

Distinctive Competence: The Role of Virginia Attorney General Opinions in State and Local Governance

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Abstract

The devolution and judicialization movements of the past thirty years have dramatically changed the nature and structure of state-federal governmental relations. States and localities are now playing a larger role in the implementation and delivery of basic government services. Many state legislatures, such as Virginia's, because of their limited sessions and inadequate staff assistance, often leave the interpretation of complex, technical matters to state and local administrators. As a result, the role of state and local administrators in public policy formulation and implementation has become increasingly important. Often, these administrators work in a complex environment marked by unclear lines of authority and ambiguous law. The question then becomes, to whom do state and local executive branch officials turn to for assistance and legal interpretation when legislation or regulatory schemes are unclear?

One answer is the state and federal judiciary, however the process of adjudication is often an ineffective instrument for solving complex administrative questions. The risk is that courts will create what Lon Fuller (1964) calls an “undanceable tune,” one to which none of the participants know the steps necessary to keep in time with the judicial order. Building upon what Fuller (1964) referred to as the “distinctive competence” of certain legal institutions, this paper offers the opinion writing function of the state attorney general as a viable alternative to adjudication. All state attorneys general issue opinions. These opinions can shape policy and the development of law, partly because the opinions may be the only guidance on statutory or constitutional issues in the absence of prior litigation.

Building upon the French Council of State, and using the state of Virginia as a model, this dissertation examines the guiding role that state attorney general opinions can play in resolving issues of ambiguity and statutory construction in various areas of public management and administration. Specifically, this dissertation will examine the influence of Virginia Attorney General Opinions from the years 1972, 1976, 1980, 1984, 1988, 1992, 1996, and 2000. The reason for choosing these years will be explained in Chapter One. The dissertation will conclude with a discussion of how state attorney general opinions contribute to the governance dialogue, as well as their potential as transmitters of what Rohr (1989) terms “regime values.”

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Chapter One: Introduction

Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them.

- Benjamin Hoadly

Background of Study

In 1981, the Virginia General Assembly changed the rulemaking procedures of the Virginia Administrative Processes Act (VAPA) by adding a legislative veto (Jones, 1984). When an agency adopted a “substantive regulation” in its final form, the agency was required to send copies to the concerned committees of the General Assembly, whereupon a majority of a quorum of any of the recipient committees could vote to postpone the effective date of the new regulation until it had been considered by the legislature as a whole during its next normal session (Jones, 1984). If the General Assembly declined to nullify the regulation by joint resolution, the agency could formally file it with the state registrar and the regulation would become effective thirty days after filing.

In 1981, J. Samuel Glasscock, a Member of the House of Delegates, wrote to then Attorney General, Gerald Baliles, requesting an opinion as to whether the change to VAPA was consistent with the Constitution of Virginia. In the opinion, dated February 15, 1982, the Attorney General stated that the change to VAPA was unconstitutional because, “...it projects the legislative branch into the executive branch beyond Constitutionally permissible limits. Moreover, the General Assembly cannot by statute confer upon agencies the power and responsibility to promulgate regulations, and then defer, modify or nullify those regulations by resolution (1982 Va. AG 93).” One year

later, the Governor's Regulatory Reform Advisory Board recommended repeal of the VAPA legislative veto, basing its recommendations on three factors: the attorney general's opinion, legislative veto invalidation rulings of several other state supreme courts, and the U.S. Supreme Court's 1983 ruling in *INS v. Chadha* (Morris, 1987).

During the 1984 legislative session, the General Assembly adopted the Board's recommendation and voluntarily divested itself of the legislative veto. This action was particularly noteworthy not only because the issue had not been adjudicated by the Virginia Supreme Court, but because the attorney general's opinion provided the rationale for reform. The story of Virginia's legislative veto demonstrates that, while not as visible as the role attorneys general play in litigating constitutional issues, the opinion writing function of the attorney general is just as important in shaping and influencing an ever increasing amount of administrative action at the state-level.

Topic Summary

Within the current context of devolution and the increasing judicialization of public administrative processes, questions are bound to arise regarding both administrative accountability and constitutionally acceptable behavior. No system of law - whether it is judge-made or legislatively enacted - can be so perfectly drafted as to leave no room for dispute (Fuller, 1969). While adjudication and judicial interpretation constitute the main vehicles for providing clarity to the law, there exists another, under-examined mechanism for legal interpretation - state attorney general opinions. The structure of the office and the duties of the state attorney general vary from state to state, and are defined in state constitutions, statutes, and court decisions in varying degrees of

detail and emphasis (Matheson, 1993). In addition to the state attorney general's more widely recognizable role as a state's chief litigator and law enforcement officer, the attorney general is also charged with rendering advisory opinions based on statutory and constitutional interpretation. These opinions cover a vast range of subjects, from the administratively mundane to far-reaching political and constitutional questions.

Most literature concerning state attorneys general has limited itself to either the political nature of the office (Freedman, 1999; Mahtesun, 1996), or the historical, structural evolution of the political office (Matheson, 1993; McArthur, 1996; Ross, et. al., 1990). Others, such as Thompson and Smith (1974), have examined the empirical role that state attorneys general play in limited policy spheres, namely environmental protection, while Tierney (1992) examined the expanding influence of state attorneys general in the area of national consumer protection policy. However, none of the literature to date has examined the opinion writing function of the state attorney general in the broader context of state administration.

Attorney general opinions, like those of the various courts, offer guidance and instruction to public officials, but without the “taint” and baggage associated with judicial intervention. Just as courts are called upon to resolve issues of ambiguity and statutory construction, attorney general opinions play the same role on the state level. Attorney general opinions can and do exert an influence on administration through their review of statutes, administrative rules and regulations, and administrative decisions. More importantly, state attorneys general are intimately involved in, and are an integral part of, state administration. In Virginia, the office of the attorney general is a part of the executive branch, and as such, I would argue has developed, what Lon Fuller (1981)

refers to as, a “distinctive competence” in dealing with administrative or legislative problems.

Administrators who are called on to make decisions in a new policy area are often dealing with the unknown (Thompson, 1974). Administrators and officials may be dealing with the application of new laws and new policies, for which there is no precedent or guiding principle. Examples of state experimentation with new welfare and environmental policy can be found throughout the devolution literature. Attorney general opinions, in these cases, can provide both a legal and a normative basis for an administrator’s decision, and for future legislation. New policy areas often reflect new political issues. In these cases, attorney general opinions provide an effective sounding board against which innovative policies can be tested for legality and congruence with existing statutes and obligations. Furthermore, attorney general opinions allow the chief law enforcement officer of the state to comment upon any legal or constitutional defects of policy changes before they go into effect, heading off any potential legal challenges and leaving any solutions in the hands of the legislature.

State attorneys general can leave a lasting mark in policymaking arenas where there is no guiding case law (Thompson, 1974). Often, changes in governing structures and arrangements are marked by blurred lines of authority and new laws are constantly being made. Frequently, the construction of new laws outpaces the development of judicial case law to provide guidance. Attorney general opinions, absent prior litigation, can and do, in effect, become the guiding jurisprudence, as demonstrated by the 1982 Virginia Attorney General Opinion finding the General Assembly’s use of the legislative veto unconstitutional. Rather than fight the decision, the Virginia General Assembly

embraced it and disposed of the legislative veto without waiting for a ruling by the Virginia Supreme Court (Morris, 1996).

Although attorney general opinions are not legally binding in Virginia, they are practically binding because of the immunity extended to administrators and public officials who follow the opinion, even if a court overturns it (Ross, 1990). Another binding feature of attorney general opinions lies in the fact that when involved in litigation, state officials are represented by the attorney general's office. This lends a special weight to the opinions because the effectiveness of an official's representation may very well depend on how closely the attorney general's advice was followed.

The public nature of attorney general opinions also contributes to their binding effect on administrators. The fact that the opinions are published monthly, annually, and are available online, provides added impetus for administrators to take extra caution before ignoring or underestimating the normative power of attorney general opinions. Additionally, when an attorney general is elected, as is the case in Virginia, the opinion is granted additional legitimacy because the issuer of the opinion represents, in a matter of speaking, the will of the people. This characteristic immunizes attorney general opinions from one of the most often cited criticisms leveled at judicial involvement in public policy, namely the perception of undue influence of unelected judges.

Advice rendered by the office has traditionally carried great weight because it is almost always followed (Morris and Sabato, 1998). Although attorney general opinions lack the stature and finality of judicial decisions, courts occasionally will adopt, in whole or part, a well-articulated and well-reasoned attorney general's opinion (Ross, 1990). Opinions are taken very seriously and often become important legal precedents. For

example, in the three cases before the various Circuit Courts in Virginia in which the court was asked to render a decision concerning an attorney general's opinion, the courts deferred to and adopted the officer's reasoning. There have also been five instances where the Virginia Supreme Court has upheld and adopted the reasoning put forth in an attorney general opinion. Furthermore, formal attorney general opinions have been held to carry the force of law in the absence of judicial decisions to the contrary (Morris, 1987).

Finally, attorneys general, through their opinions, can instruct both citizens and public administrators on the effect of a given law or policy, without the expense and time of an adversarial hearing. This fact is particularly salient when one takes into account that many state administrators are recruited from the private sector¹. Private sector principles, such as the maximization of profit, are different from those found in the public sector. Public expectations and values are different, and newly minted public officials and administrators often lack formal instruction in public administration. This lack of knowledge highlights the need for some mechanism to facilitate dialogue and provide an authoritative reference source for administrators to examine not only the legality, but also the normative implications of their actions.

Unlike traditional opinions handed down by the courts, attorney general opinions recommend, but do not mandate, a particular course of action. However, this is not to say that attorney general opinions do not function in a similar fashion as judicial opinions. In his article, "Judges as Advicegivers," Neal Katyal contends that the Supreme Court, in addition to the more conventional task of striking down acts as unconstitutional or legitimating them, engages in "constitutional advicegiving" (p. 1711). Katyal argues that

examples of this function can be seen when the Court strikes down a law, but provides an alternative remedy in its decision. Katyal further posits that the Court, by providing advice, enters into a dialogue with the political branches, and I would add, with public administrators as well. Katyal, however, does have his critics who believe that repositioning the judiciary as advicegivers upsets the separation of powers envisioned by the Framers. In his rebuttal to Katyal, Abner Mikva, disagrees as to the Court's ability to promote the "democratic values or the effectiveness" of the policymaking process (Mikva, 1998). Mikva, rather, pines for a judicial path of modesty in its use of judicial review and caution against its entrance into the policymaking process.

Other than being an interesting diversion from the present discussion, the preceding demonstrates that the advicegiving role in government is an important one, usually associated with the judiciary. However, the utility of judicial advicegiving is muted by several structural and systemic factors. First, in order for the courts to issue an opinion, there needs to be a case or controversy. Absent justiciability, there can be no advicegiving. Secondly, and perhaps more importantly, reliance on the judicial venue for the solution of administrative issues is problematic due to the nature of adjudication. Once an issue reaches the courts, due to the adversarial nature of judicial proceedings, issues must be framed and decided in such a way as to create winners and losers, which precludes the opportunity to engage in meaningful dialogue (Glendon, 1996). Parties in a judicial proceeding communicate only that information which they have a legal obligation to impart, and only that which will benefit their particular argument. Decisions of the highest court in a given jurisdiction are final, save for appeal, usually

finding one party at fault and crafting a remedy based upon the limited information submitted at the hearing.

State attorneys general, particularly Virginia's, are authorized by statute to give advice and render official written opinions when requested in writing to do so. The opinions issued cover a wide range of topics and engage numerous state and local administrators in a non-adversarial manner. The list of officials in Virginia with the authority to request a written opinion includes the Governor; a member of the General Assembly; any judge of a court of record or a court not of record²; members of the State Corporation Commission; an attorney for the Commonwealth; a city or county treasurer; a city or county attorney; a clerk of court; a city or county sheriff; a commissioner of revenue; a chairman or secretary of an election board; and the head of any state department, division, bureau, institution, or board. The only restrictions on opinion content are that the questions presented must be confined to actual, not theoretical, issues of law, and they must avoid issues pertaining to pending litigation (Ross, 1990).

State attorneys general exert an influence similar to that of the courts through interpreting statutes, rules, regulations, and administrative decisions. However, unlike courts, which are often separated and constitutionally insulated from the political and administrative realities of the modern administrative state, state attorneys general operate at the intersection of executive, legislative, and judicial processes. State attorneys general regularly interact with all major political figures in every phase of state policymaking, giving them a distinct perspective on administrative and constitutional issues (Morris, 1996). As such, state attorneys general possess a distinctive competence,

by virtue of their location and specialization, in addressing normative issues regarding state and local administration.

State attorney general opinions can shape policy and the development of law, partly because the opinions may be the only guidance on statutory or constitutional ambiguity in the absence of litigation (Matheson, 1993). The examination of state attorney general opinions, I would argue, illuminates how these opinions contribute to and facilitate the ongoing governance dialogue by virtue of their distinctive voice within state and local public administration.

Objectives and Purposes

This dissertation is an attempt to fill the gap in the literature dealing with state attorneys general by describing the opinion writing process of one particular state, in this case, Virginia. Furthermore, I will utilize other frameworks, like those of Fuller in *The Morality of Law* (1969) and Rohr in *Ethics for Bureaucrats* (1989), to analyze a specific body of state attorney general opinions and determine the import of these opinions for public administrators. What makes this approach distinctive is that Fuller's framework typically pertains to different types of legal processes, of which advicegiving is mentioned only in passing with a reference to the distinctive nature of the French Council of State. Rohr's framework, on the other hand, relies exclusively on Supreme Court opinions. For this dissertation, I will attempt to cast the opinion writing function of one state's attorney general, to the extent possible, in the frameworks of these scholars in order to understand their import for solving administrative problems and what public administration can learn from the opinions.

This dissertation is organized around several, interrelated purposes. The first purpose of this dissertation is to demonstrate that the opinion writing function of state attorneys general operates in a fashion similar to that of the French Council of State. The Council of State, which I will discuss in greater detail in Chapter 3 of the dissertation, represents a national-level institution employing both adjudicative and advisory procedures aimed at improving government administration in France. The opinions issued by the Council of State shape legislation, inform public policy, and guide administrative behavior. Furthermore, the Council of State enjoys enormous prestige in France and fills an important role. The United States has no federal-level institution comparable to the French Council of State. The Office of the U.S. Attorney General does issue advisory opinions; however, the impact of these opinions is muted by various political and structural arrangements not found at the state level³. As a result, state attorneys general represent the most comparable American institution, outside of the judiciary, to the Council of State, particularly related to the opinion writing function.

