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I. Introduction

Since the adoption of the Pennsylvania Constitution of 1874, the authority of the state attorney general to advocate or advise the constitutional invalidity of statutes has been an open issue.[1] Notwithstanding the need for a definitive resolution of this question, the judiciary has chosen to bypass the problem except for the commonwealth court's opinion in *Hetherington v. McHale*.[2] In that case, an unanimous court resolved that "the Attorney General is without power or authority, even though he is of the opinion that a statute is unconstitutional, to implement his opinion in such a manner as to effectively abrogate or suspend such statute, which is presumptively constitutional until declared otherwise by the Judiciary."[3] On appeal, however, the state supreme court addressed the merits of the case directly, and, therefore, found it unnecessary to decide the question of the attorney general's authority.[4]

With the increase in litigation involving state agencies and the adoption of a constitutional amendment providing for an elected attorney general,[5] this issue is likely to arise in the future. Thus, the purpose of this article is to review and analyze the commonwealth court's opinion in

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1. *See* notes 39-70 and accompanying text *infra*.

2. 10 Pa. Commw. Ct. 501, 311 A.2d 162 (1973), *rev'd*, 458 Pa. 479, 329 A.2d 250 (1974).

3. 10 Pa. Commw. Ct. at 512, 311 A.2d at 168.

4. 458 Pa. at 483 n.3, 329 A.2d at 252 n.3. This disposition by the supreme court is consistent with prior holdings in which it has adopted controversial positions taken by the attorney general without inquiry into whether he had the right to raise the issue. *See, e.g.*, Ault Unemployment Compensation Case, 188 Pa. Super Ct. 260, 146 A.2d 344 (1958), *rev'd*, 398 Pa. 250, 157 A.2d 375 (1960). In one instance, the supreme court adopted contentions advanced by the attorney general while simultaneously denying his right to raise them. York v. Pennsylvania Public Utility Comm'n, 449 Pa. 136, 295 A.2d 825 (1972), *overruling* Northern Pennsylvania Power Co. v. Pennsylvania Public Utility Comm'n, 333 Pa. 265, 5 A.2d 133 (1939).

5. PA. CONST. art. 4, § 4.1 (1968, amended 1978).

Hetherington,[6] to set forth the history of the attorney general's authority as it has been resolved by both the courts and the attorney general's office,[7] to discuss the legal basis of the attorney general's authority,[8] and to offer a resolution with respect to three different ways in which the attorney general may deal with constitutional questions.[9]

II. Role of the Attorney General in *Hetherington*

A. *The Attorney General's Advice*

In *Hetherington v. McHale*,[10] the state secretary of agriculture was confronted with the implementation of an amendment to the Harness Racing Act.[11] This amendment reposed the power to determine how monies from the Pennsylvania Fair Fund were to be distributed among various agricultural research projects in the hands of a committee comprised in part of members designated by private organizations.[12] Since the attorney general was of the opinion that the amendment was unconstitutional,[13] he directed the secretary of agriculture to refuse to

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6. *See* notes 10-38 and accompanying text *infra*.
7. *See* notes 39-70 and accompanying text *infra*.
8. *See* notes 71-101 and accompanying text *infra*.
9. *See* notes 102-121 and accompanying text *infra*.
10. 10 Pa. Commw. Ct. 501, 311 A.2d 162 (1973), *rev'd*, 458 Pa. 479, 329 A.2d 250 (1974).
11. PA. STAT. ANN. tit. 15, §§ 2601-2624 (Purdon 1967).
12. The Harness Racing Act had provided that if the proceeds flowing into the Pennsylvania Fair Fund were to exceed a designated amount, then the secretary of agriculture was to distribute these proceeds for agricultural research projects in accordance with "recommendations submitted by a committee appointed by him, such committee to include in its membership the dean of the college of agriculture at the Pennsylvania State University and the dean of the school of veterinary medicine at the University of Pennsylvania." Act of December 22, 1959, P.L. 1978, No. 728, § 16(e). The 1972 amendment provided that the proceeds were to be distributed as determined by a committee composed of

> the Secretary of Agriculture, the chairman and a minority member of the Agriculture Committee of the Senate, the chairman and a minority member of the Agriculture Committee of the House of Representatives, six persons designated by the Pennsylvania State Council of Farm Organizations, the chairman of the State Harness Racing Commission or his designate, one person designated by the Pennsylvania Canners and Fruit Processors Association, one person designated by the Pennsylvania Association of County Fairs and three persons designated by the Secretary of Agriculture from his staff.

Act of September 28, 1972, P.L. 897, No. 212, § 1, PA. STAT. ANN. tit. 15, § 2616(e) (Purdon Supp. 1977-78).

It is noteworthy that the 1972 amendment had been vetoed by the Governor, Veto No. 5 (1972), but the legislature successfully overrode the veto. HISTORY OF SENATE AND HOUSE BILLS, SESSIONS OF 1971 AND 1972, A-189. In its amicus curiae brief before the commonwealth court, the legislature argued that once a bill has become law over the governor's veto, the executive branch has no choice but to enforce the measure.

> The overriding of a gubernatorial veto is an extraordinary procedure rarely resorted to in the history of our Commonwealth. The last time the General Assembly successfully overrode a veto was in 1917. When the General Assembly exercises this power, the statute is entitled to more consideration than the arbitrary suspension accorded to it by the Attorney General. Such a statute, at the very minimum, must remain in effect unless and until invalidated by a court with appropriate jurisdiction.

Amicus Curiae Brief in Opposition to Defendant's Preliminary Objections at 10, Hetherington v. McHale, 10 Pa. Commw. Ct. 501, 311 A.2d 162 (1973). *But see* notes 33-37 and accompanying text *infra*.

13. PA. ATT'Y GEN. OP. NO. 30, 3 Pa. B. 712, 713 (1973).

recognize those members of the committee appointed by private organizations.[14] Heeding this advice from the state's chief law officer, the secretary was rewarded with three suits in the Pennsylvania Commonwealth Court.[15]

B. The Commonwealth Court's Decision

Because the court determined that the statutory amendment in question was constitutional, it was unnecessary to resolve the issue of the attorney general's authority. Nevertheless, President Judge Bowman declared for the court that "'[s]uch a fundamental question . . . deserves to be raised from the murky uncertainty in which it has rested for too many years in Pennsylvania.'"[16] Based on an analysis of the attorney general's statutory and common-law powers, the court concluded that the attorney general has no authority to implement his decision that a statute is unconstitutional by directing an administrative officer to ignore it.[17]

1. The Attorney General's Statutory Powers.—The court first examined the statutory powers of the attorney general, specifically the law that provides that any department requesting legal advice from the Department of Justice is bound by the advice rendered.[18] Based upon its reading of the supreme court's decision in *Commonwealth ex rel. Woodruff v. Lewis*,[19] the commonwealth court concluded that a department is bound only by an attorney general's opinion concerning an administrative as opposed to a constitutional matter.[20]

This resolution reflects an extremely literal and questionable reading of the *Lewis* case. In *Lewis*, the supreme court declared that if the auditor

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14. The attorney general not only concluded that the amendment in question was unconstitutional, but implemented that decision by directing the secretary of agriculture that "you must refuse to recognize those persons [*i.e.*, those from private organizations] as members of the committee and must deny them any authority to participate in deliberations of the committee." *Id.*

15. Since the plaintiffs were unsure of the appropriate form of action, actions were instituted in equity (to enjoin meetings of the committee and expenditures of funds unless plaintiffs were permitted to participate) and in quo warranto and mandamus (to determine that plaintiffs were appropriately appointed to the committee). The difficulty in ascertaining the appropriate form of action was recognized by the commonwealth court, 10 Pa. Commw. Ct. at 504, 311 A.2d at 164, and, fortunately, the problem has been rectified by adoption of chapter 15 of the Pennsylvania Rules of Appellate Procedure, which delineates the procedure for judicial review of governmental determinations. *See* PA. R.A.P. 1502 and accompanying note.

