THE COMMON LAW POWERS OF THE NEVADA ATTORNEY GENERAL: *RYAN V. EIGHTH JUDICIAL DISTRICT COURT*

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The office of the attorney general derived from thirteenth-century England and voyaged with the American settlers across the Atlantic, ultimately taking root in each of the thirteen original colonies.[1] There, the colonial attorneys general took on a wide variety of duties,[2] many of which originated from the common law, such as being "intrusted with the management of all legal affairs and the prosecution of all suits, civil and criminal, in which the crown was interested."[3] Time passed, the nation expanded, and now every state wields an attorney general.[4] The majority of states uphold their attorneys general's common law powers[5]—while simultaneously authorizing legislatures to withdraw

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[1] *See* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2449–50 (2006).

[2] For example, in 1708, the duties of the South Carolina Attorney General were specified as follows:

> [T]o Act, Plead, Implead, Sue and Prosecute all and every Person & Persons whatsoever, for all Debts, Fines, Amerciaments, Forfeitures, Escheats Claims and Demands whatsoever which now is or may or Shall be Due and in Arrears to Us upon any Account whatsoever whither Rents, Revenues or otherwise howsoever, And to Prosecute all Matters Criminall as well as Civill Giving and hereby Granting unto You full Power and authority and the Premises therein to Deal Doe Execute and Performe in as large and Ample manner to all Intents and Purposes as to the Said office of Attorney Generall doth in any way Appertaine & bellong . . . .

NAT'L ASS'N OF ATTORNEYS GENERAL, STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 7 (Lynne M. Ross ed.) (1990) (alteration in original) (citing Oliver W. Hammonds, The Attorney General in the American Colonies, in 2 ANGLO-AMERICAN LEGAL HISTORY SERIES 18 (Paul M. Hamlin ed., 1939)).

[3] State v. Finch, 280 P. 910, 912 (Kan. 1929); see also Rita W. Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. LEGAL HIST. 304, 309–10 (1958) (identifying many of the attorneys general's "numerous" common law powers).

[4] *See* Note, *Appointing State Attorneys General: Evaluating the Unbundled State Executive*, 127 HARV. L. REV. 973, 980 (2014).

[5] Justin G. Davids, Note, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, 38 COLUM. J.L. & SOC. PROBS. 365, 372 (2005).

those powers, either entirely or partially[6]—whereas the minority of states completely disavow their attorneys general's common law powers.[7]

The issue of whether a state's attorney general possesses common law powers lends to significant implications. For example, in the realm of intra-executive conflicts between the governor and attorney general—conflicts such as disagreeing whether to defend a challenged state law or whether to challenge the constitutionality of a federal law[8]—the existence or absence of the attorney general's common law powers may impact whether the attorney general may take a position adverse to the governor's.[9] Perhaps the Nevada Supreme

[6] *See id.*; *see, e.g.*, Padgett v. Williams, 348 P.2d 944, 948 (Idaho 1960) (concluding that "the office of attorney general is not constitutionally vested with any common law powers and duties that are immune to legislative change"); Johnson v. Commonwealth ex rel. Meredith, 165 S.W.2d 820, 826, 829 (Ky. 1942) (holding that the Kentucky General Assembly may withdraw the attorney general's common law powers, and identifying nine other states that hold similarly). Illinois, by contrast, prohibits the deprivation of the attorney general's common law powers. *See* Envtl. Prot. Agency v. Pollution Control Bd., 372 N.E.2d 50, 52 (1977) ("[N]either the legislature nor the judiciary may deprive the Attorney General of his common law powers under the Constitution.").

[7] *See* Davids, supra note 5, at 372 & n.32 (noting that Arizona, Connecticut, Indiana, Iowa, New Mexico, New York, Oregon, Texas, Washington, and Wisconsin "seem to have abandoned" their attorneys general's common law powers).

[8] Recently, the passage of the Federal Patient Protection and Affordable Care Act of 2010 drove deep divides between many states' governors and attorneys general, including Nevada's. *See* Kevin Sack, *In Partisan Battle, Governors Clash with Attorneys General Over Lawsuits*, N.Y. TIMES, March 28, 2010, at A25; Benjamin Spillman, *Official: Filing Lawsuit a Waste*, LAS VEGAS REV.-J., March 31, 2010, at 1A. At the time of writing this Note, the issue of defending a state marriage law placed Kentucky's attorney general at odds with its governor, just as the issue of whether to enforce a marriage law did for New York's a decade ago. *See* Trip Gabriel, *Kentucky Law Official Will Not Defend Ban on Same-Sex Marriage*, N.Y. TIMES, March 5, 2014, at A17; Marc Santora & Thomas Crampton, *Same-Sex Weddings in Upstate Village Test New York Law*, N.Y. TIMES, Feb. 28, 2004, at A1.