The second purpose of this dissertation, and the primary rationale for writing it, is to demonstrate that state attorney general opinions are instructive for state and local administrators, in that they represent another vehicle for making administrators aware of the ethical norms demanded of them in their positions. Rohr (1989) labels these norms, "regime values," and defines them as the values of that political entity that was brought into being by the ratification of the Constitution, which created the present American republic (p. 68). The values are grounded on three considerations: ethical norms should be derived from the salient values of the regime; the values are normative for administrators; and these values can be found in the public law of the regime. State

attorney general opinions not only reflect the broader regime values expressed by the U.S. Constitution and resultant federal law, but the specific values reflected in state constitutions and state codes. Furthermore, attorney general opinions contribute to what Fuller (1964) termed, the “inner morality” of law, by virtue of their public nature and their ability to provide clear answers to legal questions.

The final purpose of this dissertation is to demonstrate that state attorney general opinions, in many instances, may be preferable to other types of administrative and judicial interpretation due to the "distinctive competence" of state attorneys general. Fuller (1969) defines "distinctive competence" as a set of conceptual and practical mechanisms, built into the design of each legal institution, specifically designed to address particular problems or issues. It is my contention that, state attorneys general, by virtue of their institutional design, possess a distinctive ability to resolve statutory and constitutional ambiguity, and aid in the furtherance of effective administration.

Overall, this dissertation consists of a normative, descriptive, and prescriptive examination of the role that state attorney general opinions play in guiding and instructing administrative behavior. This dissertation is *descriptive* in its use of the Office of the Attorney General of Virginia as a model for exploring the opinion writing function of state attorneys general within the broad contexts of extra-judicial interpretation and devolution. I will also utilize the French Council of State as a secondary model to demonstrate that, while the United States does not have a comparable institution on the national level due to various political and structural constraints, the Virginia Attorney General's Office operates in a strikingly similar fashion when issuing written opinions.

My approach is *normative* in that it is grounded on the assumption that the key role of public administrators is the protection of the Constitution and related stability of the regime.⁴ State attorney general opinions provide a normative guide in public administration and fill the need for "systematic direction in governance" (Wamsley, et al, 1989, p. 119). A further normative underpinning of my argument is that an understanding of how attorney general opinions can inform public administration will enhance the effectiveness of individual administrators by providing additional normative and legal guidance in the performance of their duties.

Finally, this project is *prescriptive*, in that it is my contention that state attorneys general, by nature of their unique position at the political and legal crossroads of state administration, represent a viable and effective institutional alternative to adjudication as a means of statutory and constitutional interpretation. Within this framework, I will also examine state attorney general opinions in terms of their contribution to the governance dialogue, and their potential as instructive texts for determining regime values.

Accordingly, my research expectations, based upon my review of the literature, are as follows:

- State attorneys general opinions reflect a distinctive competence in resolving statutory and administrative problems that is, at times, preferable to judicial interpretation and adjudication;
- State attorney general opinions, as a form of extra-judicial interpretation, shape legislation and inform public policy; and

- State attorney general opinions promote regime values and provide normative guidance that can be translated and utilized by public administrators to instruct their work.

Methodology

For the study of state attorney general opinions, I have selected Virginia as my case study. This is due to numerous factors: first, Virginia has an elected attorney general, which gives the rendered opinions a sense of independence since the attorney general is not dependent on the governor or state legislature for appointment; second, the Office of the Attorney General is under the Executive Branch of the Virginia Constitution, which places the attorney general outside the judicial branch and within the broader literature concerning extra-judicial interpretation; and third, ease of researcher access to the actual opinions.

Methodologically, my dissertation will employ the traditional case opinion analysis, in which court opinions are "briefed" to delineate the particular case facts, questions presented, the holding of the court, and the significance of the case holding. I will brief each Virginia Attorney General Opinion in a similar fashion. This type of analysis is useful for this project, in that it will allow me to examine the core content of individual opinions and make comparisons among several opinions on a given subject over time.

In analyzing the Virginia Attorney General Opinions, I propose to examine the opinions written by each of Virginia's 6 elected Attorneys General between the years of 1972 to 2001. I will select one year during each Attorney General's tenure (Coleman and

Terry will have two years since they each served two terms) during which there was no statewide House or Senate election. I have selected this date range and selection criteria for three reasons. First, I will examine only the opinions written and authorized by elected attorneys general. The rationale for this is to control for extraneous political variables that may impact the impartiality of the opinions, such as direct appointment by the governor, legislature, or state supreme court.⁵ Secondly, prior to 1971, the Office of the Attorney General was located within the state judicial branch. The revised Virginia Constitution of 1971 reorganized the three branches and placed the Attorney General within the Executive Branch. Third, by examining the opinions of each elected attorney general I shall be able to provide a sample of opinions from every attorney general elected under the new constitutional structure.

Additionally, by examining only those opinions issued in off-election years, I shall be able to capture the opinions within their normal operating context, absent the politicized nature of statewide legislative elections. Examining the opinion writing function of the state attorney general in off-election years serves a two-fold function. First, it eliminates much of the potential bias in the opinions on issues that may factor into statewide elections during that particular year. Secondly, since the attorney general in Virginia is not subject to term-limits, this will allow me to analyze the opinions under their normal operating context without the potential baggage of re-election campaign rhetoric. I believe that this time frame will enable me to examine the development of Virginia Attorney General jurisprudence across a variety of issues as well as to capture the evolving essence of the devolution movement as expressed in the opinions.

The first *descriptive* aspect of this dissertation will involve comparing the opinion writing process of Virginia's Attorney General's Office with the opinion writing function of the French Council of State. While I do not contend that the opinions issued by Virginia's Attorney General operate exactly as the French Council of State, it is clear that in terms of their overall form and functions, the opinion writing function of state attorneys general closely mirrors that of the French Council of State. It will be shown that while the U.S. Attorney General's office is designed in theory to operate in a similar fashion, in reality, it does not due to various political and institutional constraints.

The second *descriptive* part of this dissertation will provide a comprehensive review of all Virginia Attorney General Opinions within my stated timeframe. All opinions will be gathered from the *Annual Report of the Office of the Attorney General*. Each set of opinions for each year selected will be systematically reviewed and categorized according to opinion type and question source. Each opinion will be further analyzed to determine who is seeking the advice. This will be important in determining where, within the various areas of the state and local governments, the opinions are having their greatest potential impact. Finally, I will utilize several measures to gauge the impact of the attorney general opinions on public administration, including: 1) how Virginia courts have treated the opinions; 2) legislative tracking to determine the General Assembly's response to the opinions; 3) changes in state agency administrative procedures based on the opinions; and 4) changes in local ordinances, practices, and policies in response to the opinions.

The normative aspect of this dissertation will illustrate how Virginia's Attorney General Opinions provide legal and normative guidance to state and local administrators

through their expression of both law and overarching regime values. Using Rohr's regime values framework, I will demonstrate how state attorney general opinions, like Supreme Court opinions, inform public administration via their institutional, dialectic, concrete, and pertinent characteristics. Some examples of attorney general opinion guidance include questions of whether or not the use of the term "Christmas break" is permitted by public school districts (1995 Va. AG 107), whether the issuance of an executive order requiring all state agencies to divest any holdings or investments in South Africa exceeded the governor's constitutional authority (1990 Va. AG 39), and whether or not local school districts could refuse to offer a free public education to children whose parents resided on a military base (1980 Va. AG 1).

The prescriptive aspect of this dissertation will build upon the descriptive and normative aspects illustrated above by applying Fuller's distinctive competence framework to my selected body of Virginia Attorney General Opinions to determine their import to public administrators. I will demonstrate my contention that the opinion writing process of state attorneys general possesses a distinctive competence that is preferable over adjudication for solving many of the polycentric problems and issues facing state and local administrators within the context of devolution. Furthermore, these opinions, unlike the adjudicative process, facilitate rather than hinder dialogue due to their non-adversarial framing of issues and remedies.

Chapter Summary

The remaining chapters in this dissertation will be organized as follows. Chapter Two begins with an examination of the literature regarding the opinion writing function

of state attorneys general. While in vogue for the latter part of the 1960s and 1970s, most of the literature stopped examining the opinion writing function of state attorneys general and started focusing on the more high-profile litigation function. From there, I will present a brief examination of devolution and judicialization and their impact on public administration, particularly at the state and local level. As a result of various devolution efforts, states and localities are playing a larger role in designing and implementing domestic social service programs and the accompanying regulations. The corresponding increase in judicialization has forced state and local administrators to become more cognizant of the constitutional norms expected of them in carrying out their governing tasks. The remainder of the chapter discusses the analytical frameworks of Fuller and Rohr, namely the forms and limits of adjudication as a means of addressing questions regarding public administration issues and the import of regime values for public administration, respectively.

Chapter Three presents a brief description of the Office of the Attorney General in the 50 states, detailing the selection processes and opinion writing function of each office. This will be followed by a historical overview of the Virginia Attorney General's Office and a detailed examination of the opinion writing function. The opinion writing function of the Virginia Attorney General will be compared with that of the United States Attorney General's Office and the French Council of State to demonstrate how the presence, or lack thereof, of a cohesive and uniform type of legal advicegiving can influence both legislation and administration.

Chapters Four and Five consist of an in-depth analysis of Virginia Attorney General Opinions from the attorneys general in my sample. Chapter Four will present a

broad descriptive analysis of the opinions selected, concentrating on the issues covered by the various opinions and the sources of opinion solicitation. Chapter Five presents a more detailed analysis of the opinions selected, focusing on 1) the impact of the opinions on state and local administration, 2) the impact of the opinions on General Assembly legislation, and 3) the impact of the opinions within the Virginia Judicial system.

Chapter Six provides an analysis of the Virginia Attorney General Opinions within the analytical frameworks of Fuller and Rohr. Here I will emphasize what I consider to be the distinctive competence of attorney general opinions in addressing state and local administrative issues, as well as the normative values expressed by the opinions. Chapter Six will close by offering some conclusions regarding the contribution of state attorney general opinions to public administration, lessons learned from these contributions for public administrators, and areas identified for further research on the subject.

¹ Many of the changes brought about by devolution are rooted in “New Public Management”, which is based, in large part, on private sector values.

² In Virginia, courts of record include all Circuit Courts, while courts not of record include all General District Courts and Juvenile and Domestic Relations Courts.

³ The Comptroller General of the GAO also issues written opinions concerning governmental operation, however the GAO is an instrument of Congress and only addresses those issues that Congress deems appropriate. For this reason, I would argue that the opinion writing function of the GAO is limited when compared to state attorneys general, who issue opinions to a broader constituency unencumbered by issues of political control.

⁴ Virginia Attorneys General take an oath to uphold the Constitution of the United States as well as their own state’s constitution.

⁵ The Attorney General in Tennessee is appointed by the Tennessee Supreme Court. Tennessee is the only state that utilizes this particular method for appointing an attorney general.

Chapter Two: Literature Review

The language of the law must not be foreign to the ears of those who are to obey it. – Learned Hand

Introduction

This chapter summarizes the available literature on state attorneys general, emphasizing the current gap regarding the opinion writing function. The literature review also provides the analytical frameworks used for the dissertation research. The analytical frameworks are drawn primarily from four areas of concentration: the impact of devolution on the states, the impact of judicialization on public administration processes, Lon Fuller’s “distinctive competence”, and John Rohr’s “regime values.” These frameworks are offered to provide background on two important contextual factors, devolution and judicialization, that have profoundly influenced state and local public administration. Building upon these two frameworks, this chapter then summarizes the remaining two analytical frameworks utilized, distinctive competence and regime values, to gauge the importance of attorney general opinions to public administration.

This chapter uses these conceptual and analytical lenses to build a theoretical framework for analyzing the attorney general opinions selected. The following chapter, Chapter 3, utilizes a comparative framework to understand more fully how the Virginia Attorney General operates compared to the U.S. Attorney General and the French Council of State. Chapter 3 reviews public administration and political science literatures specifically addressing the opinion writing function of the U.S. Attorney General and the French Council of State.

State Attorneys General Opinions

Most of the literature concerning state attorneys general has generally limited itself to examining the political nature of the office (Freedman, 1999; Mahtesun, 1996) or the historical, structural evolution of the political office (Matheson, 1993; McArthur, 1996; Ross, et. al., 1990). Others (Thompson and Smith, 1974; Tierney 1992) have attempted to explore the empirical role that state attorneys general play in limited policy spheres, namely environmental protection and national consumer protection policy. For the most part, current literature concerning specific functions of state attorneys general tend to focus on the more public litigation role of the office (Webster, 1988; Buniva & Kibler, Jr., 1994; Zimmerman, 1999; Waltenburg & Swinford, 1999; Zimmerman, 1998). However, very few authors have examined the opinion writing function of the state attorney general within the broader context of state administration and legal advicegiving in general.

Much of the scholarship that does acknowledge or mention state attorney general opinions focuses primarily on the impact of specific opinions in limited policy areas. For example, Dellera (1993) examined the impact of a series of opinions issued by the New York Attorney General on the power of counties to undertake affordable housing programs. At issue was whether or not the language of the New York state constitution contained a specific grant of power to counties that would enable them to issue bonds for the purpose of building affordable housing. The Attorney General opined that counties could, under their general police powers, fund such activities (Dellera, 1993). Likewise, Tuma (2001) examined the potential impact of a prior Texas Attorney General opinion forbidding the use of public property for private use on the question of whether or not

state employees could be prosecuted for theft for using a municipality's computer to send personal e-mail or to search the internet for personal reasons.

Neill (2002) discusses the controversy spurred by a recent Texas Attorney General opinion stating that hospital districts in Texas must inquire into the citizenship of persons seeking preventative care at a discounted rate. The attorney general based his opinion on an interpretation of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) stating that illegal aliens are not eligible for state and local benefits absent an "affirmative" state law to the contrary (Neill, 2002). According to the attorney general's interpretation of PRWORA, hospital districts in the state are not allowed to provide free or discounted non-emergency care to illegal immigrants without a specific exemption created by the state legislature. The opinion further stated that hospital administrators could face legal consequences and federal funding sanctions could be imposed on districts that make such an unauthorized expenditure of public funds (Neill, 2002).

Further examples include state attorney general opinions on property owner liability for cases of lead poisoning¹ (Shapiro, 1998), the ability of teachers to utilize copyrighted material for teaching or research purposes² (Georgia Attorney General Opinion, 1996), the public display of the Ten Commandments³ (*Church and State*, May 2000), and the legality of expending public funds to employ outside counsel for legal services to state officers, departments, commissions, agencies, boards, and instrumentalities created by the legislature or established under state laws⁴ (McGinely, 1997).

One of the more interesting articles concerning a specific attorney general opinion discussed the opinion's unintended negative impact (Katsinas, Colon, Johnson, Sanders, & Thompson, 1999). A 1928 opinion of the Ohio Attorney General effectively delayed the establishment of a junior college system in the state due to a strict reading of statutory law. The opinion stated that the term, "junior college", had no special significance in statutory law nor was it in current use as a designation of any particular class of schools (Ibid). This opinion forced the Ohio General Assembly to pass a series of bills, following decades of debates and vetoes, enabling the establishment of public junior colleges in the state (Ibid). As a result of this chain of events, the authors argue that Ohio has lagged behind its neighbors in establishing two-year public colleges.