16. 10 Pa. Commw. Ct. at 508, 311 A.2d at 165.

17. *Id.* at 512, 311 A.2d at 168.

18. Section 512 of the Administrative Code provides in pertinent part,

> Whenever any department . . . shall require legal advice concerning its conduct or operation, or when any legal difficulty or dispute arises, . . . it shall be the duty of such department . . . to refer the same to the Department of Justice.
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> It shall be the duty of any department . . . having requested and received advice from the Department of Justice regarding the official duty of such department . . . to follow the same . . . .

PA. STAT. ANN. tit. 71, § 192 (Purdon 1962).

19. 282 Pa. 306, 127 A. 828 (1925).

20. 10 Pa. Commw. Ct. at 509, 311 A.2d at 166.

general believes that a requisition made by a state agency is unlawful, he is compelled by the Administrative Code to refer the matter to the Department of Justice for the attorney general's opinion and is bound by the advice rendered.[21] By way of dictum, the court further opined that the auditor general, a constitutional officer who is sworn to uphold the constitution, need not follow the advice given by the attorney general if the auditor general believes the result to be unconstitutional.[22]

The supreme court, however, did not consider the converse issue, *i.e.*, whether the official is bound to follow the attorney general's advice that a statute is *unconstitutional*. Nor did the court have before it the issue whether there is a difference between a state official such as the auditor general, who is a constitutional officer,[23] and the secretary of agriculture, who is not.[24] It can, however, be readily concluded that if the auditor general, who may have no legal training, has the right to reach his *own* conclusion regarding the unconstitutionality of a statute, he would most certainly have the right to rely on the advice of the attorney general, the state's chief lawyer, that a statute is unconstitutional. It must also follow that a nonconstitutional officer should have the same right, especially when receiving the advice of the attorney general, who is, like the auditor general, a constitutional officer.[25] It can, therefore, be deduced that the attorney general does have the authority to issue the opinions on which these officers may rely. The commonwealth court's quote from the *Lewis* case on this issue thus appears to be misplaced.[26]

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21. Commonwealth *ex rel.* Woodruff v. Lewis, 282 Pa. 306, 315, 127 A.828, 831 (1925). Since the auditor general is now provided with his own counsel, the attorney general no longer renders advice to the auditor general. *See* PA. STAT. ANN. tit. 71, §§ 312-13 (Purdon 1962).

22. The dictum originated in the court of common pleas, in which Judge Fox wrote that the legislature may direct the auditor general

> where he shall obtain his legal advice. . . . In this respect the command of the legislature is fully controlling, so long as it does not attempt to take from [the auditor general] his constitutional duty of which he cannot be relieved by an act of assembly. He cannot feel that he is supporting, obeying and defending the constitution when acting and complying with a statute which is unconstitutional as he construes it, notwithstanding being advised to the contrary by the Department of Justice. . . . Nothing short of a determination by a court of proper and competent jurisdiction of the question of the constitutionality of a statute can control him.

27 Dauph. 311, 316 (Pa. C.P. 1924). Agreeing with Judge Fox, the supreme court observed that the auditor general is sworn to uphold the state and federal constitutions.

> This therefore, is his constitutional duty, overthrowing any antagonistic obligation attempted to be imposed by legislation. If we could find an interpretation for the Administrative Code which would require an executive officer to do an unconstitutional thing (which we cannot see in it, however), we would be compelled to so interpret it, if possible, so as to exclude that result . . . ; happily its reasonable construction does this.

282 Pa. at 315-16, 127 A. at 831.

23. PA. CONST. art. 4, §§ 1, 18.

24. The powers and duties of the secretary of agriculture are provided for by §§ 1701-1711 of the Administrative Code. PA. STAT. ANN. tit. 71, §§ 441-451 (Purdon 1962).

25. PA. CONST. art. 4, §§ 1, 4.1, 8.

26. [S]ection [512 of the Administrative Code] expressly provides that 'it shall be the duty of the department . . . having requested and received [such] legal advice from the department of justice regarding the official duty of such department . . . to follow the same,' unless, as the court below specifies in its judgment 'the constitutionality of a statute . . . is involved.'

The commonwealth court also emphasized dictum in *Lewis* that the attorney general has authority to deal with administrative matters only.[27] The *Lewis* court stated that, aside from asking advice whenever it is desired, the only matters *required* to be submitted to the attorney general are

> (1) administrative questions of a legal nature affecting the harmony which should exist between two or more of the executive departments of the state; (2) doubtful legal questions, not theretofore passed upon by the courts or the Attorney General, which affect any state officer's performance of his official duties; and (3) proceedings which have resulted or likely will result in litigation in which the State is interested.[28]

In that sweeping language, the supreme court construed the attorney general's authority to extend well beyond simple "administrative" questions. It limited that term strictly to the type of issue before it in *Lewis*—legal questions affecting the harmony between two or more of the executive state agencies. The issues in *Hetherington*, however, arguably fall within all three categories. First, the relationship between the secretary of agriculture and the statutory committee erected to appropriate and expend state funds is an administrative question of a legal nature affecting two state agencies.[29] Merely because the constitution is relevant to the question does not, in and of itself, render the matter nonadministrative. Second, the secretary of agriculture's performance of his official duties depends largely on whether the act in question is constitutional. Third when there is a strong question of constitutionality, litigation is likely to result. The Commonwealth has a strong interest in that litigation since it affects not only the duties of the secretary of agriculture, but also the powers of the attorney general and General Assembly. Accordingly, *Lewis* fails to support the commonwealth court's contention that the statutory duties of the attorney general preclude him from directing a state agency to refuse to follow a statute believed to be unconstitutional.

2. The Attorney General's Common-Law Powers.—Although the *Hetherington* court recognized the breadth of the attorney general's common-law powers,[30] it nevertheless concluded that the direction by the

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Commonwealth *ex rel.* Woodruff v. Lewis, 282 Pa. 306, 315, 127 A. 828, 831 (1925), *quoted in* Hetherington v. McHale, 10 Pa. Commw. Ct. 501, 509, 311 A.2d 162, 166 (1973).

27. *Id.* In *Lewis*, the court stressed that the narrow issue before it was the auditor general's duty to follow the attorney general's interpretation of a statute when *no* question of constitutionality is involved.

> In so far as our opinion goes beyond this restricted inquiry, it does so at the request of the litigants, in order that similar difficulties may be avoided, that state creditors, like all others, may have 'right and justice administered [to them] without sale, denial or delay,' and that harmony may reign where discord seems now to prevail.

Commonwealth *ex rel.* Woodruff v. Lewis, 282 Pa. 306, 310, 127 A. 828, 829 (1925).

28. *Id.* at 317-18, 127 A. at 832.

29. Questions concerning how the committee is to act and how the members of the committee are to be appointed are clearly administrative questions, and as such, are properly referred to the attorney general for his legal advice.