[9] In many states, the attorney general is required to represent multiple interests, including both those of the governor and those of the public interest. *See* Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL'Y 1, 12–13 (1993). In many states, the duty to represent the public interest derives from the common law. *Id.* at 4. Occasionally, the attorney general will determine that the representation of the public interest conflicts with the representation of the governor. *Id.* at 13. In these instances, the attorney general will perhaps choose to represent the attorney general's interpretation of the public interest, thereby taking a position contrary to the governor's. When these conflicts must be resolved in court, some courts rule in favor of the attorney general, concluding that the attorney general is authorized by the common law to represent the public interest to the detriment of the governor's wishes. *See, e.g.*, Feeney v. Commonwealth, 366 N.E.2d 1262, 1266–67 (Mass. 1977) (holding that the attorney general may take a litigation position contrary to wishes of the executive branch, including those of the governor, because the attorney general's common law powers require the attorney general to "consider the ramifications of [the executive branch's proposed course of action] on the interests of the [state] and the public generally"); *see also* Marshall, *supra* note 1, at 2460–61 (citing Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 272 (5th Cir. 1976)) ("[T]he Attorney General's common law authority is so unfettered that it may allow her to bring suits in the public interest even when other executive officers or agencies oppose such actions."). Other courts, by contrast, conclude that the attorney general lacks the common law power to represent the public interest and, therefore, must represent the governor's wishes to the detriment of the attorney general's interpretation of the public interest. *See, e.g.*, Ariz. State Land Dep't v. McFate, 348 P.2d 912, 914, 915, 918 (Ariz. 1960) (noting that the Arizona Attorney General lacks common law powers, and concluding that the attorney general may not take a

Court's most recent treatment of the issue,[10] *Ryan v. Eighth Judicial District Court* entertains whether the Nevada Attorney General retains common law powers.[11]

In *Ryan*, the state's attorney general initiated a prosecution against a public officer by filing a criminal complaint, alleging that the officer received a bribe.[12] The attorney general presented the complaint before a grand jury, but the grand jury declined to indict.[13] Unwilling to drop the action against the public officer, the pertinacious attorney general filed an information[14] with the trial court, "independently and without requesting the district attorney . . . to act."[15]

The attorney general claimed that his authority to file the information derived from NRS §173.035(2), which provided that "the district attorney may . . . file [an] information" if the accused was previously discharged from a grand jury's preliminary examination of the same alleged offense.[16] Objecting to the attorney general's reliance upon NRS § 173.035(2), the accused petitioned the Nevada Supreme Court, arguing that the provision expressly permitted only a district attorney—and not the attorney general—to file an information.[17]

Beyond merely addressing the narrow issue of whether the attorney general could file an information pursuant to NRS § 173.035(2), the court widened its gaze upon the matter, questioning whether any source of law—constitutional, statutory, or common—authorized the attorney general to file an infor-

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litigation position in defense of the public interest and adverse to the executive department's litigation position unless authorized to do so by statute). Finally, other courts, such as California's, uphold the attorney general's common law power to represent the public interest but conclude that such representation must yield to the representation of the governor's wishes. *See, e.g.*, People ex rel. Deukmejian v. Brown, 624 P.2d 1206, 1209–10 (Cal. 1981). In *Deukmejian*, the court acknowledged the California "Attorney General's dual role as representative of [the executive branch] and guardian of the public interest," but concluded that the attorney general may not take a position adverse to the executive department in litigation because, first, the attorney general continuously maintains a client-attorney relationship with the executive department and, second, the California Constitution placed within the Governor—and not the attorney general—"the supreme executive power to determine the public interest" when the governor and the attorney general differ as to the interpretation of the public interest. *Id.* at 1209 (internal quotation marks omitted).

[10] Fifty years prior to *Ryan*, the Nevada Supreme Court upheld the Nevada Attorney General's common law powers. *See* State ex rel. Fowler v. Moore, 207 P. 75, 76 (Nev. 1922).

[11] Ryan v. Eighth Judicial District Court, 503 P.2d 842, 845 (1972).

[12] *Id.* at 842–43.

[13] *Id.* at 843.