The most extensive discussion of state attorney general opinions is provided by Thomas Morris (1987) in an article entitled, "State Attorneys General as Interpreters of State Constitutions." Morris (1987) argues that state attorneys general contribute significantly to the administrative functioning of state government through their frequent interpretation of state laws and state constitutions, particularly in light of the prohibition in many states against high court advisory opinions. The opinions issued by state attorneys general become "significant mediums for expounding upon and implementing state constitutions" (Morris, 1987, p. 135). Attorney general opinions are "legal in essence, administrative in their character, and quasi-judicial in effect" (Akers, 1950, p. 571). The opinions are legal in that they emanate from the office of the chief law enforcement officer of the state, administrative in that the opinions are similar to rules adopted by administrative agencies, and quasi-judicial in the sense that the opinions are an expedient alternative to adjudication (Morris, 1987). Morris (1987) also argues that

the opinions, while not specifically binding as law, are binding in nature due to their public nature and perceived degree of impartiality. For a more thorough discussion see Chapter 3. Along the same line of thought, Abrahamson (1991) discusses the legislative oversight function performed by many state attorneys general through their monitoring of judicial opinions to determine their effect on existing or proposed statutes as well as through their issuing written opinions to state officers and agencies interpreting statutes and advising specific courses of action.

Overall, the literature concerning state attorneys general is rather limited concerning specific functions of the office, with a dominant focus on the more visible litigation function of the office. Although some scholars, as evidenced by the aforementioned authors, have mentioned the opinion writing function in brief, there has been little research committed to examining the opinion writing function of state attorneys general within the broader context of state and local administration. While some scholars (Morris, 1987; Thompson and Smith, 1974) have attempted to analyze attorney general opinions in terms of their impact on public administration within limited policy spheres, none has made a concentrated effort to examine an entire body of state attorney general opinions and their impact over time on a state legislature, local and state administrators, and the state judiciary, particularly taking into account newer trends of devolution and judicialization.

Analytical Frameworks

Devolution and the States

The modern U.S. federalist governmental structure involves a complex system of interrelated and complimentary powers. The devolution movement of the 1970s, the

New Federalism of the 1980s, and the New Fiscal Federalism of the 1990s added to this complexity, fundamentally changing both the structure and nature of governance. As a result, states and localities are playing a larger role in the design, funding, and implementation of public policy. Not only have states taken the lead in policy efforts, they are considered to be the most responsive, innovative, and effective level of government in the federal system today (Lowry, 1992). The use of states as the primary independent nonfederal actors to carry out federal policy objectives has grown with the role of the federal government itself (Posner, 1996). States have become the “paramount implementers of domestic governmental programs” (Walker, 1996).

The New Deal programs of the 1930s centralized government authority over social programs at the federal level. Prior to the New Deal era, these programs had been conducted mainly at the state and local level. The centralizing trend continued with the explosion of grants during post-World War II prosperity, new social and environmental programs developed during President Johnson’s Great Society, and labor and civil rights legislation. In the early 1970s, President Nixon’s program of “new Federalism” heralded the beginning of a new trend aimed at reducing the role of the federal government in domestic programs, most notably social welfare, through the use of grants-in-aid and categorical block grants administered at the state and local level (Shafritz, 1996). This trend continued under the Reagan administration in the 1980s with the intent of further reducing the federal government’s policy and fiscal role in social welfare and environmental programs. Devolution reached its zenith in 1994 under the “new fiscal federalism” advocated by the majority of the 104th Congress. Legislation passed as part of the “Contract With America” transformed most social welfare entitlements into block

grants to the states (Ladenheim, 1999). The most recent trend in the devolution movement, “second order devolution,” has taken place on the state level, with states “devolving” the responsibilities of program management and oversight to local governments and non-profit institutions (Nathan, 1997).

Current devolution experiments have raised a variety of concerns. Most problematic are questions of oversight and the protection of personal rights and civil liberties. Since the federal government, and to a great degree state governments, lack the resources for full oversight of their myriad programs, most programs rely on “fire alarm” oversight, addressing and confronting issues affecting program management only when they evolve into emergency situations (Posner, 1998). Many state legislatures, because of their limited sessions and inadequate staff assistance, leave the interpretation and implementation of complex technical legislative matters to other branches and officials (Anderson, 2000). Without the traditional administrative controls provided by a full-time legislature, “the effectiveness of government substantially depends upon executive leadership in both the formulation and execution of policy (p. 55).”

The question then becomes, to whom do those charged with implementing policy turn for assistance and legal interpretation when legislation or regulatory schemes are unclear? One possible answer is the judicial branches of government. Courts are often called upon to interpret and decide the meaning of statutory provisions that are ambiguously or unclearly stated, leaving such legislation open to conflicting interpretation by actors in the political branches. Courts are becoming more involved in policy formulation, specifying not only what government cannot do, but also what it must do to meet legal or constitutional requirements (Anderson, 2000). The judiciary’s

greatest impact on administration flows from the interpretation of statutes, administrative rules and regulations, and the review of administrative decisions.

However, public administration and legal theory literature is replete with disenchantment regarding the influence that the judiciary exerts on public policy. Some authors argue that an over reliance on judicial adjudication tends to lead to "piecemeal development of constitutional doctrine (Rosenfeld, 1993)." Very often, court-made law produces a lack of congruence between judicial action and statutory law through its failure to articulate reasonably clear general rules and inconsistency in decisions manifesting itself in contradictory rulings, frequent changes of direction, and retrospective changes in the law (Fuller, 1969).

Other authors (Bickel, 1979; Diver, 1979) contest the legitimacy of judicial involvement in the public administrative process, citing among other things, conflicts in the notion of separation of powers and encroachments on the division of power inherent within federalism. Still, others point to Publius' argument in *Federalist 78*, which stated that the judiciary would be the least intrusive of the three proposed branches of government due to its lack of influence "...over either the sword or the purse...(Cooke, 1989, p. 523)." President Abraham Lincoln himself even called into question a blind reliance on the judiciary, stating,

"If the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court...the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal (as quoted in Eisgruber, 1994).

Still others adopt a different critical stance, such as Horowitz (1983), questioning the ability of judges to understand the complexities of public policy factors, such as budgeting constraints.

An additional impediment to reliance on judicial opinions is evidenced by the fact that the courts seldom review many executive branch decisions and administrative actions. The judiciary's use of "...threshold justiciability and political questions barriers often gives the elected branches sole responsibility for ensuring that their own actions conform to constitutional norms (Fisher, 1988, p. 85)." In reality, many public administration issues are nonjusticiable (Rosenfeld, 1993). Often, no one will have standing, the case will be moot before there is a chance of review, there will be insufficient incentive to sue, or an immunity defense will preclude judicial review on the merits (Strauss, 1993). Even the implementation of judicial decrees to settle disputes and restore rights often requires the executive branch to exercise discretion (Rosenfeld, 1993).

In confronting important constitutional issues, state courts face a range of interpretive questions, many unanswered by state constitutions (Rossi, 1999). When asked to answer legal questions to which no text or legal precedent is available, courts must look to extra-textual interpretive tools to aid in decision-making (Rossi, 1999). Likewise, public administrators also face the same dilemma in the absence of clear guidance. However, unlike courts, whose misinterpretation of the law can be remedied by appellate branches or legislative action, public administrators are expected to act with confidence that their decisions and actions comply with important legal mandates, a task made even more difficult within the context of devolution.

Judicialization and Constitutional Competence

In addition to devolution, a separate, yet parallel, increase in the "judicialization" of public administrative processes has provided another challenge to modern governance. Public administrators are expected to be aware of the various constitutional requirements that accompany their positions. Numerous rulings from federal district courts, circuit courts of appeal, and the U.S. Supreme Court have sought to introduce procedural and due process protections into virtually all administrative processes. As a result, public administrators, at all levels, are expected to take on more diverse responsibilities with greater autonomy and fewer controls, while ensuring that their actions comply with constitutional norms (Rosenbloom, Carroll, and Carroll, 2001).

That the language of public administration, and that of the United States, is heavily influenced by the law is not a new revelation. Tocqueville noted as much during his travels in the United States from 1831 and 1832 when he observed that the discourse of lawyers and the law had penetrated, "...beyond their walls into the bosom of society where it descends to the lowest classes (Tocqueville, 1840, p. 280). Not only was legal language adopted in common speech, but a legalistic spirit seemed to pervade "the whole community and country" (p. 280). Glendon (1991), a more recent observer of this phenomenon, argues that the increasing tendency of citizens to speak in terms of "rights" is further evidence of the law's permeation into the life of the modern state.

As the administrative state expanded under the New Deal and solidified with the passage of the Administrative Procedures Act (APA), a debate arose between defenders of administrative agency authority and those who criticized the multi-functional ability of public agencies to create new rules that carried the force of law, enforce the rules, and

adjudicate disputes arising from the enforcement of the rules (Cooper, 2000). Critics feared that the lack of court-like protections within administrative actions would result in an unchecked abuse of power. Defenders of the modern administrative system argued that the greater danger was an overjudicialization of administrative processes, resulting in a weakened flexibility. Since courts and agencies perform different government roles, they should have different procedures tailored to their respective functions. Other supporters, fearful of overjudicialization, took issue with the idea that rigid procedural guidelines would be helpful, arguing that democracy should not end up being replaced by a lawyerocracy (Cooper, 2000).

Modern American public administration exists in one of the most law-ridden societies that has ever existed (Glendon, 1991, p. 2). The marked increase in the assertion of rights-based claims, the result of the civil and criminal rights movements of the 1950s and 1960s, has also seen a parallel increase in recognition of those claims in federal courts (Glendon, 1991). In the 1980s, many state supreme courts, following the lead of their federal brethren, began interpreting state constitutions in a manner which conferred more rights on individuals (Glendon, 1991). Whether these developments have been for good or ill is debatable, but the irrefutable evidence of this movement has been increased attention by the courts, at all levels, to administrative processes, often resulting in a shotgun marriage between administrative and judicial procedures.

Public administrators are expected to use their discretion in implementing policies that promote the public interest, but they are also expected to inform this discretion with constitutional principles (Rohr, 1986, p. 183). Constitutionally motivated public administrators may be policy advocates but their advocacy must be tempered by the

imperatives of constitutional order and individual rights (p. 183). In exercising discretionary authority, their judgment must be informed by the constitutional needs of the time (p. 183). If one accepts the argument put forth by Rohr (1986) that public administrators exercising discretionary authority must often choose which constitutional master to serve, there is still an expectation and a demand implicit in their authority that their choice will reflect constitutionally acceptable behavior.

Rohr (1986) posits that the overwhelming majority of claims regarding individual rights begin and end in administrative agencies, not the courts. As a result, public administrators must learn to think like judges, as well as like legislators and executives, because they are often all three of these (Rohr, 1986, p. 185). However, Rohr cautions public administrators that the exercise of administrative discretion must not collapse into a theory of managerial utilitarianism, weighing compliance with constitutional norms against managerial and policy efficiency. The failure of administrators to actively engage constitutional expectations and acknowledge their multiple roles may result in judicial intervention that can destroy the most careful long-term planning and the most elegant cost/benefit analysis (Rohr, 1986).

American public administration is based on the proposition that government decisions and activities should follow the rule of law (Rosenbloom, Carroll, and Carroll, 2000). To govern according to the law, public managers, on all levels, must understand the law that applies to their conduct (Rosenbloom, et. al., 2000). Public managers must possess two kinds of legal knowledge, a basic understanding of constitutional principles, concepts, and values, and the substantive and administrative law that is specific to different units of government, individual agencies, policies, and programs (p. xv). The

threshold of constitutional competence was established by the U.S. Supreme Court in *Harlow v. Fitzgerald* (457 U.S. 818, 1982), where the Court concluded that, "...a reasonably competent official should know the law governing his conduct," and that most public personnel can be held personally liable for violating, "clearly established statutory or constitutional rights of which a reasonable person would have known." All relationships within public administration are regulated to one degree or another by the Constitution (Rosenbloom, et. al., 2000). Constitutional competence does not require that public managers become constitutional lawyers, only that they need have knowledge of the constitutional rights of their subordinates and other individuals affected by their official actions (p. 2). The federal courts have also expanded the definition of "state action" over the last twenty years, applying not only to official acts of office, but to those involving contractors in a variety of contracting out situations. As such, the number of state actors whose behaviors are subject to constitutional norms has increased, particularly when coupled with the diffusion of authority accompanying devolution.

At a minimum, constitutionally competent public administrators must be aware of how the Constitution limits the means available for implementing public policy (Rosenbloom, et. al., 2000, p. 105). As the Court stated in *McCulloch v. Maryland* (17 U.S. 316, 1819), "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are Constitutional." Popular ends will never justify unconstitutional means. The complexity of many governmental objectives, the often chronic underfunding of public agencies, the need to balance competing values, media attention, the requisites of political

accountability, the diffusion of authority brought about by devolution, and the openness with which much of the public sector operates all contribute to the challenges that public managers face (Rosenbloom, et. al., 2000). A further challenge to public administrators is the fact that the constitutional limits on administrative means are not fixed or static, which requires more diligence and guidance in exercising authority (Rosenbloom, et. al., 2000).

The changes to public administration brought about by devolution (diffused authority and responsibility) and judicialization (constitutional protections as part of administrative procedures) has resulted in an ever changing landscape of organization and responsibility. These changes call for vigilance on the part of public managers, yet vigilance alone may not suffice. In an era of unclear lines of authority and often conflicting interpretations of relevant statutes and regulations, where does the constitutionally minded public administrator turn for advice? And what else should the administrator take away from that advice in addition to a constitutionally sound plan of action? The remainder of this chapter seeks to provide answers to these questions.

Distinctive Competence and Adjudication

The manner in which public bureaucracies are organized and administered has a profound effect on their capacity to serve the public good (Terry, 1995) and their ability to conform to constitutional standards. To this end, it is vital that these various administrative policies, actions, and powers be kept in congruence with one another to guard against intentional and unintentional constitutional violations.

Lon Fuller posits that the solution to problems of administrative congruence can be found in the creation and interpretation of law that will respect not merely words, but the implicit ideals of society and government that those words attempt to express (Winston, 1981). According to Fuller, and others such as Rohr (1986), the interpretation of law is the foremost institutional process able to give form and meaning to these ideals. The legal system represents a complex set of rules designed to "rescue man from the blind play of chance and to put him safely on the road to purposeful and creative activity (Fuller, 1969, p. 9)." Within this framework, an interpretation of law does not simply express what one can or cannot do; it furnishes a baseline against which behavior and interaction are guided (Winston, 1981).