30. 10 Pa. Commw. Ct. at 509-10, 311 A.2d at 166. The common-law powers of the

state's chief law officer to ignore a statute would amount to a "suspension"[31] of that statute in direct contravention of the Pennsylvania Constitution.[32] The assumption, however, that a direction to ignore a statute is a constitutional "suspension" of that statute is tenuous. A legal opinion that explains the disharmony between a law and the constitution under which that law is enacted is hardly the type of unilateral and arbitrary action that our forefathers feared in the executive branch.[33] Rather, it is little more than an invitation to litigation. The final decision of the constitutionality of the statute rests, as it should, with the judiciary.[34]

Under the *Hetherington* court's broad definition of the word "suspend," a state officer who is sworn to uphold the state and federal constitutions would be barred from implementing that oath by refusing to comply with a statute that he believes to be unconstitutional, for such an action would be a unilateral "suspension" of that statute. But this is precisely the type of conduct that the supreme court condoned in the *Lewis* case.[35] Thus, the commonwealth court has managed both to accept and reject the *Lewis* case simultaneously.

Even if the attorney general's direction to ignore a statute because of constitutional deficiencies is considered a "suspension" of that statute, his order is not necessarily violative of the Pennsylvania Constitution, because the state constitution expressly provides that the power to sus-

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attorney general are illustrated in Matson v. Margiotti, 371 Pa. 188, 88 A.2d 892 (1952) (as chief law enforcement officer attorney general is charged with the over-all duty of enforcing the Commonwealth's laws); Margiotti Appeal, 365 Pa. 330, 75 A.2d 465 (1950) (Pennsylvania Attorney General clothed with powers that enveloped attorney general at common law); Dauphin County Grand Jury Investigation Proceedings (No. 1), 332 Pa. 289, 2 A.2d 783 (1938); Commonwealth *ex rel.* Minerd v. Margiotti, 325 Pa. 17, 188 A. 524 (1936). ***But see*** Commonwealth v. Schab, — Pa. —, 383 A.2d 819 (1978).

31. In Bishop v. Bacon, 130 Pa. Super. Ct. 240, 247, 196 A.918, 921 (1938), the word "suspend" was defined to mean "to cause to cease for a time; to postpone." Admittedly, the attorney general's direction to the secretary of agriculture in *Hetherington* to refuse to recognize various individuals as members of the committee operated to "postpone" the effect of the statute establishing the committee, *see* notes 13-14 *supra*, but it is noteworthy that in *Bishop*, the court made no attempt to define "suspend" in the constitutional sense. It merely distinguished that word from the word "supersede" to determine the effect of an amendment to the School Code of 1911. *Id.* Thus, it cannot be concluded that the mere direction to ignore a given statute is a constitutional "suspension" of that statute.

32. "No power of suspending laws shall be exercised unless by the Legislature or by its authority." PA. CONST. art. 1, § 12. This provision of the constitution can be traced back to the practice in England before the Revolution of 1688, in which

> it was not uncommon for the King to suspend the operation or execution of laws for the purpose of carrying out some temporary and arbitrary intention of his own. Such action was really illegal, and in fraud of the rights of the citizens, but was nevertheless persisted in until finally forbidden by the [English] Bill of Rights, providing 'That the pretended power of suspending of laws, by regal authority, without consent of Parliament, is illegal.' In order that executive authority (of which there was great jealousy at the foundation of our constitutional government) might be deprived of the power ever to suspend laws, a provision forbidding any power except the Legislature to do so, was made a part of our fundamental law in 1790 (Art. IX, § 12), and has remained a part of it ever since.

T. WHITE, CONSTITUTION OF PENNSYLVANIA 161 (1907).

33. *See* note 32 *supra*.

34. *See* PA. CONST. art. 5, § 1.

35. *See* note 22 and accompanying text *supra*.

pend laws can be delegated,[36] and the legislature may have done so by adoption of section 512 of the Administrative Code.[37]

After concluding that the attorney general had neither statutory nor common-law power to direct a state official to refuse to comply with a statute believed to be unconstitutional, the *Hetherington* court acknowledged that the attorney general does have a limited right to consider constitutional questions. The court observed that the chief law officer may exercise this right by (1) instituting litigation to support his views; (2) preparing legislation to support his views; and (3) in some limited instances, such as when the United States Supreme Court has spoken, to determine that the High Court's opinion is controlling in Pennsylvania.[38]

III. Historical Relationship of Attorney General to Unconstitutional Statutes

A brief review of the last hundred years discloses that attorneys general have ruled statutes to be unconstitutionally unenforceable and have advocated such positions in litigation. As early as 1876, the attorney general ruled a statute unconstitutional.[39] In his opinion, Attorney General Lear stated, "[i]t is my duty as well as my official obligation to 'support, obey and defend the Constitution.' In this case, I have no doubts."[40]

A similar question was brought to Attorney General Palmer some five years later. He referred to previous opinions holding parts of a certain

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36. *See* note 32 *supra*.

37. *See* note 16 *supra*. The delegation of the authority to *suspend* laws is not considered a delegation of law-making power.

> The making of laws is purely a legislative act, but the determination by some agency when, if ever, their operation shall be suspended, has never been so considered. . . . Acting under the authority of the legislature, the Supreme Court, by promulgating a rule of practice which may be inconsistent with some statute, is merely declaring the event upon which the expressed will of the legislature is to take effect. The actual suspension is the act of the legislature.

Blair Motor Car Co. v. Mervine, 48 Pa. D. & C. 351, 353-54 (C.P. Bed. 1943). *See also* Young v. Fetterolf, 320 Pa. 289, 182 A. 676 (1936).

38. If the Attorney General in his opinion believes that a statute is unconstitutional, he has the right and indeed the duty to either cause to be initiated an action in the Courts of this Commonwealth and thus obtain judicial determination of the issue or he may prepare, for submission to the General Assembly, such revision of the statute as he may deem advisable. [Citation omitted]

> There may exist an exception in those instances where the Supreme Court of the United States has declared unconstitutional a statute of another jurisdiction, which statute is the same as or similar to the Pennsylvania statute in all important aspects. In such instances, the Attorney General being of the opinion that the United States Supreme Court decision is controlling as to a Pennsylvania statute, may implement that judicial decision. We do not mean to suggest that in all cases the Attorney General should enjoy this latitude, only in those cases when the applicability of the U.S. Supreme Court decision to a Pennsylvania statute is clear and unequivocal.

10 Pa. Commw. Ct. at 511-12, 311 A.2d at 167.

39. Commonwealth *ex rel.* Wolfe v. Butler, 99 Pa. 535, 538 (1882).

40. Opinion of Attorney General George Lear dated 9 December 1876. A copy is in the author's files.

act to be unconstitutional. He stated "by those opinions I propose to abide until convinced of error by the Court of last resort."[41]

> It is the *right* of a private citizen to question the constitutionality of any act of assembly that infringes upon his rights and bring it before the courts for adjudication. It is the *duty* of a public officer who is sworn to support, obey and defend the constitution to raise such a question and procure judicial determination whenever required to pay out public money under acts which he is properly advised are not sanctioned by the Constitution.[42]

Although the Supreme Court later held that both attorneys general had been in error on the merits,[43] significantly, it did not comment at all upon their actions in ruling the statutes unconstitutional. It is also noteworthy that there is no indication that the members of the General Assembly, who were suing the executive branch for additional compensation, argued that the attorney general acted beyond his authority.[44]

History repeated itself in 1932, when Attorney General Schnader not only advised the governor that certain welfare legislation was unconstitutional, but implemented that advice with an opinion directing the secretary of welfare to refuse to draw any requisitions under the act.[45] Although the supreme court ultimately disagreed with the attorney general's position,[46] it once again refused to comment on the attorney general's power either to issue an opinion holding a statute unconstitutional or to argue that position in court.

Attorneys general themselves were divided on the extent of their own authority. In the early part of the twentieth century, a conservative view was advanced by Attorneys General Carson,[47] Todd,[48] and Bell,[49]

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41. Opinion of Attorney General Henry W. Palmer dated 9 June 1881. A copy is in the author's files.