[14] "A prosecutor . . . who wants to charge someone with a crime either can ask a grand jury to return an indictment or can file an information without bothering with a grand jury." Tyson v. Trigg, 50 F.3d 436, 438 (7th Cir. 1995). Much like a complaint in a civil case, "[a]n information is a statement by a district attorney or the attorney general to the court that on a certain day a named person committed an offense against the peace and dignity of the [s]tate . . . ." *Ryan*, 503 P.2d at 845.

[15] *Ryan*, 503 P.2d at 842–43.

[16] *Id.* at 843 & n.1. At the time of *Ryan*, NRS 173.035(2) read as follows: "If, however, upon the preliminary examination the accused has been discharged . . . the district attorney may . . . file an information, and process shall forthwith issue thereon." *See id.* at 846 n.6 (citing NEV. REV. STAT. § 173.035(2) (1967)).

[17] *Id.* at 842–43.

mation. Turning first towards the state constitution and statutes, the court discovered no provisions that expressly empowered the attorney general to file an information.[18] By contrast, the court discovered multiple statutory provisions that expressly empowered the district attorney to file an information.[19] Notably, the court focused upon a neighboring provision to NRS §173.035(2) that provided that the district attorney "shall" file "all" informations.[20]

The statutory investigation largely quenched the court's inquiry, leading the court to conclude that the clear statutory language authorized only the district attorney to file an information.[21] Nonetheless, the court continued forward, questioning in a sporting manner whether the common law powers of the attorney general could perhaps provide for a different conclusion.[22] The court first assumed that the common law authorized the attorney general to file an information,[23] but then concluded that this common law power conflicted with the statutory provisions that authorized only the district attorney to file an information.[24] Consequently, the court held that the attorney general's common law power to file an information was vacated because the attorney general's common law powers exist only to the extent that they are "not repugnant to or in conflict with the . . . laws of this state."[25]

Thus, *Ryan* illustrates the widely recognized subservience of the common law to conflicting statutory law.[26] But more significantly, because *Ryan* recog-

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[18] *Id.* at 843–44.

[19] *Id.* at 843.

[20] *Id.* ("Indeed, our statutory scheme invests control of the information process in the district attorney to the exclusion of others. The legislature wisely has forbidden dual control. For example, NRS 173.045(1) provides that all informations shall be filed by the district attorney."). Incidentally, amendments to NRS §§ 173.035(2) and 173.045(1) enacted following the *Ryan* decision and corresponding legislative history cast a dubious shadow upon the court's conclusion that the legislature intended to forbid dual control, for the amended provisions—which "are the result of" *Ryan*—authorize both the district attorney and the attorney general to file informations. *See Minutes of the Nev. Assemb. Comm. on Judiciary, Assemb. B. 496*, 1975 Leg., 58th Sess. 636–37 (April 16, 1975) (testimony of Pat Walsh, Deputy Attorney General of Nevada, and Michael Fondi, Carson City District Attorney on Proposed Amendment to Assemb. B. 496).

[21] *Ryan*, 503 P.2d at 843.

[22] *Id.* at 845.

[23] *Id.* ("Assuming, without deciding, that the common law may have granted the attorney general the power he here seeks to exercise . . . ."). Whereas the court in *Ryan* avoided the dusty exertion of drilling into the depths of the common law to decide whether the filing of a criminal information was one of the attorney general's common law powers, other authorities provide conflicting views. *See, e.g.*, State v. Boswell, 4 N.E. 675, 678 (Ind. 1886) (noting that the grand jury indictment is the centuries-old common law method and, by contrast, "[p]rosecution by information is in derogation of the common law"); *Judicial Discretion in the Filing of Informations*, 36 HARV. L. REV. 204, 205 (1922) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *309) (explaining that an attorney general's "proceeding by information in the King's name, in criminal cases, is said to be as old as the common law itself").

[24] *Ryan*, 503 P.2d at 845.

[25] *Id.* (citing NEV. REV. STAT. § 1.030 (1967)).

[26] Many states similarly limit the attorney general's common law powers to the extent that those powers conflict with statutory law. *See, e.g.*, N.C. GEN. STAT. § 114-1.1 (2013); State v. Jiminez, 588 P.2d 707, 709 (Utah 1978); State ex rel. Carmichael v. Jones, 41 So. 2d 280, 284 (Ala. 1949); State v. Finch, 280 P. 910, 913 (Kan. 1929).

nized the attorney general's common law powers rather than dismissed those powers, *Ryan* upholds the Nevada Attorney General's common law powers, insofar as those powers harmonize with legislation.