Lon Fuller developed a theory of jurisprudence called "eunomics," which he defined as, "the science, theory, or study of good order and workable social arrangements (Winston, 1981, p. 14)." The eunomic approach viewed the emergence of legal institutions as a conscious and reasoned response to problematic social situations (p. 14). Secondly, it viewed different forms of social ordering as constituted by basic moral principles that are independent of the ends sought by means of these forms (p. 14). Third, eunomics focused on the "distinctive competence" of different legal institutions in purpose, structure, and capacity to resolve substantive problems (p. 14). In other words, each legal institution, or arrangement, has built into its design a set of conceptual and practical mechanisms specifically designed to address particular problems or issues. Fuller describes this specialized set of tools and viewpoints as each institution's "distinctive competence." Fuller identified five principal legal processes, each with its own mechanisms, which contribute to social ordering: adjudication, mediation, contracts,

legislation, and managerial discretion. For my purposes here, I will focus primarily on adjudication.

Adjudication is a device that gives formal and institutional expression to the influence of reasoned argument in human affairs (Winston, 1981, p. 94). Adjudication, according to Fuller, is a form of social ordering which occurs within an institutional framework that is intended to assure opportunity for the presentation of proofs and reasoned arguments (p. 94). The product of this process is not merely judicial pronouncement of law, but a contribution to what Fuller (1969) calls the “inner morality of law.” Fuller’s “inner morality of law” demands that there be rules (i.e. laws), that they be made known, and that they be observed in practice by those charged with their administration (Fuller, 1969, p. 157). While Fuller was primarily describing commercial and criminal law, I would argue that the same could be said of all public law, particularly administrative law, as it is designed to guide the behavior of public administrators in their interactions with citizens and with each other. Murphy (1982) applies the same argument to the constitutional mandate that government promulgate the law making it publicly available and announcing its existence before it can take effect. The public’s right to be advised of the law and the government’s duty to make the law known are essential in a democratic society (Murphy, 1982).

Fuller, in his book, *The Morality of Law* (1969), states that most of the world’s injustices are inflicted “not with the fists” but “with the elbows (p. 159).” What Fuller means here is that while direct, intentional violations of the law by those charged with enforcing it harm society, more often, it is the indirect, unintentional action or omission that causes the most harm. It is only a strong commitment to the “principles of legality”

that compels government to answer not only for its fists, but its elbows as well (Fuller, 1969, p. 159). Through a reasoned interpretation of the law, the interpreter aids the user in not only avoiding harm, but in understanding the need for reflection. Others, such as Fiss (1981) and Rohr (1989) argue, along the same line as Fuller, that through adjudication values, such as equality, fairness, and due process, are given recognition, legitimacy, and operational standards by which administrators can guide their actions.

In his typology of legal processes, Fuller outlines the strengths and weaknesses of adjudication as a social ordering mechanism. Adjudication's strength is in dealing with questions of right or fault. Often when the courts enter into the administrative process it is because the rights of an individual, or a group, have allegedly been violated by the government. At other times, courts are called on to solve deeper administrative and political questions concerning the authority of one agency or branch of the government over a particular policy area. Under these limited circumstances, adjudicative bodies are blessed with a "distinctive competence" in resolving problems. However, the great danger is that we will "unthinkingly carry over to new conditions traditional institutions and procedures that have already demonstrated their faults of design" (Fuller, 1969, p. 176).

Adjudication is a process with which we are familiar, yet one that may be an ineffective instrument for solving complex polycentric issues in government (Fuller, 1969). Adjudication loses its effectiveness and its "distinctive competence" when dealing with polycentric problems. A polycentric dispute is one in which any resolution is likely to have unpredictable, indirect consequences on both the parties involved and those not directly involved in the dispute (Wright, 2000). As the number of interacting centers

present within a dispute increase, there is a corresponding increase in the likelihood that one of them will be affected by a change in circumstances (Fuller, 1969). Polycentric disputes are far more complicated than issues of right or fault due to the varied centers of power and multiplicity of functions involved. Issues involving public administration, particularly within the devolution context of today, often revolve around coordinating and monitoring collective activities, for which the judiciary can provide little guidance, or guidance that may make matters worse. There are legitimate concerns involving rights and fault, but more often, the conflicts stem from coordinating the various activities of local, state, and federal officials.

Adjudication's distinctive competence is also diminished by the fact that the judiciary is sometimes unprepared for or unresponsive to broad societal changes. Early in the 20th Century, Roscoe Pound (1926) observed that there was a crisis in American law and a strain on legal and judicial institutions which he attributed to the failure of responsive jurisprudence to catch up to the new problems created by the republic's rapid urbanization. The judicial actor who is out of touch with the pressing needs of the present is particularly dangerous because he or she does not merely promote unfortunate policies but can also freeze rules of the game, rendering them an inadequate measure by which to judge new governmental frameworks (Rosenfeld, 1993). Judges are often weighed down by obsolete ideological baggage rooted in a largely static and relatively distant past, rendering their guidance on specific modern administrative issues particularly problematic.

Despite the shortcomings of adjudication, there is still much of value for the interested public administrator looking for guidance on broader issues of constitutional

rights and norms. Adjudication establishes firm rules on constitutionally acceptable forms of behavior, delineates rights, and establishes boundaries of authority for the elected branches. Legal opinions, the product of adjudication, afford the opportunity for public administrators to reflect upon the historical and institutional nature of rights, behavior, and authority; and how those rights have evolved over time.

Rohr's Regime Values

In *Ethics for Bureaucrats* (1989), Rohr writes about the critical importance for public administrators, at all levels of government, to be cognizant of the ethical norms demanded of them in their governing activities. Rohr terms the ethical norms, "regime values," and defines them as "...the values of that political entity that was brought into being by the ratification of the Constitution that created the present American republic (p. 68)." For Rohr, it is the recognition of these values that proves to be the most critical aspect of ethical public administration. He further delineates three considerations upon which these regime values rest. The first is that ethical norms should be derived from the salient values of the regime. Second, these values are "normative" for bureaucrats because they take an oath to uphold the regime. Third, these values can be discovered in the public law of the regime.

In addition to public law, Rohr lists several other sources where one can find indications of regime values. Among these are the writings and speeches of outstanding political leaders, major Supreme Court decisions, campaign platforms, scholarly interpretations of American history, literary works, religious tracts, and even the rhetoric of standard Fourth of July oratory (p. 75). Rohr prefers, however, to rely on Supreme Court decisions because they expose bureaucrats to several conflicting interpretations of

American values through their four, interrelated characteristics. According to Rohr, Supreme Court decisions are *institutional*, *dialectic*, *concrete*, and *pertinent* (p. 77).

Supreme Court decisions are *institutional* in the sense that they represent a history of values as they apply to all citizens, whereas attorney general opinions represent a much narrower history of state and local values. Rohr posits that bureaucrats must be able to distinguish between stable principles and passing fads when studying the values of the American people (1989, p. 77). Supreme Court justices are part of a historically fashioned institution, and as such, their opinions seek to establish a continuity of jurisprudence through their reliance on the principles established in previous opinions in a self-referential manner. This is not to say that these opinions are not at times contradictory and confusing. As Rohr suggests, bureaucrats who use legal opinions would be well advised to examine what the issuing institution has said at other points in its history to avoid “becoming imprisoned by their own historical circumstances (1989, p. 78).” Many of the Court’s decisions are often issued on subjects that defy historical reference and precedent, and as such, the Court must reinterpret familiar principles in light of new circumstances, just as adults reevaluate the principles learned from childhood in the face of new personal demands (Rohr, 1989, p. 78).

Supreme Court opinions are *dialectic* in that they often consist of concurring and dissenting opinions. The dialectic nature of the opinions offers the reader an opportunity to observe a dialogue or debate concerning key issues within a formal context. The opinions offer insight into how different Justices construe certain laws and policies, and provide administrators with alternative ways of looking at the same problem and offer the readers an opportunity to reflect on their own views and legal/policy constructions.

Often, as situations change, the opinions reflect new policy statements. This is especially evident when they break from previous interpretations of law, or break new ground in establishing benchmarks for future policymaking decisions and statutory construction.

Supreme Court decisions can shape attitudes and influence the exercise of administrative discretion (Rohr, 1989). According to Rohr, it should make no difference whether Supreme Court opinions present a single, unified legal position or interpretation without the benefit (or distraction) of concurring and dissenting opinions. What matters, ultimately, is the wisdom and integrity of the opinion (Rohr, 1989, p. 81).

The third characteristic is that the opinions are *concrete*. Justices may soar to the highest abstractions in discussing broad concepts, but at the end of the day, they must apply their wisdom to an immediate and concrete situation (Rohr, 1989, p. 81). Supreme Court decisions resolve ambiguity, address specific questions, and demonstrate what certain values (i.e. due process) mean in practice and in relation to the facts presented. Public administrators often exercise considerable discretion. Often, there is a lack of rules explicitly addressing the exercise of such discretion and a lack of specific guidelines governing policy implementation. In addition to providing theoretical discourse, opinions of the Court often provide instructions on how to put regime values to practical use (Rohr, 1989, p. 81).

The final characteristic identified by Rohr is that Supreme Court opinions are *pertinent*. Many of the political issues of the day find their way into the Courts. Supreme Court opinions often address variations on the same issue in a number of opinions. As Rohr has suggested, administrators can examine cluster opinions of the Court on a given issue to get a feel for the argument occurring within and between the

Justices. Supreme Court opinions provide an opportunity for administrators to reflect on how the values espoused in such writings inform the exercise of their duties in the public governance process, and the potential consequences of both action and inaction.

So why are regime values so important? Regime values offer a method of encouraging responsibility that supplements our traditional reliance on elections, appellate procedures, judicial review, and the “representative” character of bureaucracy in a demographic sense (Rohr, 1989, p. 85). Regime values aim at developing an understanding of responsibility that includes an informed patriotism and sound judgment on the part of public administrators (p. 85). Opinions, whether they are issued by courts or attorneys general, represent another chapter in the ongoing governance dialogue, a dialogue aimed at discovering both the proper social ordering and the morals, or regime values, implicit within that order.

One of the most commented on aspects of the American political system is the tendency for both citizens and government officials to turn to legal advice. O’Leary and Wise (1991) illustrate the increasing trend towards a “legalized” society and the need for public administrators to be well versed in constitutional law. Supreme Court opinions present a dialogue aimed at providing the opportunity for public administrators to “do good” rather than “avoiding evil” (Rohr, 1989, p. 73). Likewise, attorney general opinions afford public administrators an opportunity to seek specific advice on doing good prior to taking actions that may land them before the bench as an unwilling defendant.

Chapter Summary

The lack of attention within the literature regarding the opinion writing function of state attorneys general is not completely unexpected. As devolution has placed additional authority and responsibility upon the states for implementing and monitoring governmental programs, the enforcement role of the state attorney general has grown apace. As the potential for lawsuits from disgruntled interest groups or wronged citizens has increased, so too has the focus on the litigation function of the state attorney general. Combined with the additional fiscal stress placed upon state and local administration by the need for additional enforcement, devolution has engendered a need for states to tap into new streams of funding outside the traditional tax base to pay for the additional costs of program management. The method of choice, for most states, has been via litigation in state and federal courts. Nowhere is this more evident than recent state class action suits against Microsoft, several of the tobacco companies, pharmaceutical companies, and gun manufacturers.

As noted above, the language of public administration and that of the United States is heavily influenced by the law. From Tocqueville's observations regarding legal discourse, to Glendon's critique of "rights talk", the lens through which law is viewed is that of litigation. The literature regarding state attorneys general is no exception. The focus on litigation responses to the challenges posed by devolution and judicialization have largely ignored alternative approaches, such as the opinion writing function of state attorneys general.

The two trends of devolution and judicialization have placed increasing burdens upon public administration, blurring the boundaries between federal, state, and local action and adding to the complexity of administrative and constitutional law. Administrators who are called on to make decisions in a new policy area are often dealing with the unknown (Thompson, 1974). Administrators and officials may be dealing with the application of new laws and new policies, for which there is no precedent or guiding principle. Examples of state experimentation with new welfare and environmental policy can be found throughout the devolution literature. Attorney general opinions, demonstrated in more detail in Chapters 5 and 6, can provide both a legal and a normative basis for an administrator's decision and for future legislation. New policy areas often reflect new political issues. In these cases, attorney general opinions provide an effective sounding board against which innovative policies can be tested for legality and congruence with existing statutes and obligations. The judicialization of the administrative state and the proliferation of litigation have added extra weight to the burden of governance. Attorney general opinions allow the chief law enforcement officer of the state to comment upon any legal or constitutional defects of policy changes before they go into effect, thereby reducing potential legal challenges and leaving solutions in the hands of the legislature.

Often, changes in governing structures and arrangements are marked by blurred lines of authority and shifting legal standards. Frequently, the construction of new laws outpaces the development of judicial case law to provide guidance. While it is true, as many commentators have argued (Rohr, 1989; Fiss, 1981; and Fuller, 1969), that judicial interpretation of law gives recognition and legitimacy to many of the values upon which

the administrative system is built, the tendency of the past to turn to adjudicative processes for answers to the difficult tasks of coordinating governmental efforts has produced a mixed result of conflicting interpretations and standards. State attorneys general opinions can leave a lasting mark in policymaking arenas where there is no guiding case law (Thompson, 1974). Furthermore, as I shall demonstrate in Chapter 6, state attorney general opinions, like those of the Supreme Court, can provide recognition of the regime values critical for the constitutionally conscious administrator both to do good and to avoid evil.

¹ The question here was the time frame for enforcement. The Attorney General's opinion stated that although the stated effective date of the Lead Poisoning Prevention Program Act was October 1, 1994, the regulations implementing the Act were not put into place until February 24, 1996. The Attorney General concluded that the latter was the actual effective date.

² The Attorney General concluded that federal law permitted the fair use of copyright material for teaching and research purposes. While acknowledging the possibility of use exceeding the limits, the Attorney General concluded that any infringement of a copyright with good faith required courts to remit statutory damages in there is an infringement action.

³ The Tennessee Attorney General issued an opinion in 1992 stating that the public display of the Ten Commandments on public property was unconstitutional. It was the second time in six years that a Tennessee attorney general was asked for a formal opinion on this issue.

⁴ The West Virginia Attorney General concluded in an opinion that public agencies were prohibited from employing outside counsel to represent its employees or the agency concerning official state actions. The state constitution placed the burden upon the attorney general to represent all state employees and agencies in their official capacities. The use of outside counsel would make it difficult to sustain a degree of objective detachment necessary for government action.

Chapter Three: Advicegiving in a Comparative Perspective

The business of the law is to make sense of the confusion of what we call human life—to reduce it to order but at the same time to give it possibility, scope, even dignity. - Archibald MacLeish

Introduction

In *The Morality of Law* (1969), Lon Fuller writes that the two fundamental decision processes that characterize a democratic society are decisions by the vote of an electorate or representative body and decisions by impartial judges (p. 177). However, Fuller opines that neither of these processes can by itself solve complex issues involving a wide range of solutions, nor do they offer a guarantee of protection against abuses of power (176-177). In the search for procedures and institutional safeguards to detect abuses and deficiencies in government, we need not confine ourselves to adjudication and the ballot box. One such institutional model singled out by Fuller (1969) that serves this purpose is the French *Conseil d'Etat*. The *Conseil d'Etat* (Council of State) is an institution which combines adjudicative processes with non-adversarial advicegiving for the purpose of rendering advice on legislative and administrative issues in an effort to enhance sound practices and avoid legal conflicts.