42. *Id.* Accordingly, the state treasurer was advised to refuse to make certain payments to members of the General Assembly.

43. Commonwealth *ex rel.* Wolfe v. Butler, 99 Pa. 535 (1882).

44. *See id.* at 536-38.

45. PA. ATT'Y GEN. OP. NO. 37 (1931-1932), *supplementing* PA. ATT'Y GEN. OP. NO. 30 (1931-1932) and PA. ATT'Y GEN. OP. NO. 32-D (1931-1932).

46. Commonwealth *ex rel.* Schnader v. Liveright, 308 Pa. 35, 161 A. 697 (1932). Though the supreme court avoided comment on the attorney general's authority, it did refer to Attorney General Schnader as "one of the ablest constitutional lawyers in the State." *Id.* at 78, 161 A. at 711.

47. In Brown v. Dairy & Food Comm'r, 1905-06 PA. ATT'Y GEN. OP. NO. 398, 15 Pa.D. 829 (1906), the attorney general permitted the use of the name of the Commonwealth in a quo warranto proceeding to test the constitutionality of an act of assembly creating a public office, but cautioned, "As I am not a judicial officer, I am without power or right to determine [judicial questions]. The sole question for me is whether the issue sought to be raised can be presented to a court and determined in quo warranto proceedings." *Id.* at 399, 15 Pa.D. at 830. A suit was brought and thereafter *defended* by the attorney general.

48. 1909-10 PA. ATT'Y GEN. OP. NO. 264, 13 Dauph. 49 (1909). In this opinion, the attorney general wrote that "[t]his Department does not assume that any Act of Assembly is unconstitutional before the courts have so declared and you [a state official receiving advice] are justified in acting upon the assumption that the Act in question is constitutional until it is otherwise delcared by the Courts of the State." *Id.* at 265, 13 Dauph. at 50.

49. Mothers' Pensions, 1913-14 PA. ATT'Y GEN. OP. NO. 47, 41 Pa.C. 216 (1913). Attorney General Bell advised the auditor general that

and by Attorney General Reno in 1940.[50] On the other hand, Attorneys General Cohen,[51] McBride,[52] and Alpern[53] unhesitatingly issued opinions advising that legislation was unconstitutional.[53a]

In recent years, attorneys general have adopted the latter view by exercising their powers more independently through opinion and advocacy, which undoubtedly led to President Judge Bowman's alacrity in *Hetherington*.[54] The springboard may well have been Attorney General Speaker's "midnight" opinion in 1971 that declared punishment by electrocution unconstitutional.[55] Thereafter, through the end of 1977, twenty-seven opinions have been issued advising state officials to disregard various laws because the attorney general deemed them unconstitutional.

This explosion of opinions, however, is not so revolutionary as it might first appear. Six opinions dealt with legislation nullified by the equal rights amendment and thus presented only questions of statutory

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> [a]fter an act of assembly has been certified to the governor as having been duly passed by both houses and has received the approval of the governor, this department has, of course, no jurisdiction or authority to pronounce it unconstitutional—that power being exclusively vested in the judiciary. As every act duly passed and approved is presumed to be contitutional until a court of competent jurisdiction has pronounced it unconstitutional, an expression of the opinion of this department at this time would serve no good purpose, as such opinion would not be binding upon any individual or any department of the state government.

Id. at 51, 41 Pa.C. at 221. The attorney general did suggest, however, that if the auditor general had "substantial doubt" of the constitutionality of the act in question, he should decline to comply with the act so that the matter could be litigated. *Id.* at 52, 41 Pa. C. at 222.

50. *See* PA. ATT'Y GEN. OP. NO. 325, 37 Pa. D. & C. 529, 530 (1940) (Department of Justice has no authority to pass on constitutionality of legislation); PA. ATT'Y GEN. OP. NO. 320, 38 Pa. D. & C. 129, 137 (1940) (Department of Justice has no authority to pass on constitutionality of legislation).

51. *Id.* NO. 664 (1955-1956) (statute providing for mandatory increases to all professional employees of school districts contravenes Pennsylvania Constitution); *id.* NO. 655 (statute permitting increased annuities to former state employees violates Pennsylvania Constitution).

52. *Id.* NO. 16 (1957) (language in appropriation act that repeals prior statutes violates Pennsylvania Constitution); *id.* NO. 14 (1957) (restriction of deer hunting permits to county residents contravenes equal protection clause); *id.* NO. 7 (1957) (restriction in appropriation act unconstitutional).

53. *Id.* NO. 237 (1961) (language in appropriation act violates Pennsylvania Constitution).

53a. Attorney General Brown successfully argued the unconstitutionality of a law permitting a suit against the commonwealth as special legislation in Collins v. Commonwealth, 262 Pa. 572, 106 A. 229 (1919). No opinion has been found taking this position; it was just asserted in the litigation.

54. Hetherington v. McHale, 10 Pa. Commw. Ct. 501, 311 A.2d 162 (1973), *rev'd*, 458 Pa. 479, 329 A.2d 250 (1974).

55. In a strongly worded directive, Attorney General Speaker ordered the removal of the electric chair from the Rockview State Correctional Institution just before he left office. PA. ATT'Y GEN. OP. NO. 1 at 3 (1971). Though the attorney general recognized that the death penalty had never been considered "cruel and unusual punishment" by the Supreme Court, he further observed that "[t]he failure of the Supreme Court to act does not preclude state executive action. On the contrary, the Attorney General's oath 'to support, obey and defend the Constitution' obliges him to determine and act upon a constitutional mandate when the Court remains silent." *Id.* This opinion was quickly reversed by Attorney General Creamer. "If the death penalty in Pennsylvania is to be abolished at this time, such action should be taken, either by the Legislature by repeal or by a court of competent jurisdiction declaring the death penalty unconstitutional." *Id.*

construction.[56] Another eleven opinions, premised upon the Supreme Court's decision in *Graham v. Richardson*,[57] declared American citizenship requirements for various licenses and other governmental benefits to be unconstitutional.[58] Four of the remaining opinions met *Hetherington's* third criterion[59] by advising that United States or Pennsylvania Supreme Court decisions applied to Pennsylvania law in such areas as durational residency requirements,[60] loyalty oaths,[61] veterans' preference,[62] and field trip transportation for nonpublic school children.[63] Another three opinions dealt with the continuing ability of the insurance commissioner and auditor general to sit on boards that they were required to audit, in light of a recently adopted change in the constitution.[64]

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56. *Id.* No. 6, 6 Pa.B 796 (1976) (act providing for benefits to widows of Commonwealth employees must be construed to include widowers as well under equal rights amendment); *id.* No. 30, 5 Pa.B. 2736 (1975) (statute that forbids an official prison visitor from interviewing member of opposite sex violates equal rights amendment); *id.* No. 41, 3 Pa.B. 1185 (1973) (statute prohibiting boxing and wrestling licenses to females unconstitutional under equal rights amendment); *id.* No., 150, 2 Pa.B. 1916 (1972) (law that prohibits parole officers of one sex to supervise parolees of opposite sex unconstitutional under equal rights amendment); *id.* No. 71 (1971) (statute that prohibits females from ages twelve through twenty-one to carry newspapers contravenes equal rights amendment); *id.* No. 69 (limiting cosmetologists to the care of women's hair only violates equal rights amendment).

57. 403 U.S. 365 (1971) (classifications based on alienage are inherently suspect and, therefore, subject to strict judicial scrutiny). *See also In re* Griffith, 413 U.S. 717 (1974) (Connecticut statute that denies resident aliens the right to take bar examination violates equal protection clause); Sugarman v. Dougall, 413 U.S. 634 (1974) (state may not require United States citizenship as a condition precedent to employment with the state).

