate the office's enforcement policies to accommodate other executive actions, such as economic stimulus programs. Electoral responsibility for this failure often falls on the shoulders of the governor, although there is no true authority to compel cooperation across departments.¹³⁶

Political competition undoubtedly has the potential to cause significant discord in the state executive branches. Many attorneys general run for governor, often against incumbents alongside whom they served in the executive branch.¹³⁷ These political rivalries can lead to divergent priorities in enforcement of the law.¹³⁸ One obvious example of potential political conflict would be when the governor and the attorney general come from different political parties — an intrabranch divided government.¹³⁹ However, even when the two officials are from the same party, they may represent different ideological bases or otherwise be personally or politically rivalrous.¹⁴⁰

The negative influence of political rivalries should not be overstated. In fact, some have claimed that despite the potential for political rivalries to freeze the executive branch, “debilitating conflict has not materialized.”¹⁴¹ Elections subject the attorney general and the

¹³⁵ See, e.g., *Va. Gov. and Attorney General Disagree Over Education Law*, WBOC (Sept. 4, 2013, 1:15 PM), <http://www.wboc.com/story/23338492/va-gov-and-attorney-general-disagree-over-education-law>.

¹³⁶ See, e.g., LEONARD A. BLUE, *THE GOVERNOR AND EXECUTIVE ORGANIZATION* 18 (1902) (“The governor has no authority constitutional, statutory or otherwise to control their actions or guide their policy.”); DODD, *supra* note 111, at 268–69.

¹³⁷ See *supra* note 115 and accompanying text; see, e.g., *Brewer Defeats Goddard in Arizona Governor's Race*, USA TODAY (Nov. 3, 2010, 12:57 AM), http://usatoday30.usatoday.com/news/politics/2010-11-03-arizona-governor_N.htm.

¹³⁸ See, e.g., Marshall, *supra* note 6, at 2453.

¹³⁹ See, e.g., BLUE, *supra* note 136, at 18; Marshall, *supra* note 6, at 2453.

¹⁴⁰ Marshall, *supra* note 6, at 2453.

¹⁴¹ *Id.* at 2454 (“[T]he divided executive has been the rule, rather than the exception . . . yet there is little to suggest that it has created endemic dysfunction.” *Id.* at 2468.). *But see* NAT'L MUN. LEAGUE, *supra* note 93, at 29 (“[A]ctive cooperation between such officials is seldom found.”); BLUE, *supra* note 136, at 18 (“[T]here is an utter lack of coordination.”).

governor to “significant political pressure to work together.”¹⁴² An attorney general may in fact go out of his way to coordinate activities with a governor from the opposite party to present himself as bipartisan and above politics.¹⁴³ The governor will also face pressure to coordinate with the attorney general to avoid appearing “reckless, if not lawless,”¹⁴⁴ and the attorney general will likely be wary of overstepping his authority and acting as a general executive.¹⁴⁵ Additionally, there is political pressure for an active and effective government.¹⁴⁶ If the attorney general and governor diverge so significantly in their activities as to impede government effectiveness, each will face significant political consequences.

Competition between the attorney general and the governor is not without its benefits. There is certainly a benefit in that an attorney general who is not beholden to the governor can serve as an important check on the governor.¹⁴⁷ Proponents of direct elections suggest that elections are essential if the attorney general is to be a “check on the governor and his administration to prevent violation of the law and to expose official wrongdoing in the state government wherever it is found.”¹⁴⁸ One way this occurs is through monitoring for possible misconduct or corruption, which the attorney general would prosecute. An independent attorney general is more likely to be aggressive in these cases than an attorney general who was appointed to the position by the subject of the investigation. The attorney general may also serve as a political check: his enforcement priorities may more accurately reflect the public’s and he may constrain the activity of a governor who diverges from the public’s preferences too extremely.

That the attorney general provides an intrabranched check on the governor is not a sufficient justification for maintaining a system of elections for several reasons. First, in every state the legislature serves as a check on the executive branch.¹⁴⁹ Second, states could easily remedy any deficit by permitting the appointment of special counsel to investigate allegations of wrongdoing. This model is employed effective-

¹⁴² Marshall, *supra* note 6, at 2454.

¹⁴³ See, e.g., *id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (noting that the attorney general “may also be restrained from overreaching because she is wary that her role is, in large part, defined by public expectations and that her primary obligation is to defend, not contradict, the policies of state offices or agencies, except when those policies violate the law”).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 2446 (“[A]n independent attorney general has proved both workable and effective in providing an intrabranched check on state executive power.”).

¹⁴⁸ ABERNETHY, *supra* note 1, at 41.

¹⁴⁹ See, e.g., *id.* at 46.

ly by the national government,¹⁵⁰ and there is no reason to expect that it would be less successful in the states. Third, in an attempt to establish the attorney general as a check on the governor, there is a risk that the attorney general “may not only be in open disagreement with the governor on important policy questions, but may actually be one of his outspoken political rivals, aspiring to the governor’s office, with the result that the office of attorney general might well be used to obstruct the workings of government.”¹⁵¹ Finally, electing an additional executive official to serve as a “watchdog” further taxes the oversight responsibilities of the public, which would then need to watch both the governor and the attorney general.¹⁵² Not only would responsibility be obscured, but there would perhaps be a greater risk of attorney general misconduct, because the position is less high profile and thus subject to less scrutiny.¹⁵³

CONCLUSION

The experience of state attorney general elections perhaps proves that “[p]ower once surrendered to a people is seldom returned.”¹⁵⁴ There is no doubt that the goal of changing the selection method for the state attorney general “seem[s] far distant at the present time.”¹⁵⁵ Indeed, no state has changed from election to appointment of the attorney general in American history.¹⁵⁶ But with significant scholarly attention paid to the federal unitary executive, it is worth considering whether reforms are appropriate at the state level. On review, there are benefits of the current unbundled executive system, but unbundling the attorney general position is likely more harmful than productive. Additional research can expand the questions raised here to other executive positions such as the secretaries of state, treasurers, and auditors. It is undoubtedly plausible that unbundling is net beneficial in those instances. However, the broad enforcement power and discretion of the attorney general make the position a strong candidate for appointment, rather than election. Transitioning to a system of appointment of state attorneys general would produce better officials and more effective and accountable executive branches in the states.

¹⁵⁰ See, e.g., 28 C.F.R. § 600.1 (2013) (establishing procedures for appointment of special counsel); Matheson, *supra* note 57, at 28.

¹⁵¹ ABERNETHY, *supra* note 1, at 43.

¹⁵² *Id.* at 46.

¹⁵³ See, e.g., *id.*; Matheson, *supra* note 57, at 11.

¹⁵⁴ Ellis, *supra* note 77, at 1568 (quoting *The New Constitution — The Tendency of Its Power*, WKLY. NW. GAZETTE (Galena, Ill.), Sept. 17, 1847, at 2) (internal quotation mark omitted).

¹⁵⁵ PHILLIPS, *supra* note 7, at 475.

¹⁵⁶ Matheson, *supra* note 57, at 28.