As noted in the first two chapters, the opinion writing function of state attorneys general is designed to offer the same type of legal and administrative guidance. One purpose of this chapter is to demonstrate how institutionalized advicegiving operates by utilizing the Council of State as a model. The fact that the Council of State is widely recognized and honored as a distinctive voice in the French national government led me to ask whether or not the United States possessed a similar advicegiving institution. As this chapter will demonstrate, the United States Department of Justice, particularly the Office of Legal Counsel, was designed to act as the federal government's primary source

of legal advice, yet various political and structural arrangements have prevented it from achieving this end. However, the opinion writing function of Virginia's Attorney General does appear to represent an advisory process comparable to that of the Council of State.

The second purpose of this chapter is to identify areas of similarity and difference between the French Council of State, the U.S. Attorney General, and the Virginia Attorney General in terms of advicegiving, rather than to suggest that we should copy the institutional structures the French have adopted. These institutions and their historical traditions are not the same, and the differences are often aggravated by different terminology, culture, and law. Instead, this chapter demonstrates how a full-fledged advicegiving institution, such as the French Council of State, can influence administrative, legislative, and judicial decisions; why the United States does not have a comparable institution on the federal level; and how the opinion writing function of the Virginia Attorney General operates in a similar fashion to the French model.

France's Council of State

Brief Historical Background of the Council of State

The strong state tradition in France has produced a number of remarkable governing institutions. One of the oldest and most respected of these institutions is the Council of State. The Council of State specializes in administrative law, but covers a broad range of administrative activities beyond questions of law (Rohr, 1995, p. 121). The Council has been an advisor to government over a long period, through its dual function as both France's highest administrative court and the government's highest

official advisory body. The *section du contentieux* (judicial section) adjudicates cases brought against officers of the state and the *section administrative* (administrative section) advises the government on the legality of proposed legislation and serves as a consultant to the government on legal matters (Questiaux, 1995). Because members of the Council are originally administrative officers, they are familiar with the problems of administration and understand its difficulties and needs (Duguit, 1914; Questiaux, 2000).

The origin of the Council of State has its roots in the 13th Century, with the establishment of the King's Council, or Royal Council, during the reign of King Louis IX (1226-1270). The Council of State continued to flourish, in one form or another, within the French government until it was abolished by the Revolution of 1789, and reestablished by Napoleon in 1799 (de Sauvigny and Pinkney, 1983). The first incarnation of the Council of State (known as the King's Council) was made up of noblemen, chosen by the King for the purpose of providing advice in the affairs of state. The Council was also responsible for the creation of specialized sections within the royal court to administer royal justice throughout the country (de Sauvigny and Pinkney, 1983). Within the various duties and structure of the Council lay the origin of the highest French courts, many of which continue to this day (Questiaux, 2000).

With the French Revolution, all old vestiges of the monarchy and aristocracy were eliminated, including the King's Council. When Napoleon assumed the title of Emperor in 1799, one of his first acts was the reestablishment of the Council of State. The Council of State under Napoleon provided a useful integrating mechanism by bringing together, in one deliberative body, representatives of the pre-revolutionary aristocracy and the newly created imperial aristocrats, who owed their rank to the

emperor (Rohr, 1995). Under the Constitution of 1799, the Council of State was designed to be a body “authorized to resolve administrative difficulties,” however; its main functions were drafting and interpreting laws and regulations (Falcone, 1996, p. 204).

Although the Council’s structure and recruitment have been modified by various administrative reorganizations and constitutions, the Council has maintained a sense of continuity in the face of major political, economic, and social upheavals (Langrod, 1955). The Council of State has been responsible for a number of momentous decisions and opinions covering a wide variety of topics, including deportation, individual rights, tort liability, and absolute immunity for administrative acts (Rohr, 1995). As the prestige of the Council of State became more pronounced, so did its role in the governing process. The Council of State even played a crucial role in writing the text of what would become the Constitution of the Fifth Republic in 1958, yet its opinion regarding the final text was not made public (Lowenstein, 1959).

While much has been written on the adjudicative functions of the Council of State, far less attention has been given to its consultative function of furnishing confidential advice to French government departments (Bell, 2000; Brown, 1974). One reason for this is that the advice given to the government on draft legislation and the legality of administrative actions is not made public, except on rare occasions, making an analysis of opinion influence difficult to measure (Bell, 2000). However, there is little doubt among scholars concerning the magnitude of the Council’s influence on French administration and the development of law.

Advisory Role – Form and Function

The advisory function of the Council of State is divided between four sections – finance, domestic affairs, public works, and social affairs (Falcone, 1996). Each section is headed by a president, and includes six or seven full-time councilors, as well as intermediate and lower ranked part-time civil servants (Falcone, 1996; Questiaux, 2000). The Council of State is further divided into two additional sections. The litigation section is responsible for handling all litigation between any body of the French Civil Service and any person or corporation (both private and public) (Falcone, 1996). The final section of the Council of State is known as the Section of the Report and the Studies. This section compiles the annual report detailing all of the Council of State's activities, proposals for administrative reform, and reviews the implementation and enforcement by the administration of the decisions and judgments adopted by the Council (Falcone, 1996).

The 1958 Constitution establishes the current process by which the Council of State renders advice. Article 38 of the 1958 Constitution mandates all bills, or *projet de loi*, prepared by the government be submitted to the Council of State for an opinion prior to being introduced to Parliament for discussion. When the government uses its powers to regulate and modify what had, previously, been decided by the legislature, Article 37 states that the text must also be submitted to the Council for review (Questiaux, 1995). Article 39 specifies that individual members of Parliament and the Prime Minister must also submit their own legislation to the Council of State for review prior to discussion in the full Parliament. The opinion of the Council is also required in many fields where the government has to define the way the law applies (Questiaux, 1995). Consultation of the

Council is regarded as a safeguard in many situations where an administrative decision may affect individual interests or those of local authorities, for example, the compulsory purchase of land for governmental purposes (Questiaux, 1995).

In its advisory capacity, the Council of State examines the legality of regulations and the behavior of the executive branch in implementing them, not the constitutionality of laws (Saffran, 1998). In addition to formalized means, the advice of the Conseil may be sought in a less formal manner to seek to resolve any difficulty encountered by the government. These requests, called *demandes d'avis* are increasing and may touch upon a variety of issues (Questiaux, 1995). The government is not bound to follow the Council's advice, yet it very often does so.¹ The extent to which the government is bound to accept the text of the Council depends on whether or not there is a legal requirement for consultation (Brown, 1974). However, there is an incentive in identifying causes of illegality because the Council also brandishes the sword of judicial control regarding administrative actions (Questiaux, 1995). Appointments to the Council of State are based on competence and competitive examinations, and many of its members are drawn from the prestigious ENA, France's top administrative school. The President is authorized by Article 13 of the 1958 Constitution to make these appointments in meetings with the Council of Ministers. The Council of State is not independent, but rather a component of the French Civil Service and the executive branch (Safran, 1998).

When requested by the government, ministers, or Member of Parliament to render advice, each request is assigned to a *rapporteur* (or reporter) within the Council of State. The rapporteur begins the process of collecting information related to the question, on

which the final decision will be made (Bell, 2000). During this process, the rapporteur may consult informally with the different departments of the administration concerned with the question at hand. After all pertinent information is collected; a preliminary draft of the opinion is submitted to the appropriate administrative section – finance, domestic affairs, public works, or social affairs. The preliminary study conducted by the rapporteur is critically important because the Council's advice is based on, and is a function of, the information collected (Falcone, 1996). As mentioned above, the opinion of the Council of State is not binding on the government or the Parliament, but it does wield considerable influence. A bill cannot be presented in Parliament if it does not contain the Council's provisions and suggested modifications, although the Parliament can choose not to follow the suggestions. However, the Constitutional Council, which is empowered by the 1958 Constitution to examine the constitutionality of laws passed by Parliament, relies heavily on the principles of administrative law and jurisprudence developed by the Council of State to formulate its own jurisprudence (Rohr, 1996). Matters of political consideration (i.e. manner of elections) do not fall within the Council of State's advisory capacity (Falcone, 1996).

The Council reports on its activities each year in a published report wherein the Council summarizes the cases adjudicated by the *section du contentieux* and describes the lessons it draws from its central position in the administration (Questiaux, 1995). The Council's informal advice can only be published by the government agency or minister to whom the advice is concerned, not by the Council itself (Falcone, 1996). The government is entitled to keep the Council's advice to itself. However, in recent years,

opinions are more frequently referred to by the government in the justifications it gives the public (Questiaux, 1995).

The Council of State performs a legislative function when reviewing legislation, a judicial function when it adjudicates disputes involving government officials, and an executive function when it renders advice on administrative actions. The Council of State's advisory function is not limited to giving legal advice; it also offers opinions as to the merits of proposed legislation and administrative actions. The Council's advice can be both direct and indirect. It is direct when the advice offers legislative modification of substance and identifies weaknesses in certain measures (Rohr, 1995). Its advice is felt indirectly as measured by the amount of preparation performed by the government in developing measures that will conform to the principles of law found within the Council of State's jurisprudence (Rohr, 1995).

The advisory function of the Council of State exerts a real qualitative and substantive influence in the French regulatory system (Falcone, 1996). Day after day, and in all fields of specialization, the Council observes administration in the making and carries out a check on legality (Questiaux, 1995). The Council is in a position to anticipate problems that could arise in litigation, while dealing with uncontested pieces of legislation or regulation, and examining proposed administrative acts (Questiaux, 1995; 2000) Its opinions often extend to matters that go beyond questions of strict legality, and often enrich concepts of civil liberties by "deducing" them from existing laws (Safran, 1998). One such example is the role that the Council of State played in the resolution of the "foulard affair" in 1989. The controversy concerned the expulsion of two Muslim girls for wearing foulards, or veils, to school. This type of religious expression was seen

as violating the secular character of the French public school system. This notion of secularism, expressed explicitly in the 1958 Constitution, prohibits students and teachers from displaying their religious beliefs (Rohr, 1995).

The Council of State was eventually asked to enter into the fray and issue an opinion regarding the wearing of the veils and the authority of the school to expel students who crossed the threshold of secularism. The Council of State's opinion stated that the Muslim girls could wear veils to school without violating the principles of secularism in public education, but only if they were worn in a manner that did not constitute an act of "pressure, provocation, proselytizing, or propaganda that would offend the liberty or dignity of other members of the educational community (as cited in Rohr, 1995, p. 5)." The Council opined that veils could be banned if they impeded the customary routine of a public school, and upheld the discretionary authority of principals to make such a determination for the purposes of expulsion (p. 5).

The Council of State has always recognized its duty not to limit itself to the role of legal advisor in the strict sense, but to be an advisor in the fullest sense, guided by its experience of the administration which arises both from its knowledge of the government and the experience of its members (Bell, 2000). The advice provided by the Council of State goes beyond issues of legality to take into account the concern for effective administration (Bell, 2000; Questiaux, 1995). The role played by the Council of State in French administration is far-reaching, and nearly all scholars who examine the French administrative system comment not only on its vital role, but also on the high esteem with which the Council of State is viewed within and outside of France.

This particular type of institution, which blends executive, legislative, and judicial powers has spawned copies elsewhere in Europe and Africa, however, there is no comparable federal level institution found in the United States. This is not to say that U.S. administrative agencies do not exercise a blend of quasi-executive, quasi-legislative, and quasi-judicial power. In fact, many do, however the extent to which U.S. administrative agencies use these blended powers does not have the far-reaching effect or esteem associated with the Council of State. Though, as I shall discuss later in this chapter, some state attorney general's offices, in particular Virginia, do appear to function in a manner much like the Council of State, especially when one examines the vital role that state attorney general opinions play in state and local governance.

U.S. Attorney General's Office

Brief Historical Background

The Office of U.S. Attorney General was established by the Judiciary Act of 1789, and was to be filled by "a meet person learned in the law (U.S. Department of Justice, 1990)." The Attorney General, originally a part-time position, was to function in an advisory manner with very little enforcement power and did not originally head an executive department. Congress' intent in establishing the office as purely advisory was clear. The authorizing statute empowered the Attorney General to give opinions upon matters of law when requested by the President and heads of the executive departments (U.S. Dept. of Justice, 1990). Although not officially designated as such, the Attorney General's office was viewed as the lawyer for the Executive Branch, as well as Congress. The Attorney General's advice was sought on any number of bills and procedures, until

Attorney General William Wirt stopped the practice of legislative advising in 1819, citing the absence of an expressed statutory requirement (U.S. Dept. of Justice, 1990).

Early federal Attorneys General had a profound influence on national policy. Edmond Randolph, the first man to occupy the office, advised President Washington on taking a policy of neutrality in wars between other countries (U.S. Dept. of Justice, 1990). Randolph's opinion remained the general foreign policy doctrine for several decades. Other early influential Attorney General opinions included Attorney General William Bradford's 1794 opinion authorizing President Washington to withhold from Congress personal correspondence between the Secretary of State and a French Minister. Bradford's opinion was the very first separation of powers opinion dealing with the proper relationship between the President and the Congress (Dellinger and Powell, 1996). President Thomas Jefferson's actions concerning the Louisiana Purchase were also based on the opinion of his attorney general. Since the beginning of the republic, the jurisprudence of the U.S. Attorney General has been an important guiding force on federal governance. The opinion writing function played a dominant role in the early operation of the Attorney General's office.

The Judiciary Act of 1870 formally created the U.S. Department of Justice, and vested the Attorney General with broad powers, including leadership of an executive department (Meador, 1980). The motivation behind the creation of the Department of Justice was the belief that the federal government should speak with one voice on matters of law (Bell, 1993). During the twentieth century, the Department of Justice grew in both size and scope of responsibility. The Department's role in anti-trust litigation and federal civil litigation soon overshadowed the opinion writing function. As the Department

became more specialized, litigation and enforcement became the Attorney General's primary functions (Meador, 1980). In 1933, the Office of Legal Counsel (OLC) was established within the Department of Justice to serve as the legal advisor to the President and the heads of executive departments. The OLC is currently responsible for reviewing certain pieces of pending legislation, issuing formal and informal opinions, and reviewing executive orders and presidential proclamations as to form and legality (Meador, 1980; Kmiec, 1993).

U.S. Attorney General's Office – Structure and Function

The modern U.S. Attorney General's Office serves three primary functions – lawyering, non-lawyering, and investigative. The *lawyering function* of the Attorney General's office is divided among several sub-departments.