58. PA. ATT'Y GEN. OP. No. 48, 4 Pa.B. 2152 (1974) (Liquor Code unconstitutional insofar as it imposes United States citizenship requirements on the officers, directors, and shareholders of corporate applicants for liquor licenses); *id.* No. 23, 4 Pa.B. 964 (1974) (Liquor Control Board cannot constitutionally revoke license of corporate licensee for employing aliens as officers of corporate licensee); *id.* No. 16, 4 Pa.B. 679 (1974) (state may not impose citizenship requirement upon inspector of boilers and unfired pressure vessels); *id.* No. 52, 3 Pa.B. 2154 (1973) (citizenship and state residency requirements for licensure of public weighmasters unconstitutional under equal protection and privilege and immunities clauses); *id.* No. 9, 3 Pa.B. 204 (1973) (citizenship requirement imposed for teaching in public schools constitutionally invalid); *id.* No. 4, 3 Pa.B. 201 (1973) (citizenship requirement imposed for participation in scholarship program unconstitutional); *id.* No. 116, 2 Pa.B. 745 (1972) (citizenship requirement for licensure of nurses unconstitutional); *id.* No. 114, 2 Pa.B. 635 (1972) (citizenship requirement for licensure of pharmacists unconstitutional); *id.* No. 113, 2 Pa.B. 635 (1972) (citizenship requirements for licensure of physicians unconstitutional); *id.* No. 112, 2 Pa.B. 634 (1972) (citizenship requirements for licensure of real estate brokers unconstitutional); *id.* No. 92 (1971) (citizenship requirements for licensure of veterinarians unconstitutional).

59. *See* note 38 and accompanying text *supra*.

60. PA. ATT'Y GEN. OP. No. 121, 2 Pa.B. 874 (1972) (durational residency requirements imposed as qualifications for electors unconstitutional under Dunn v. Blumstein, 405 U.S. 330 (1972)).

61. PA. ATT'Y GEN. OP. No. 2, 5 Pa.B. 214 (1975) (loyalty oath unconstitutional under Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974)).

62. PA. ATT'Y GEN. OP. No. 17, 6 Pa.B. 1521 (1976) (veterans' preferences in public employment unconstitutional under Commonwealth *ex rel.* Maurer v. O'Neill, 368 Pa. 369, 83 A.2d 832 (1951) and Commonwealth *ex rel.* Graham v. Schmid, 333 Pa. 568, 3 A.2d 701 (1938)).

63. PA. ATT'Y GEN. OP. No. 15, 7 Pa.B. 2674 (1977) (field trip transportation statute for nonpublic school students unconstitutional under Wolman v. Walter, 433 U.S. 229 (1977)).

64. Under the Pennsylvania Constitution of 1968, "[a]ny Commonwealth officer whose approval is necessary for any transaction relative to the financial affairs of the Commonwealth shall not be charged with the function of auditing that transaction after its occurrence." PA. CONST. art. 8, § 10. Because of this constitutional provision, the insurance

Only three of these twenty-seven opinions are truly independent constitutional analyses of legislation. The first of these opinions[65] is the one examined by the commonwealth and supreme courts in *Hetherington*.[66] The second opinion, which dealt with the authority of the General Assembly to appropriate federal funds, was clearly designed to set the stage for litigation.[67] The third opinion scrutinized the power of the General Assembly to reenact the general appropriation act for the following year.[68]

Notwithstanding the commonwealth court's alarm in *Hetherington*,[69] therefore, the attorney general's power to direct state officials to disregard unconstitutional laws is being exercised in a limited number of areas only. Moreover, there are abundant grounds upon which this authority can be based.[70]

IV. Rational Basis for the Attorney General's Authority

The attorney general is a constitutional officer[71] clothed with broad powers under law. The Department of Justice, which he heads,[72] represents the interests of the Commonwealth.[73] The attorney general is "the chief law officer of the Commonwealth."[74] He is the "legal advisor of the Governor, in the performance of his official duties,"[75] and has the power to bind any department, board, commission, or officer of state government with his legal advice.[76] He supervises, directs, and controls all of the legal business of every administrative department, board, and commission of the state government and represents the Commonwealth in any litigation to which the Commonwealth is a party or may be permitted or required by law to intervene or interplead.[77] Similar powers and duties

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commissioner was precluded from simultaneously serving on and auditing the Workmen's Insurance Fund, *see* PA. ATT'Y GEN. OP. NO. 44, 5 Pa.B. 3245 (1975), and the Coal and Clay Mine Subsidence Insurance Board, *see id.* NO. 38, 5 Pa.B. 3005 (1975), and the auditor general was advised that he could not both serve on and audit the Board of Commissioners of Public Grounds and Buildings, *see id.* No. 9, 7 Pa.B. 1277 (1977).

65. *See* note 13 *supra*.

66. Hetherington v. McHale, 10 Pa. Commw. Ct. 501, 311 A.2d 162 (1973), *rev'd*, 458 Pa. 479, 329 A.2d 250 (1974).

67. PA. ATT'Y GEN. OP. NO. 21, 6 Pa.B. 1705 (1976) (statute prohibiting state treasurer from issuing warrant for requisitioned federal funds unless such funds have been specifically appropriated by the legislature violates both state and federal constitutions). These statutes, however, have passed constitutional muster under the Commonwealth court's decision in Shapp v. Sloan, 27 Pa. Commw. Ct. 312, 367 A.2d 791 (1976), *aff'd* July 1978, No. 214 January term 1977.

68. PA. ATT'Y GEN. OP. NO. 19A, (1977) (attempt to reenact general appropriation act for next year is unconstitutional and may be disregarded).

69. Hetherington v. McHale, 10 Pa. Commw. Ct. 501, 311 A.2d 162 (1973).

70. *See* notes 71-101 and accompanying text *infra*.

71. PA. CONST. art. 4, §§ 1, 4.1, 8.

72. Administrative Code, § 206, PA. STAT. ANN. tit. 71, § 66 (Purdon Supp. 1977-78).

73. Administrative Code, § 903(b), PA. STAT. ANN. tit. 71, § 192 (Purdon 1962).

74. Administrative Code, § 704, PA. STAT. ANN. tit. 71, § 244 (Purdon 1962).

75. *Id.*

76. Administrative Code, § 512, PA. STAT. ANN. tit. 71, § 192 (Purdon 1962).

77. Administrative Code, §§ 902-903, PA. STAT. ANN. tit. 71, §§ 292-293 (Purdon 1962).

are conferred upon the Department of Justice.[78] In *Commonwealth ex rel. Minerd v. Margiotti*,[79] the court stated,

> The Code of 1929 places the Attorney General at the head of the Department of Justice, *the most responsible post in state government after that of the Governor*. Section 904 (71 P.S. § 294) provides: 'The Department of Justice shall have the power, and its duty shall be, with the approval of the Governor: (a) To investigate any violations, or alleged violations, of the laws of the Commonwealth which may come to its notice; (b) To take such steps, and adopt such means, as may be reasonably necessary to enforce the laws of the Commonwealth.' This enjoins upon the Attorney General some of the most important duties in the conduct of government and *could never have been intended to lessen his powers to achieve the purposes contemplated or the ends desired.*[80]

Moreover, the Attorney General has the right under state law to intervene on behalf of the Commonwealth in any case in which the Commonwealth or any officer of the Commonwealth may have any interest.[81]

In recognition of his role as the chief legal officer of the Commonwealth, various rules of procedure provide that in any proceeding in which an act of assembly is alleged to be unconstitutional and in which the Commonwealth is not a party, the party raising the question of constitutionality shall promptly give notice to the attorney general, who may intervene as a party or may be heard without the necessity of intervention.[82] Under these rules the attorney general is not mandated to defend the constitutionality of a statute, but must be advised when a challenge is made. The determination whether to intervene and, if so, what position to take, is a matter for his discretion.