- The Solicitor General's Office handles all federal government litigation before the U.S. Supreme Court.
- The Anti-trust Division enforces all anti-trust legislation.
- The Civil Division represents the government in all civil suits and torts.
- The Civil Rights Division enforces federal civil rights law through both investigation and litigation.
- The Criminal Division administers all federal criminal law prosecution.
- The Land and Natural Resources Division represents the government in all land use and environmental cases.
- The Tax Division handles the administration and enforcement of all tax laws.

- The U.S. Attorney's Offices supervise federal litigation and enforcement in each federal district throughout the United States.
- The Office of Legal Counsel, as mentioned before, provides legal advice to the president and other executive department heads.

The *non-lawyering functions* of the Attorney General are varied, and include the supervision and administration of the U.S. Bureau of Prisons, the U.S. Parole Commission, the Law Enforcement Assistance Administration (LEAA), Community Relations, the U.S. Marshal's Service, the Office of Pardon Attorney, the Justice Management Division, the Office of Professional Responsibility, the Office of Public Information, the Office of Legislative Affairs, and the Office for Improvements in the Administration of Justice.² Finally, the *investigative function* of the Attorney General's office includes the administration and supervision of the Federal Bureau of Investigation and the Drug Enforcement Agency.

The administrative duties of the Attorney General are vast given the numerous agencies, large and small, in the Department of Justice, but "the heart and soul of the office remains in the litigating divisions...in the opinion writing function of the Office of Legal Counsel, and in the appellate court function exercised by the Solicitor General (Bell, 1993, p. 30)." One needs only to read any major newspaper today to see clear examples of the litigation and enforcement functions of the Attorney General. From the Microsoft anti-trust litigation and the tobacco industry settlements, to the investigation of civil rights abuses by major metropolitan police departments, the U.S. Attorney General's office looms large on today's political and policymaking scene. However, if one

examines the history of the department and the original authorizing legislation, it becomes clear that the opinion writing function has taken a backseat to the more high-profile functions of litigation and law enforcement.

U.S. Attorney General's Opinions

The Supreme Court and Presidents since 1870 have acknowledged the Department of Justice as the prime instrument of the President in carrying out his duty under the Constitution to take care that the law be faithfully executed. The Office of Legal Counsel has been delegated virtually all of the Attorney General's opinion writing function, earning it the moniker of "the Attorney General's Lawyer" (Kmiec, 1993, p. 337). By law, "the head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his (sic) department" (28 U.S.C. 512, 1988). There are few limitations on the opinions other than that the issue presented must actually arise in the administration of an executive department (Kmiec, 1993). The opinion writing authority has been augmented by two executive orders: Executive Order 2877 which declared that any opinion issued by the Attorney General be treated as binding, and Executive Order 12,146 which encouraged all executive agencies to submit any legal disputes to the Attorney General (Kmiec, 1993).

The opinions of the U.S. Attorney General are contained in forty-three volumes of published opinions of the Attorney General and sixteen volumes of published opinions of the Office of Legal Counsel (McGinnis, 1993). In addition to the formal published opinions, there are at least five filing cabinets of largely unpublished opinions dating

back to 1932 located at DOJ headquarters in Washington, D.C. (McGinnis, 1993). Many of the opinions are the final word on the law because the issues have never been adjudicated in court. The main purpose of U.S. Attorney General opinions is to aid the President and executive department heads under the President's charge in taking care that the law be faithfully executed. There is no statutory requirement specifically authorizing the release or issuing of opinions, only the Constitutional provision under Article II that gives the President the right to require opinions from the head of any department. Although Article II, Section Three of the Constitution gives the President the legal responsibility to "take care that the laws be faithfully executed," it does not expressly define how that responsibility should be exercised and has left substantial room for disagreement concerning the Attorney General's obligation as a legal advisor and opinion writer (McGinnis, 1993).

While it can be argued that the Attorney General has an obligation to advise the President in matters of governance and should undertake to render opinions when requested, there is wide disagreement over the extent to which the advisory function should be, or could be, applied to other executive department agencies. Most department and agency heads go to great lengths to seek advice only from their own general counsel (Bell, 1993). Additionally, Cabinet officers are not bound by the Attorney General's interpretation of the law (Meador, 1980). This condition is heightened by the fact that the Attorney General is appointed by the President, and as such, is subject to removal for merely political considerations. The Office of Legal Counsel was not created to separate the Attorney General from the opinion writing function; however this separation has largely occurred. Opinion requests seldom come through the Attorney General, but

rather directly to the Office of Legal Counsel (Kmiec, 1993). The opinions issued by OLC are seldom cleared by the Attorney General in any formal way, and the number of formal Attorney General Opinions has been declining, with fewer than ten percent of the opinions of the Department of Justice signed by the Attorney General (Kmiec, 1993).

Furthermore, as Frohnmayer (1988) argues, the federal legal services system is “balkanized” as a result of the number of in-house legal counsels in the various federal agencies. This leads to differing statutory interpretations that confuse rather than clarify (p. 92). General counsels for various agencies constantly seek to conduct their own litigation and render parochial advice that is in line with the interests of their specific agency (p. 92-3). This practice was also discussed in a 1980 meeting of former and current Attorneys General and Assistant Attorneys General (Meador, 1980). Many in attendance lamented the fact that many executive departments never consulted the Attorney General’s office on legal or policy issues until they became involved in litigation (Meador, 1980). The solution offered by the conference participants is to recognize the U.S. Attorney General’s office as the government’s principle and controlling agency on legal matters (Bell, 1993; Frohnmayer, 1993). As Frohnmayer (1993) argues, while some agency administrators want advice that conforms to their wishes, dedicated public servants want objective legal analysis and well-considered alternatives that will stand up in court (p. 93). Yet, the incentive to utilize OLC opinions to prevail in court has been muted by a string of Supreme Court decisions, beginning with *Chevron v. Natural Resources Defense Council* (467 U.S. 837, 1984), in which the Court has indicated its willingness to defer to agency interpretation of law, not the Department of Justice’s, OLC’s, or the Attorney General’s.

As demonstrated in the discussion above, the U.S. Attorney General's office, while possessing the potential for unifying federal legal services in a manner similar to those of both the states and the French Council of State is unable to do so for two reasons. The first is the sheer volume and variation in the duties of the Attorney General as the head of the Department of Justice. The second is the overabundance of individual executive agency lawyers prohibiting the government from speaking in one legal voice. The office of the U.S. Attorney General, which was at one time both the leading legal authority for both the executive and legislative branches and a key source of federal jurisprudence outside of the federal courts, is now relegated to putting out litigious fires and solving interagency disputes.

Standing in stark contrast to the U.S. Attorney General's Office is that of the Office of Attorney General for the State of Virginia. Whereas the balkanization and decentralization of the federal legal system has hindered the jurisprudential development of U.S. Attorney General opinions and limited their impact on governance, the environment found in the states has produced the opposite effect on the opinion writing function of state attorneys general. In the following section, I shall examine the development and function that attorney general opinions have played in state governance, using the state of Virginia as an example.

Virginia Attorney General Opinions

State Attorney General Background and Description

The structure of the office and the duties of the state attorney general vary from state to state, and are defined in state constitutions, statutes, and court decisions in varying degrees of detail and emphasis (Matheson, 1993). Common duties include

providing informal legal advice and formal opinions to the governor and other state officials, agencies, and legislators; representing the state, state agencies, and state officers in litigation; and enforcing state civil and criminal law. Common law supplies authority for most attorneys general, and as such, state legislatures may restrict or withdraw common law authority in some instances.

Virginia, like many other states, has an elected attorney general. This approach can be traced back to the 1830's when states began to embrace the Jacksonian idea of democracy, based on open participation and the expansion of government employment to the "common man" (Matheson, 1993). State attorneys general, whether elected by the general public or appointed by the governor or legislature, are considered executive branch officers and function as such. In Virginia, the executive dimensions of the office were firmly entrenched when the General Assembly shifted the provisions for the officeholder from the judicial to executive article of the 1971 Virginia Constitution (Morris and Sabato, 1998). Article V, Section 1 of the present Constitution of Virginia vests the chief executive power of the Commonwealth in the Governor. Article V, Section 1 charges the Governor to take care that the laws be faithfully executed. Article V, Section 15 of the Constitution of Virginia designates the Attorney General as an elected executive officer. When rendering advisory opinions concerning the execution of state laws, the Attorney General exercises quasi-executive functions by taking care that the laws are faithfully executed. Likewise, when the Attorney General prosecutes a case on behalf of the Commonwealth, he/she is exercising quasi-executive powers by enforcing the law.

State attorneys general exercise several executive functions, but they are predominantly the chief law enforcement officers of the state. In Virginia, like most other states, the attorney general is also the legal counsel for the state. The attorney general's office investigates complaints brought against public officials, businesses, and state agencies. The attorney general's office is additionally charged with disseminating certain types of public information, such as consumer and public safety warnings. However, the Virginia Attorney General also performs legislative and judicial roles as well.

In addition to interpreting Virginia law, the Attorney General's office acts as a lawmaker when it becomes involved in drafting and reviewing proposed legislation. The Legislative Services Division of the Office of Attorney General periodically reviews proposed legislation from the General Assembly in terms of its legality and adherence to constitutional principles (Morris, 1980). Statutory authority enables the Attorney General's office not to only recommend changes in state law, but to propose legislation across a broad field of issues ranging from drug laws to the protection of crime victims (Morris, 1980). The Office of Attorney General also functions in a legislative role by initiating legislation on key consumer protection or criminal justice issues. In Virginia, the attorney general often uses his/her political position to get his/her legislative priorities before the General Assembly. The attorney general also assists other executive agencies in drafting legislation.

Finally, the attorney general plays a large judicial role in state government through its involvement in litigation. This is the role traditionally associated with the office. The attorney general initiates litigation on behalf of the state and state agencies,

and defends state officials, agencies, and the state's position in state and federal court. Another aspect of the attorney general's judicial role is the submission of amicus curiae, or friend of the court, briefs. By submitting a friend of the court brief, states allow a court to see how its decision may go beyond the immediate parties in terms of its impact. The last judicial role played by the attorney general's office is found in its issuance of advisory opinions. It is within this role that the Office of Attorney General can have its greatest unrecognized influence.

Attorney General opinions serve a quasi-judicial function in their capacity as legal opinions. An opinion would certainly be viewed as quasi-judicial if it served as an "expeditious alternative to securing a declaratory judgment (Matheson, 1993)." Advice rendered by the office has traditionally carried great weight in the fact that it is almost always followed (Morris and Sabato, 1998). While Attorney General opinions lack the stature and finality of judicial opinions, courts occasionally will adopt, in whole or part, a well-articulated and well-reasoned Attorney General's opinion (Ross, 1990). Opinions are taken very seriously by recipients and become important legal precedents. In a 1975 case for instance, the Virginia Supreme Court found the statutory constructions of two attorneys general over a period of seven years not binding on it, but "entitled to due consideration" (Morris, 1980). Formal opinions have been held to carry the force of law in the absence of judicial decisions to the contrary; however, these opinions must be overruled when in conflict with the conclusions of the courts (Morris, 1980).

Opinion Form and Function

All state attorneys general render advisory opinions on questions of law, either through statutory or constitutional mandate (Ross, 1990). Opinions cover a vast range of

subjects, but generally limit themselves to questions of administrative or constitutional law. Opinions are generally confined to actual, not theoretical, questions of law, not fact, and avoid questions pertaining to pending litigation (Ross, 1990). Additionally, in Virginia, Attorneys General traditionally refuse to issue opinions on matters of purely local concern, or on matters involving legislative bodies' application of their internal rules or procedures, unless they involve a specific state statute (*Annual Report of the Attorney General of Virginia, 1997*). An additional 1976 statute was passed in an effort to discourage unnecessary questions from local prosecutors (Morris, 1980). The statute stipulates that an opinion request from a county or commonwealth's attorney must itself be in the form of an opinion, with a precise statement of all relevant facts together with the requesting attorney's legal conclusions (Ibid.).

In Virginia, the Attorney General is charged by Article V, Section 15 of the Constitution of Virginia (1971) and by Section 2.1-117 of the Code of Virginia with providing legal representation to all agencies and public institutions of the Commonwealth. Section 2.1-118 of the Code of Virginia authorizes the Attorney General to give advise and render official written advisory opinions, when requested in writing to do so, to the Governor, a member of the General Assembly, a judge of a court of record or a court not of record, the State Corporation Commission, an attorney for the Commonwealth, a county attorney, a clerk of a court of record, a city or county sheriff, a city or county treasurer, a commissioner of revenue, or a chairman or secretary of an electoral board, the head of a state department, division, bureau, institution or board.

Opinion writing is a time-consuming process that involves a great deal of legal research. Opinion requests are assigned to those assistant attorneys general who have

some legal expertise or experience bearing on the particular issue at hand (Morris and Sabato, 1998). Once an opinion is drafted, a deputy attorney general and the chief deputy attorney general review it before being presented to the Attorney General for final approval. Approved opinions are released periodically to the press and to interested parties, and summaries of recent opinions become part of a monthly newsletter, *The Law Digest*, which is mailed to more than 6,000 government officials throughout the state. These formal opinions are also published annually on May 1, pursuant to Section 2.1-128 of the Virginia Code, in the *Report of the Attorney General*.

The Annual Report of the Attorney General is a bound collection of all formal opinions issued by the Office of the Attorney General throughout the course of the previous year. The *Report* also includes a listing of all court cases decided, or pending before the Supreme Court of Virginia, as well as all cases pending or decided by the U.S. Supreme Court, in which the state is involved (either as a plaintiff or defendant). In addition, the publication contains a complete personnel roster of the Office, as well as a listing of every Attorney General who has been either elected, or appointed by the Governor (in the case of unexpired terms), to the office.

Each copy of the *Annual Report* is prefaced with the “letter of transmittal” addressed to the governor. This letter states quite clearly the purpose and focus of the Attorney General occupying the office, sometimes elaborating on specific actions taken in the areas of legislation, law enforcement, and coordinated efforts. While the purpose of the *Annual Report* is to provide effective legal advice to state and local agencies or officials, it also represents a “written commitment to respect for the laws, a commitment

to the equal justice of the citizens, and a means to anticipate potential legal problems and prevent them from arising (*Annual Report of the Attorney General, 1998*).”

Virginia Attorney General opinions follow the same basic structure as that of judicial opinions, however, unlike opinions handed down by the courts, attorney general opinions recommend, but do not mandate, a particular course of action. The issue or controversy at question is delineated, followed by a review of relevant statutes or case law. The statutes or case law found to be relevant are then applied to the issue at hand, followed by a detailed explanation of the reasoning used in reaching the decision. The opinion then concludes with a statement of the findings or decision. Unlike traditional judicial opinions, attorney general opinions are much shorter because of the narrow scope of the questions being asked. Each opinion is prefaced by a subject header which refers to the specific part, or parts, of the Virginia Code to which the opinion applies. The header is followed by a short paragraph, in bold, that briefly states the Attorney General’s position.