In addition to the statutory powers of the attorney general the supreme court has held that he is clothed with broad common-law powers.[83] These ancient powers have usually been examined in a criminal-law setting to determine the attorney general's right to supersede local district attorneys,[84] but are nevertheless bottomed on the broad degree of responsible discretion with which he is clothed. This broad discretion was recognized by the supreme court well over one hundred years ago in *Commonwealth v. Burrell*.[85] "The Office of the Attorney General is a public trust, which involves, on the discharge of it, the exercise of an

78. Administrative Code, §§ 901-908, PA. STAT. ANN. tit. 71, §§ 291-298 (Purdon 1962).
79. 325 Pa. 17, 188 A. 524 (1936).
80. *Id.* at 33-34, 188 A. at 531 (emphasis added). ***But see*** Commonwealth v. Schab, — Pa. —, 383 A.2d 819 (1978).
81. Act of May 28, 1915, P.L. 616, No. 266 (PA. STAT. ANN. tit. 12, § 145 (Purdon 1953)).
82. PA. R.C.P. 235; PA. R.A.P. 521.
83. *See* note 30 *supra*.
84. ***But see*** Commonwealth v. Schab, — Pa. —, 383 A.2d 819 (1978).
85. 7 Pa. 34 (1847).

almost boundless discretion by an officer who stands as impartial as a judge . . . ."[86]

In the context of his role as chief law officer of the Commonwealth, issues regarding the constitutionality of state statutes often come before him. The attorney general's position in response to these questions cannot be an unfailing positive Pavlovian one. He has taken an oath to "support, obey, and defend the Constitution of the United States and the Constitution of this Commonwealth and [to] discharge the duties of [his] office with fidelity."[87] In some cases the question will be governed by decisions of the Pennsylvania or federal courts.[88] In other cases, while there may be no one case that determines the issue, the attorney general will conclude upon his study of an issue on review before him that a statute is unconstitutional.[89] How then is the Commonwealth's attorney to act in such a case? To answer this question, one must first consider what effect the opinion of the attorney general has and what it means to advise that a statute is unconstitutional.

Attorneys have the right to advise their clients. Often an attorney will advise a client that a statute is probably unconstitutional and that the client is, therefore, justified in disregarding it in taking his actions.[89a] The attorney will undoubtedly advise the client that there is some risk in so doing absent a declaration of unconstitutionality by a court with jurisdiction.

That is all the attorney general does when he advises one of his clients that in his opinion a statute is constitutional. This is not advice to the public and is not an encroachment on the judicial function. It is legal advice to the official who must be advised how to conduct himself under the constitution and statutes of the Commonwealth.

> The advice of unconstitutionality given to the official does not suspend or abrogate the statute. It tells the official that, unless otherwise ordered by a court he may disregard a statu-

86. *Id.* at 39 (quoting Rush v. Cavenaugh, 2 Barr 187, 189 (1845)). In *Burrell*, an individual attempted to bring a quo warranto proceeding in face of a statute which said it "may be issued upon the suggestion of the Attorney General." The court held that the individual could not bring the proceeding and the individual then contended that the attorney general was required by the statute to bring it. The court held that this too was incorrect; not only was the attorney general the only one who could bring the action, he was the only one to decide whether the quo warranto should be brought in the exercise of his discretion. This holding raised the obvious objection that since the governor appointed the attorney general and had appointed the office-holder whose right was being challenged, it was unlikely that the attorney general would bring a quo warranto proceeding against him. The court answered that issue by stating that the attorney general was deemed to be a person of integrity and as an officer of the state would exercise his duty with proper discretion. To conclude otherwise, the court determined, "would deprive the Attorney General of his official discretion, and compel him to act against the dictates of his judgment . . . ." 7 Pa. at 40.

87. Administrative Code, § 218, PA. STAT. ANN. tit. 71, § 78 (Purdon 1962). *See also* PA. CONST. art. 4, § 3. A specific oath for the attorney general that predates the Pennsylvania Constitution of 1874 can be found at PA. STAT. ANN. tit. 71, § 813 (Purdon 1962).

88. *See* notes 59-63 and accompanying text *supra*.

89. *See* notes 64-68 and accompanying text *supra*.

89a. This conduct is expressly sanctioned by the Code of Professional Responsibility. *See* EC7-5 (lawyer as adviser serves client's interests by giving professional opinion of the ultimate decision likely to be rendered by the courts on the matter at hand).

> tory provision. Such an opinion is in no way binding upon the public. The law is still on the books . . . . [A]ny aggrieved person has a right to go to court to test the propriety of the official's conduct. It is for this reason that the opinion of the Attorney General refers to the obligation of the public official to disregard a provision believed to be unconstitutional and does not make a bald declaration of unconstitutionality.[90]

The advice that an attorney general should be empowered to give must be considered in conjunction with the general rule that an important official may refuse to perform a nonministerial task because the statute purporting to impose the duty is unconstitutional.[91] If a state officer has the authority to conclude that a statute is unconstitutional, *a fortiori* he has the right to seek advice from the chief law officer of the state on the question and rely on that advice. Concomitantly, the chief law officer has the right to render that advice.

What is the effect of that advice? It is a declaration that an act passed by the General Assembly falls afoul of the constitution adopted by the people. The act, therefore, cannot stand in face of the superior provision. In *Emerick v. Harris*,[92] the seminal Pennsylvania case confronting this issue, the court stressed the oath taken by the judiciary to support the federal and state constitutions. Justice Yeates construed the obligation of this oath as follows:

> Whether the party moves in the sphere of the *Legislative, Executive* or *Judicial* department, he is bound to maintain and uphold those compacts made with the people. Possessed of a portion of the lawmaking power, he is interdicted from exercising his legislative right in such a manner as may injure or impair the sources from which his authority is derived. In the Executive branch he shall carefully avoid every act which may have that injurious tendency. In the Judiciary, he shall fairly and patiently compare legislative acts with both the constitutions and honestly pronounce upon them as his judgment and conscience shall dictate, without regarding consequences.[93]

For members of the Executive branch to fulfull their oath to support the constitution, as suggested by Justice Yeates, the attorney general must necessarily be authorized to advise those officers when they are violating that document.

Justice Yeates also stated in *Emerick* that though he had drawn his opinion before *Marbury v. Madison*[94] was published, Chief Justice Marshall's observations confirmed his own sentiments.[95] The observa-

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90. Brief for Appellant at 30-31, Hetherington v. McHale, 458 Pa. 479, 329 A.2d 250 (1974), *rev'g* 10 Pa. Commw. Ct. 501, 311 A.2d 162 (1973).

91. Huntington v. Worthum, 120 U.S. 97 (1887); Commonwealth *ex rel.* Woodruff v. Snyder, 279 Pa. 234, 123 A. 792 (1924); Commonwealth *ex rel.* Attorney General v. Mathues, 210 Pa. 372, 390, 59 A. 961, 968-69 (1904); Note, *The Power of a State Officer to Raise a Constitutional Question*, 33 COLUM. L. REV. 1036 (1933); *See* notes 19-26 and accompanying text *supra*.

92. 1 Barr 416 (1808).

93. *Id.* at 424 (emphasis in original).

94. 5 U.S. 87 (1803).

95. 1 Barr at 423-24.

tions of Chief Justice Marshall in *Marbury v. Madison* regarding the duty of a judicial official to examine the Constitution when reaching a judicial decision[96] are applicable to an executive official who carries out executive functions, such as administration of a law relegated to him, or, in the case of an attorney, advising the official how to administer that law or whether the law is unconstitutional.