The opinion is addressed to the actual state or local official asking the question, and written in a first person narrative. The actual body of the opinion itself reads much like an opinion issued by a court. Throughout the opinion, references are made not only to state codes, but also to former Attorney General opinions, and, in some instances, state or federal court decisions. However, unlike published court opinions, in which the court refers to itself as a “timeless” institution (“this court has stated in the past...”), former opinions of the Attorney General are referred to in the past tense, giving the current writer of the opinion first-person status. Notations are provided within the text and direct the reader to the opinion’s endnotes section for further elaboration.

Attorneys general, in all states, are authorized by statute and/or constitutional provisions to render advisory opinions, however these opinions do not carry the full weight of law in their recommendations. Opinions are not viewed as judicial edicts, but rather as reasoned expert guidance on legal issues. While attorney general opinions in Virginia are not legally binding on state officials, or on the General Assembly (*Forest Hills Early Learning Center, Inc. v. Lukhard*, 540 F. Supp. 1046 [E.D. Va. 1982]), state or local officials who act in good faith on the advice offered in conflict of interest opinions are immune from criminal liability (*VA Code Ann.* Section 2.1-639.18(A), 2.1-639.55, 1987). However, state officials who do refuse to follow the opinion offered by the Attorney General's office on such matters of law are in a weaker bargaining position should the controversy find its way to the courts, than would be an official who, acting in good faith on such opinions, could point to mitigation.

As the preceding discussion indicates, the potential and actual influence of Attorney General Opinions on Virginia government is widespread. The opinion writing function of the Virginia Attorney General, as the next section will demonstrate, operates in a similar fashion along several key features to the opinion writing function of the Council of State. While the opinion writing function of the U.S. Attorney General, particularly the Office of Legal Council, and the Virginia Attorney General share several similar features, the U.S. Attorney General's opinion writing function differs greatly from that of the Council of State and the Virginia Attorney General, particularly regarding the opinions' sphere of influence and binding nature.

Opinion Writing in Comparison

As noted above, any comparison between these institutions must take into account the fundamental differences between their respective cultural and legal traditions. Yet, despite these differences, there is much to be learned from how the opinion writing function of these institutions operate compared to one another. The remainder of this chapter will explore briefly many of the similarities and differences between the Council of State, the Office of Legal Council, and the Virginia Attorney General's Office in terms of their duties and responsibilities in providing legal advice and opinions to their respective governments and public administrators.

The first, and most obvious, similarity between these three institutions is the fact that each has within its organizational responsibilities the duty to issue opinions and advice when requested. One of the primary differences between these institutions is the normative foundation for this advisory function. The opinion writing function is enumerated in Articles 37, 38, and 39 of the Constitution of 1958 for the Council of State, and in Article V, Section 8 of the Virginia Constitution for the Virginia Attorney General; whereas the opinion function of the Office of U.S. Attorney General is a statutory creation. Although the opinion writing function is constitutionally created for the Council of State and the Virginia's Attorney General, Article V, Section 8 of the Virginia Constitution authorizes the governor only to request an opinion. The bulk of the Virginia Attorney General's opinion writing duties have been created and modified by statute, much like those of the U.S. Attorney General. As a result, the advicegiving

function of the Council of State is enshrined within the constitutional fabric of the French state, making the function a constitutional requirement, rather than a legal option.

Another similarity between these institutions is power to render advice to their respective legislatures on the legality of proposed bills. However, whereas the French Parliament is constitutionally mandated to seek the Council's advice, the U.S. Congress and the Virginia General Assembly are provided the same option by statute. Yet, the Virginia Attorney General's Office, like the French Council of State, is a more active participant in the legislative process than the U.S. Attorney General's Office. Although the General Assembly is not mandated to submit bills to the Legislative Services Division of the Virginia Attorney General, there is a recognized historical tradition of doing so. While earlier U.S. Attorneys General issued advice to members of Congress, the wide scale practice was eliminated in 1819 and replaced by limited statutory authorization. When the General Assembly submits legislation to the Virginia Attorney General, it does so with the understanding that the Legislative Services Division may provide the final word regarding legality and adherence to constitutional principles, much like that of the Council of State. When Congress requests the advice of the Office of Legal Council on legislative matters, it compares the advice with that of other entities, such as the General Accounting Office and the Congressional Budget Office, opting for the least restrictive opinion (Kmeic, 1993).

The opinions of the Council of State and the Virginia Attorney General also share similarities in terms of their independence and binding nature. Unlike the U.S. Attorney General, who serves at the pleasure of the appointing president, members of the Council of State earn their position through merit and expertise, whereas the Virginia Attorney

General is elected. This renders the advice given by the Council and the Virginia Attorney General a degree of independence not found at the level of U.S. Attorney General, although the recent trend of bypassing the Attorney General and submitting opinion requests directly to the Office of Legal Council may demonstrate that federal officials view the OLC as more impartial than the Office of U.S. Attorney General itself. A large part of the perceived impartiality on the part of the Council of State and the Virginia Attorney General also stems from each institution's expertise and regular interaction with all levels of their respective governments. By operating at the crossroads of executive, legislative, and judicial powers, both the Council and the Virginia Attorney General have developed demonstrable evidence of their ability to function in and understand all three spheres of activity.

While the advice rendered by the Office of Legal Council may share a degree of impartiality with the Council of State and the Virginia Attorney General, it does not enjoy the same sense of finality. There is a great deal of debate and uncertainty regarding the binding nature of opinions coming from the Office of Legal Council and the U.S. Attorney General, particularly with regard to whom the opinions apply. As noted above, the incentive to view these opinions as binding has been hampered by the willingness of federal courts to defer to agency interpretations of law. Because the Council of State and the Virginia Attorney General also play an immense judicial role in their respective governments, their opinions carry weight among the recipients. The Council of State's role in adjudicating cases of administrative law guarantees that officials who ignore the Council's advice do so at their own peril. An administrator who acts contrary to the Council's advice may find himself or herself defending their actions before the very same

body which rendered the advice they ignored. In Virginia, the Attorney General's Office is charged with representing all agencies and public institutions within the Commonwealth. An administrator who ignores the Attorney General's advice may find themselves in a weaker bargaining position than would an administrator who followed the Attorney General's advice in good faith. Attorney General Opinions in Virginia are granted additional weight in the fact that they provide limited immunity to administrators who follow them.

There are, however, many glaring differences between the opinions of the Council of State and those of the Virginia Attorney General, particularly regarding the public nature of the opinions. Opinions of the Council of State are neither published nor made public, except at the discretion of the official receiving the advice. This makes knowing exactly what the opinions say or how they are organized difficult, if not impossible. The U.S. Attorney General and the Office of Legal Council do publish those opinions that the requestor agrees to publish and those which the Department of Justice deems appropriate for release. Virginia's Attorney General, on the other hand, publishes all opinions, monthly in the *Law Digest* and annually in the *Annual Report of the Attorney General*. The opinions of the OLC and the Virginia Attorney General are also available electronically, with access made available at each department's homepage and online using *Lexis-Nexus* and *Westlaw*. The only decisions made public by the Council of State itself are opinions in cases that the Council adjudicates.

Chapter Summary

The power of courts to declare an act of the legislature or an action of the executive branch unconstitutional, while more striking is less significant for the daily functioning of a legal system than the power to declare an act or action not in keeping with the law (King, 1965). Additionally less striking and more significant to the functioning of a legal system is the ability of those charged with executing and implementing the law to obtain clarification and guidance where there are no precedent or guiding principles. As the ability to govern has grown in terms of its complexity, so too has the necessity for guidance. As Fuller (1969) noted, no system of law is so perfectly crafted as to leave no room for dispute. Advicegiving plays an important role in government, yet it is one traditionally associated with the judiciary. However, as this chapter has noted, extra-judicial advicegiving and legal interpretation is practiced by a variety of institutions, and its influence ranges from barely noticeable to large in scope.

Advicegiving, particularly in the context of legal uncertainty, serves three manifest purposes. One, the advice given offers the recipient a solid foundation upon which to base administrative decisions and serves as a warning around which future plans can be arranged in order to avoid dire legal consequences. Secondly, advicegiving highlights the centrality of legal and constitutional principles and helps explain the rationale behind a given law(s) and checks the natural tendency to focus solely on the bottom line (Kaytal, 1993). Thirdly, advicegiving is a device through which one can give persuasive advice that administrators and legislators will hear and that will ingrain itself in the interpretation and application of the law.

Although the United States does not possess a federal level advicegiving institution equivalent to the French Council of State, it does have the mechanisms in place to provide limited advice via the Office of Legal Council within the U.S. Attorney's Office. Yet, as noted above, the ability to render opinions on a wider scale within the federal government is muted by various political and organizational limitations. The states, on the other hand, do possess a cross-departmental and government-wide advicegiving mechanism represented by the state attorney general. The opinions issued by the Virginia Attorney General are taken seriously by recipients and do influence state and local administration, much like those issued by the Council of State. The opinions issued by the Council of State and the Virginia Attorney General are perceived as impartial, informed, and, in many cases, binding statements on administration and the law.

In the next two chapters, I shall provide a detailed and descriptive analysis of Virginia Attorney General Opinions and how they have influenced governmental administration in Virginia. Chapter Five will provide a descriptive overview of the Virginia Attorney General Opinions for the years 1972, 1976, 1980, 1984, 1988, 1992, 1996, and 2000. The analysis will focus on the various categories of the opinions, the sources of opinion requests, and changes in the state political context that influenced the types of questions asked and the ability of the attorney general to provide guidance. Chapter Six will explore, in greater detail, how these opinions have influenced local and state administration, legislation, and the state judiciary.

¹ A sample study conducted over nine months of the Council's work in 1994 on 420 opinions showed complete conformity in 399 cases and on the other 21 cases, advice was followed partially (Questiaux, 1995, p. 254).

² The U.S. Attorney General used to supervise and administer the Immigration and Naturalization Service and the Board of Immigration Appeals, but these functions have now been transferred to the Department of Homeland Security.

Chapter Four: Virginia Attorney General Opinions in Brief

No law or ordinance is mightier than understanding. – Plato, *Laws*

Introduction

Chapter Three presented the first descriptive aspect of this dissertation, comparing the opinion writing process of Virginia's Attorney General's Office with the opinion writing function of the French Council of State in terms of their overall form and function. The first part of this chapter lays out the methodology used to select, categorize, and examine the opinions of the Virginia Attorney General. The second, and more substantive, part of this chapter presents the second descriptive aspect of this dissertation, namely a comprehensive review of all Virginia Attorney General Opinions, within my stated time frame, based on opinion category, opinion topic, and question source. This was done to give a general description of Virginia Attorney General Opinions, and will lay the groundwork for Chapter Five, which determines where, within the various areas of the state and local governments, the opinions are having their greatest potential impact. The section of this chapter briefly compares the opinions for each of the years selected and provides explanations for the similarities and variations between the years selected for study.

The following chapter, Chapter Five, uses several measures to gauge the impact of the attorney general opinions on public administration, including: 1) how Virginia courts have treated the opinions; 2) legislative tracking to determine the General Assembly's response to the opinions; 3) changes in state agency administrative procedures based on the opinions; and 4) changes in local ordinances, practices, and policies in response to the opinions.

Methodology

As noted in Chapter One, Virginia was selected as my case study for several reasons: first, Virginia has an elected attorney general, which gives the rendered opinions a sense of independence since the attorney general is not dependent on the governor or state legislature for appointment. Second, the Office of the Attorney General is under the Executive Branch of the Virginia Constitution, which places the attorney general outside the judicial branch and within the broader literature concerning extra-judicial interpretation. Finally, Virginia was selected due to ease of researcher access to the actual opinions.

I examined the opinions written by each of Virginia's 6 elected Attorneys General between the years of 1972 to 2001.¹ One year was selected during each Attorney General's tenure (Coleman and Terry have two years since they each served two terms) during which there was no statewide Gubernatorial, House, or Senate election. Accordingly, the years under study are 1972, 1976, 1980, 1984, 1988, 1992, 1996, and 2000. This date range and selection criteria were used for three reasons. First, I wanted to examine only the opinions written and authorized by elected Attorneys General. The rationale for this was to control for extraneous political variables that may influence the impartiality of the opinions, such as direct appointment by the governor. Secondly, prior to 1971, the Office of the Attorney General was located within the state judicial branch. The revised Virginia Constitution of 1971 reorganized the three branches and placed the Attorney General within the Executive Branch. Third, by examining the opinions of each elected attorney general I was able to provide a set of opinions from every attorney general elected under the new constitutional structure.

Additionally, by examining only those opinions issued in off-election years, I was able to capture the opinions within an operating context absent the politicized nature of statewide gubernatorial and legislative elections. Examining the opinion writing function of the state attorney general in off-election years serves a two-fold function. First, it eliminates much of the potential bias in the opinions on issues that may factor into statewide elections during that particular year. Secondly, since the attorney general in Virginia is not subject to term-limits, this allowed me to analyze the opinions under their normal operating context without the potential baggage of re-election campaign rhetoric. Additionally, by selecting these years, I was able to examine changes within the political and social contexts of Virginia that may have significantly influenced the types of questions asked of the attorney general. Furthermore, by isolating these years, I was able to identify statutory and policy changes that occurred as a result of the opinions.

The external validity of this study might be questioned by my use of Virginia as the only case study. Extrapolating the results of Virginia to other states may be problematic due to various institutional and political constraints present within the opinion writing function of other state attorneys general, particularly in those states where the attorney general is not popularly elected. The constitutional and statutory requirements and limitations on the issuance of attorney general opinions in other states may also make it difficult to draw valid comparisons. However, I believe the value in critically examining the opinion writing function of one state's elected attorney general is that it provides a template one could utilize in expanding this study to other elected state attorneys general.

The selection of specific years of opinions for study also raises several issues related to internal validity. By controlling for external statewide political factors that may influence the opinions, each year selected for study corresponds with national presidential elections. The years selected for study do not negate the possible effect of presidential elections on the type of opinion requests submitted and the advice rendered. The use of only one year within each attorney general's term of office is also problematic and would make any assumptions associated with that particular attorney general difficult to sustain. However, as previously mentioned, the purpose of this study is not to compare the impact of specific attorneys general on local and state administration, but to examine the effect of the opinion writing function of the attorney general's office in general. Additionally, due to the relatively high number of opinions issued between the years 1972 and 2000, it is necessary to set some logical limits on the body of opinions to be studied in order to provide more than a cursory and descriptive examination of the opinion writing function. By limiting the total number of opinions selected, it affords an opportunity to track the substantive impact of specific opinions within the Commonwealth.

Opinion Categories

In analyzing the opinions, I employed the traditional case opinion analysis, in which court opinions are "briefed" to delineate the particular case facts, questions presented, the holding of the court, and the significance of the case holding. Each Virginia Attorney General Opinion was briefed in a similar fashion and categorized according to opinion category and source of request. The opinion categories were

selected based on the central question asked of the attorney general by the requestor. Opinions were categorized according to the following broad topics: general interpretation, official duties and government authority, the law in action, general personnel issues, and general administration.