An apt example may be seen in a comparison of the Pennsylvania equal rights amendment[97] with the Human Relations Act[98] insofar as both preclude discrimination based on sex. The Human Relations Act also contains a section repealing or suspending any inconsistent law.[99] When confronted, therefore, with a statute that provided that no person of one sex shall be paroled in charge of a parole officer of the opposite sex,[100] the attorney general was bound to review the validity of that law, which had been passed in 1941, in view of the later passage of the Human Relations Act. The issue before him was a typical issue of statutory construction, *i.e.*, whether a later passed statute had, by its terms and provisions, impliedly repealed or otherwise superseded an older law. It could hardly be argued that this was not within his duties as set forth in the Administrative Code. But that was the ***very analysis that was also necessary*** under the equal rights amendment. Yet, according to the opinion of the commonwealth court in *Hetherington*, it might be held that the attorney general had no right to refer to the provisions of the equal rights amendment, even though the analysis was in effect the same. When faced with the problem, the attorney general did rule the section in violation of both the Human Relations Act ***and*** the Pennsylvania Constitution.[101]

One may conclude, therefore, that the attorney general, as part of his official duties, does have the authority to advise a state official that a particular law that he administers is not in harmony with the Pennsylvania Constitution and should, therefore, be disregarded or modified to comply with the Constitution. It goes without saying that this authority should be used sparingly and only when the attorney general is clearly convinced of the conclusion.

V. How Constitutional Issues Arise and How They Should be Resolved

How and when the attorney general's authority to advise that a statute is unconstitutional should be employed depends upon the manner

96. 5 U.S. at 109-113.
97. PA. CONST. ART. 1, § 28.
98. PA. STAT. ANN. tit. 43, § 951 (Purdon 1964).
99. *Id.* § 962(a) (Purdon Supp. 1977-78).
100. PA. STAT. ANN. tit. 61, § 331.28 (Purdon 1964).
101. PA. ATT'Y GEN. OP. NO. 150, 2 Pa.B. 1916 (1972) (Parole Act inconsistent with both Human Relations Act and equal rights amendment). ***But cf. id.*** No. 9, 4 Pa.B. 334 (1974) (since provisions of Unemployment Compensation Law are impliedly repealed by Human Relations Act, necessity to examine equal rights amendment is obviated).

in which the issue arises. The constitutionality of a statute may be addressed by the attorney general in any one of three settings, which he may often, but not always, control. First, he may be asked to render an official opinion regarding specific legislation.[102] Second, he may be advised that a suit has been instituted to challenge the constitutionality of a statute.[103] Third, he may initiate or join in a suit to establish the constitutional invalidity of a statute.[104]

A. Opinions

The attorney general should have the right to render his opinions regarding constitutionality to the members of the executive branch of government whom he binds with his advice.[105] In so doing, he acts as a normal attorney. When he is free of doubt, he advises them, and upholds the statute. When he is convinced, however, that a statute is unconstitutional, he should have the right to advise the executive official of this conclusion insofar as it governs the official's duties. This power is an outgrowth of the attorney general's responsibility to advise state officials regarding their duties and functions. This does not mean that he has the power to declare statutes unconstitutional. Moreover, the attorney general must always begin with the presumption of constitutionality.

The attorney general also has the right to review and decide the legality of regulations promulgated by state agencies under the Commonwealth Documents Law.[106] He may often conclude that a regulation is unconstitutional and issue an opinion to that effect.[107] If a statute is thereafter passed identical to the regulation held invalid there would seem to be no reason why he could not issue such an opinion.

Normally, the ruling on unconstitutionality is reviewable by a court and by an aggrieved party. It must be conceded, however, that there may be instances in which no one would have standing to raise the issue, except, perhaps, members of the legislature.[108] For example, in a series

102. *See* notes 105-111 and accompanying text *infra.*

103. *See* notes 112-116 and accompanying text *infra.*

104. *See* notes 117-121 and accompanying text *infra.*

105. *See* DiNubile v. Kent, 466 Pa. 572, 353 A.2d 839 (1976).

106. Act of July 31, 1968, P.L. 769, No. 240, § 101 (PA. STAT. ANN. tit. 45, § 1101 (Purdon Supp. 1977-78)). Section 205 of the Commonwealth Documents Law requires the attorney general to approve the legality of all proposed administrative regulations, and, unless the agency is independent from the control of the governor, the attorney general's decision that a proposed regulation is illegal is final. PA. STAT. ANN. tit. 45, § 1205 (Purdon Supp. 1977-78).

107. *See, e.g.*, PA. ATT'Y GEN. OP. NO. 16, 5 Pa.B. 1383 (1975) (proposed regulations on discrimination with respect to abortion and sterilization in public hospitals contravene Doe v. Bolton, 410 U.S. 179 (1973)); PA. ATT'Y GEN. OP. NO. 13, 4 Pa.B. 488 (1974) (school board regulations of teachers' hair styles unconstitutional under Stull v. School Bd., 459 2d 339 (3d Cir. 1972)); PA. ATT'Y GEN. OP. NO. 57, 3 Pa.B. 2210 (1973) (state police minimum height requirements unconstitutionally discriminate against Spanish-surnamed and female applicants).

108. In this regard, it is noteworthy that the legislature's agricultural committee filed an amicus curiae brief in Hetherington v. McHale, 10 Pa. Commw. Ct. 501, 311 A.2d 162 (1973).

of opinions the attorney general has held that various licenses and privileges requiring that a person be a citizen of the United States are unconstitutional under the equal protection clause.[109] It is unclear that any member of the public has the standing to challenge these rulings, but it is clear that a person aggrieved by a contrary ruling would have had standing. On balance it would seem that these opinions were justified, given the status of the law when they were rendered and because it saves individuals the expense of litigating the constitutional issue once the attorney general has concluded, on precedent, that the law was unconstitutional.

An interesting issue can arise when the governor vetoes a particular piece of legislation because of the attorney general's opinion that the bill in question is unconstitutional. If that legislation is then passed over the governor's veto, what right and duty does the attorney general have to defend it? Or, put in another way, how can he defend a law having once opined that it is unconstitutional? The attorney general can solve this problem by retaining outside counsel clearly committed to the constitutional validity of the statute to defend it.[110] Though this particular resolution of the problem is not binding precedent for future cases, it should nevertheless serve notice that the attorney general has a right, after having counseled the chief executive to veto a bill because it is unconstitutional, to urge the unconstitutionality of that bill in court and to so advise state officials.[111]

B. Defensive Litigation

When the Commonwealth is a party to an action, and the attorney general agrees with the plaintiff's contention that the statute at issue is unconstitutional, the danger arises that the court will be denied the advantage of having advocates on both sides of the issue. It is one thing to have a civil case in which the parties compromise, and another to have a case in which the compromise includes a declaration of unconstitutionality. One way to obviate this problem is to attempt to find an adverse party in interest.

For example, the constitutionality of a provision in the Administrative Code automatically placing the president of a private professional society on the state licensing board was raised as a defense in a license

109. *See* note 56 *supra*.

110. In United States v. Lovett, 328 U.S. 303 (1946), for example, the Attorney General refused to defend a suit instituted by government employees discharged by Congress as purported security risks. The Attorney General commented, "In these circumstances I feel that Congress should be afforded an opportunity to be represented by their own counsel. . . . I find it impossible to advocate with conviction the views of the Congress." H.R. REP. NO. 1117, 78th Cong., 2d Sess. 3 (1944). In Planned Parenthood Assoc. v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975) *judgment vacated sub. nom.* Beal v. Franklin, 428 U.S. 901 (1976), the Pennsylvania Attorney General retained outside counsel to defend the validity of Pennsylvania's abortion law.

111. *See* Commonwealth *ex rel.* Schnader v. Liveright, 308 Pa. 35, 161 A. 697 (1932).

suspension case.[112] The dentist alleged that since the board was unconstitutionally composed, it could not rightfully suspend his license. The attorney general agreed that the provision was unconstitutional, but argued successfully that the rule of de facto officers precluded the licensee from raising this issue in the context of a license suspension case. When the matter was initially argued before the commonwealth court, that court expressed great concern with the position of the attorney general because there was no party before it to defend the constitutionality of the statute.[113] This problem was obviated when the attorney general thereafter brought a direct action in quo warranto against the president of the society predicated on the unconstitutionality of the statute. The suit was successful, and the president was ousted.[114]

On the other hand, there are instances when, in the course of litigation, it becomes apparent to the attorney general that the statute is indeed unconstitutional. In such cases, with the approbation of the court, there have been opinions written so concluding, which resolved the litigation.[115] The latter type of case presents a growing tendency in the federal courts that can give rise to problems. Often issues are resolved between a party seeking a declaration of unconstitutionality and the state, which either agrees or concedes, but other interested parties are not heard. This has given rise to difficult ancillary litigation.[116] The courts should require notice to all interested adverse parties before allowing such a result.

C. *Affirmative Litigation*

As the state's chief lawyer, the attorney general has long been permitted to challenge the actions of administrative agencies[117] and the constitutionality of the legislation of another jurisdiction.[118] His standing, however, to test the constitutional validity of an act of his own legislature has been criticized by at least one commentator.

> The acts of an elected body of legislators should generally be treated as co-extensive with the best interests of the government, and even if an attorney general has personal doubts as to the validity of a statute, his duties seem to require that he enforce the statute until it is repealed or successfully challenged by those who are personally injured by it.[119]

112. State Dental Council & Examining Bd. v. Pollock, 457 Pa. 264, 318 A.2d 910 (1974).

113. This is not reflected in the opinion because the commonwealth court upheld the suspension by a 3-3 per curiam vote. The author, however, as the advocate for the Commonwealth, endured the "slings and arrows" of the court.

114. Commonwealth *ex rel.* Kane v. McKechnie, 467 Pa. 430, 358 A.2d 419 (1976).

115. *See, e.g.*, Fernandez v. Shapp, C 74-2959 (Pa. E.D. 1978).

116. See, e.g., Bolden v. Pennsylvania State Police, 371 F. Supp. 1096 (E.D. Pa. 1974), *modified* 73 F.R.D. 370 (E.D. Pa. 1976); Hoots v. Pennsylvania, 359 F. Supp. 807 (W.D. Pa. 1973), *appeal dismissed*, 495 F.2d 1095 (3rd Cir.), *cert. denied*, 419 U.S. 884 (1974).

117. *See, e.g.*, State *ex rel.* Sorensen v. State Bd. of Equilization & Assessment, 123 Neb. 259, 242 N.W. 609 (1932).

118. *See, e.g.*, Hopkins Savings Ass'n v. Cleary, 296 U.S. 315 (1935); Ohio v. West Virginia, 262 U.S. 553 (1923).

119. Comment, *An Attorney General's Standing Before the Supreme Court to Attack*

It is unclear, however, what "duties" require an attorney general to enforce a statute that he sincerely believes is unconstitutional. Certainly the attorney general's duty to uphold the state and federal constitutions do not impose this burden, but dictate the opposite.

The most reasonable view is that the attorney general *must* have standing as a defender of the public interest to attack unconstitutional legislation.[120] Otherwise, many individual citizens who lack the expertise or finances to challenge legislation will suffer needlessly.[121]

VI. Conclusion

Putting the discussed powers into practical effect is not an easy task, and no general guidelines are here attempted. Some considerations, however, are worthy of mention. First, when a statute encroaches the power of the executive branch, the attorney general's role as counsel to that branch imposes upon him a greater duty to test the constitutional issues than in other cases, especially since it is unlikely that a private party will do so. Second, when a statute affects the personal or property rights of individuals *inter se* the proper forum to adjudicate constitutionality is through a private law suit, in which the attorney general may or may not wish to intervene, depending on the importance of the policy to his office and to the administration. Third, on a close question, he must consider the likelihood of the issue being tested if he does not act. Only by issuing an opinion or instituting a law suit will unconstitutional action be forestalled. But, when the statutory duty falls upon a state agency, the attorney general does not have the liberty of bringing suit to challenge the constitutionality of the action taken, because he cannot very well sue his

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the Constitutionality of Legislation, 26 U. CHI. L. REV. 624, 627 (1959).

120. Numerous state courts have confirmed that the attorney general's authority to challenge the constitutional validity of a state statute is in accordance with his broad common-law powers. *See* State *ex rel.* Watson v. Kirkman, 158 Fla. 11, 27 So. 2d 610 (1946); State *ex rel.* Landes v. S.H. Kress & Co., 115 Fla. 189, 155 So. 823 (1934); State v. Washburn, 177 La. 27, 147 So. 489 (1933); Greenway's Case, 319 Mass. 121, 65 N.E.2d 16 (1946); State *ex rel.* Olsen v. Public Service Comm'n, 129 Mont. 106, 283 P.2d 594 (1958); State *ex rel.* Evans v. Brotherhood of Friends, 41 Wash. 2d 133, 247 P.2d 787 (1952). *See generally* NAT'L ASS'N OF ATTORNEYS GENERAL, REPORT ON THE OFFICE OF ATTORNEY GENERAL 32-61 (1971).

121. This point is emphasized in two cases in which the attorney general sought judicial determinations that certain state actions were unconstitutional. State Bd. of Educ. v. Bd. of Educ., 108 N.J. Super. 564, 262 A.2d 21 (Ch. Div. 1970); Hansen v. Barlow, 23 Utah 2d 47, 456 P.2d 177 (1969). In *State Board*, the court remarked,

> In equity, as in the law court, the Attorney-General has the right, in cases where the property of the sovereign or the interests of the public are directly concerned, to institute suit, by what may be called civil information, for their protection. *The state is not left without redress in its own courts because no private citizen chooses to encounter the difficulty of defending it, but has appointed this high public officer on whom it has cast the responsibility and to whom, therefore, it has given the right of appearing in its behalf and invoking the judgment of the courts on such questions of public moment.*

108 N.J. Super at 572, 262 A.2d at 25 (Ch. Div. 1970), (quoting from Wilentz v. Hendrickson, 133 N.J. Eq. 447, 445, 33 A.2d 366, 374-75 (Ch. 1943), *aff'd*, 135 N.J. Eq. 244, 38 A.2d 199 (1944)) (emphasis in *State Board* opinion). *See* also Gibbs v. Titelman, 369 F. Supp. 38 (E.D. Pa. 1973), *rev'd on other grounds*, 502 F.2d 1107 (3d Cir. 1974) (attorney general may intervene on behalf of Commonwealth's citizens under doctrine of *parens patriae* to advocate unconstitutionality of state statute).

own client. In such a case he must either issue an opinion or bring an action to uphold the powers of the state official. Fourth, when the issue is close but the matter is certain to be tested in court, the attorney general may rely on the presumption of constitutionality. Fifth, in complicated fact situations involving detailed analyses of the due process and equal protection clauses, the attorney general should recognize his limitations and defer to the courts. Last, because of the danger of upsetting the delicate balance of powers in each branch of government, the attorney general should tread lightly on statutes dealing with the legislature and its powers.