The first group of opinions was those asking the attorney general for an interpretation of existing laws. *Statutory Interpretation* opinions dealt primarily with questions regarding the construction of, application of, or definitions within a specific statute(s) in the *Code of Virginia*. *Virginia Constitution Interpretation* opinions dealt with specific questions requesting an interpretation of Virginia's Constitution. *U.S. Constitution Interpretation* opinions were those which asked the attorney general to interpret specific sections of the federal constitution. *Civil Rights/Civil Liberties* opinions asked the attorney general to construe the extent and application of specific enumerated Constitutional rights (e.g. right to counsel, privacy, etc.). *Conflict of Interest* opinions concerned interpretations of Virginia's Conflict of Interest Law and related statutes. *Federal Statute Interpretation* opinions dealt with questions concerning the application of and definitions arising from specific federal law(s). *Local Ordinance/Charter Interpretation* opinions were those requests asking the attorney general to construe specific sections of ordinances and charters for meaning and application. *Common Law Interpretation* dealt with questions regarding the application and interpretation of common law practices. *Regulatory Interpretation* concerned questions about the proper application and legality of Virginia rules and regulations.

The second grouping of opinions was those which dealt with questions regarding the authority of government units or government officials. *Local Government Unit*

Authority opinions concerned questions regarding the ability of certain local governing units (i.e. boards of supervisors, school boards, industrial development authorities) to exercise specific or implied grants of power. *State Agency Authority* opinions represented answers to questions regarding the specific authority of state government agencies, universities, and commissions. *Local Officials – Duties, Powers, and Authority* opinions concerned questions regarding statutory duties, powers, and authority of local officials (i.e. Constitutional Officers and their subordinates). *State Official – Duties, Powers, and Authority* opinions answered questions regarding grants of power and job duties of state officials. *Administrative Discretion* opinions dealt with specific questions regarding the exercise of implied statutory discretion by state and local officials. *Judicial Power* opinions are those which answered questions regarding court jurisdiction and the authority/discretion of judges. *Legislative Powers* opinions dealt with questions regarding specific grants of power to the General Assembly and the ability of the state legislature to engage in certain activities. *Rulemaking* opinions concerned questions regarding the regulatory authority of some state agencies.

The third grouping, the law in action, includes those opinions which dealt with questions regarding the application and interaction of local, state, and federal laws. *Local Ordinance/Charter Validity* questions asked the attorney general to comment on the legality of specific ordinances and charter practices. *Constitutionality of State Law* opinions answered questions regarding the constitutionality (both state and federal) of existing state laws. *Legality of Pending Legislation* opinions were those in which the attorney general was asked to comment upon the legality/constitutionality of House and Senate bills prior to their introduction. *Effect of Legislation* opinions were answers to

questions regarding the hypothetical and real impact of specific bills or laws on existing laws, policies, and practices. *Conflict Between Laws* opinions were those questions that concerned possible conflicts between and among local ordinances, state laws, and federal statutes. *Legal Consequences* opinions were those in which the attorney general was asked to comment upon the ramifications of specific cases of action or inaction by state and local officials. *Criminal Law/Procedure* opinions concerned questions regarding methods of prosecution, acceptable definitions of criminal offenses, and proper judicial procedure in criminal cases. *Civil Law/Procedure* opinions dealt with matters of civil law interpretation and proper procedure. *Prior Attorney General* opinions were those answering questions concerning the application of prior attorney general opinions, the validity of prior opinions, and requests for reconsideration of prior opinions in light of changing circumstances. *Application of Virginia Supreme Court Opinions* and *Application of U.S. Supreme Court Opinions* dealt with the proper application of judicial rulings to existing laws and practices.

The fourth grouping of opinions, general personnel, concerned questions regarding the application of existing law to issues of employment and liability. *Qualifications for Office/Employment* opinions answered questions concerning statutory and constitutional provisions regarding individual eligibility for appointment to boards and commissions, in addition to state and local government positions. *Liability/Immunity* opinions dealt with questions regarding local and state officials' liability and/or immunity under a given set of circumstances.

General Administration opinions were those questions that did not neatly fall into one of the proceeding categories (i.e. acceptable use of the Seal of Virginia). Additional

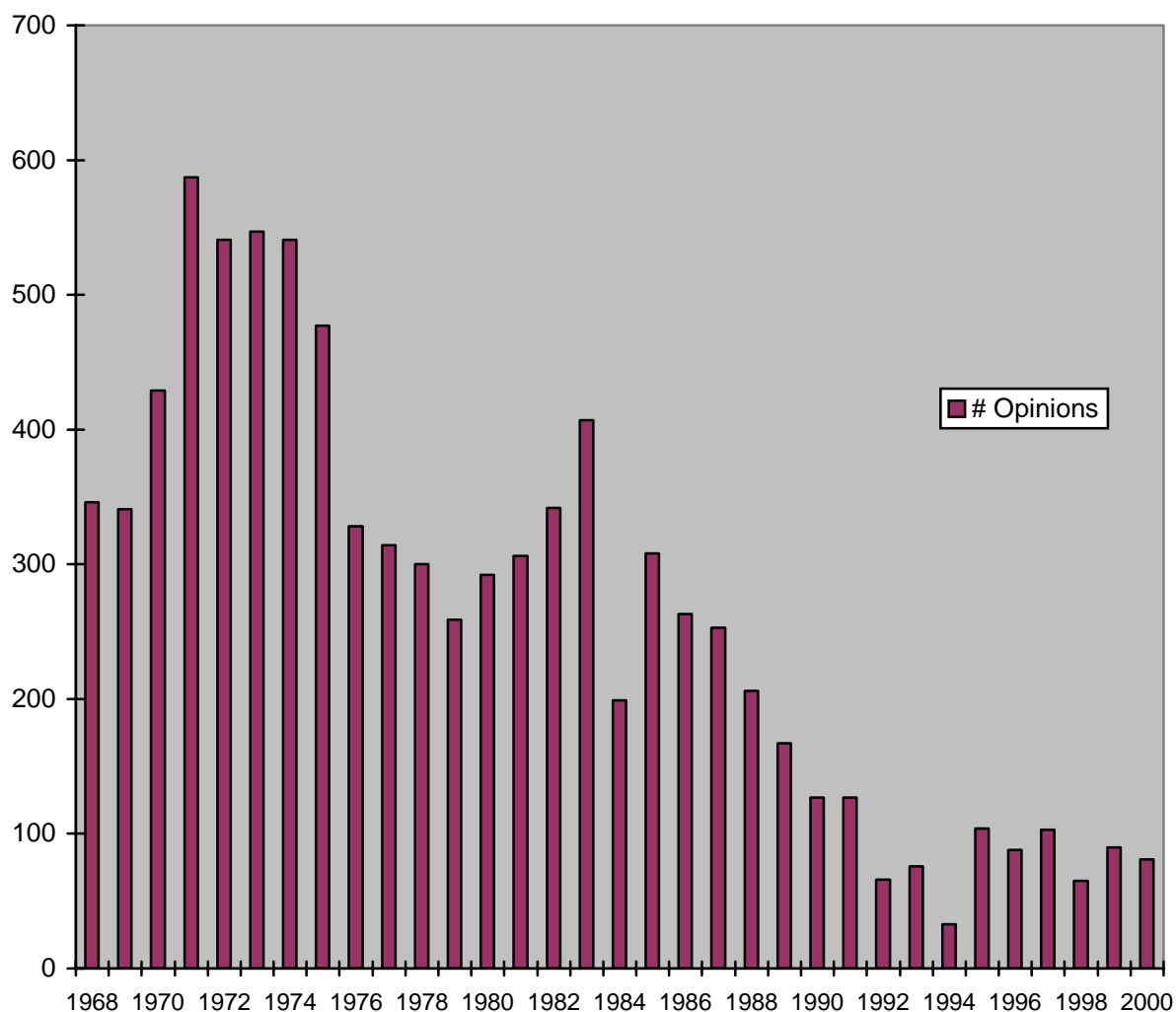
categories found among the opinions I examined include, *Contract Interpretation*, *Judicial Ethics*, *Professional Ethics*, *Non-profit Administration*, *Administrative Hearings*, *Interpretation of Other Official Opinions*, and the *Legality of Private Association Rules*.

Requestor Categories

The requestor categories utilized for analyzing the opinions were very straightforward. Each of the opinions is prefaced by the name and position of the individual requesting the opinion. Thus, it was evident from the opinion itself as to exactly who was requesting the opinion, such as a Commonwealth's Attorney, Member of the General Assembly, or local government official. The use of requestor categories is helpful in understanding where the majority of opinion requests originate, and consequently, where the opinions are being directly utilized.

Virginia Attorney General Opinions – Overview

The following chart shows the number of Attorney General Opinions issued for each year between 1968 and 2000. The purpose of this chart is to show the distribution of opinions within the years selected for study compared with all other available years.

FIGURE 1. Number of Opinions 1968-2000

As shown in Figure 1 above, the largest volume of opinions can be found in first half of the 1970s, with the year 1971 containing the highest number of opinions (587 total opinions). The number of opinions issued declined during the latter half of the 1970s, and began climbing again during the first three years of the 1980s, where the number declined again in 1984. The number of opinions increased again in 1985 and started to decline gradually from 1986 to 1989. The decade of the 1990s saw the fewest total

number of opinions issued, with 1994 containing the least number of opinions for any year (33 opinions total). However, with the exception of 1994, this decade saw a degree of stability in the number of opinions issued from year to year, with relatively small spikes and dips in the total number of opinions. A summary of the total number of opinions for each of the years selected for this study is presented in the table below:

TABLE 1. Total Number of Opinions for Selected Years

Year Selected	Number of Opinion Issued
1972	541
1976	328
1980	292
1984	199
1988	206
1992	66
1996	88
2000	81
TOTALS	1801

As noted above, each opinion for the years selected was grouped into a general category based on the type of question asked. An overview of the opinion categories for all of the years selected are presented in Table 2 below:

TABLE 2. Total Opinion Categories for Selected Years

OPINION CATEGORY	NUMBER OF OPINIONS
Specific Statutory Interpretation	778 (43%)
Local Government Authority	248 (14%)
Local Officials – Duties, Power, and Authority	98 (5%)
Criminal Law/Procedure	66 (4%)
Judicial Power	58 (3%)
Virginia Constitutional Interpretation	55 (3%)
Qualifications for Office/Employment	54 (3%)
Local Ordinance/Charter Validity	50 (3%)
Conflict of Interest	37 (2%)
Federal Statute Interpretation	30 (2%)
Local Ordinance/Charter Interpretation	30 (2%)
Liability/Immunity	24 (1%)
State Agency Authority	24 (1%)
Administrative Discretion	22 (1%)
Civil Rights/Civil Liberties	22 (1%)
Rulemaking	22 (1%)
Effect of Legislation	21 (1%)
Civil Law and Procedure	20 (1%)
Local/State Law Conflict	17 (1%)
General Assembly Legislative Powers	17 (1%)
Conflict of State Laws	16 (< 1%)
Legality of Pending Legislation	14
State Executive Branch Official Duties	14
Conflict State/Federal Law	13
Clarification of Prior Attorney General Opinion	13
General Administration	9
Constitutionality of State Law	9
U.S. Constitution Interpretation	4
Contracting Out	3
Lieutenant Governor – Duties, Powers, and Authority	2
Legal Consequences of Action	2
U.S. Supreme Court Opinion Interpretation	2
Common Law Interpretation	1
Judicial Ethics	1
Contract Interpretation	1
Interpretation of Virginia Supreme Court Opinion	1
Contract Law	1
Conflict Local/Federal Law	1
Commonwealth's Attorney Opinions	1
Professional Ethics	1
Administrative Hearings	1
Federal Agency Authority	1
Non-profit Administration	1
Legality of Private Association Rule	1
Other Agency Interpretation	1
TOTALS	1,801

As shown in Table 2 above, the largest percentage of opinions were those dealing with specific statutory interpretation (43%), either the meaning of definitions within or the construction and application of certain sections of the *Code of Virginia*. The second largest percentage of opinions issued within the years studied were those dealing with questions concerning the authority of local government units (14%), such as Boards of Supervisors, School Boards, and Industrial Development Authorities. The third largest category of opinions was those answering questions regarding the duties, powers, and authority of local government officials (5%), including elected/appointed officials and public employees. The fourth largest category of opinions dealt with issues of criminal law and procedure (4%), such as prosecutorial discretion and application of the criminal code to certain situations involving trials and criminal offenses. The fifth largest category of opinions concerned questions of judicial power, interpretations of the Constitution of Virginia, and qualifications for public office/employment (3% each). The remaining categories of opinions constituted 2% or less of the total number of opinions issued for the years selected for examination.

In addition to opinion category, each opinion was also grouped according to the source of the request. An overview of the sources of opinion requests for the years selected is presented in Table 3 below:

TABLE 3. Total Sources of Opinion Requests for Selected Years

Source of Request	Number of Requests
Member, House of Delegates	386 (21%)
Commonwealth's Attorney	325 (18%)
Member, Virginia Senate	193 (11%)
State Executive Branch Official	188 (10%)
County/Town/City Attorney	157 (9%)
Commissioner of Revenue	129 (7%)
Circuit Court Clerk	102 (6%)
General District Court Judge	87 (5%)
Sheriff	55 (3%)
Local Treasurer	54 (3%)
Juvenile and Domestic Relations Court Judge	46 (2.5%)
Circuit Court Judge	32 (2%)
Local Electoral Board	21 (1%)
Justice of the Peace/Magistrate	6 (< 1%)
Executive Director, VA Bar Association	5
Clerk/Executive Secretary Supreme Court of Virginia	4
Governor	3
Members, House and Senate	3
Local Registrar	2
Clerk, Virginia Senate	1
Lieutenant Governor	1
Clerk, Board of Supervisors	1
TOTALS	1,801

As shown in Table 3 above, the highest percentage of opinion requests came from House of Delegates Members (21%). Most of the opinion requests submitted by House of Delegates Members were submitted on behalf of local government officials in their districts. Due to constitutional and statutory prohibitions, many local officials are unable to directly request an opinion and must use a proxy, such as their local Delegate, Senator, or other official permitted by statute to submit a request. The second largest percentage of opinion requests came from Commonwealth's Attorneys (18%), although the number of requests from Commonwealth's Attorneys declined over the years examined due to statutory limitations placed on opinion requests from those officers. The third largest percentage of opinion requests came from Virginia Senate Members (11%). Like the

House of Delegates counterparts, most requests were made on behalf of and concerning issues important to their constituents. The fourth largest percentage of opinion requests came from state executive branch officials (10%). Most of these requests concerned issues related to official duties and/or powers and the legal authority of state agencies. The fifth largest percentage of opinion requests came from county/town/city attorneys (9%). Unlike Commonwealth's Attorneys who represent the state and locality only in criminal issues, county/town/city attorneys represent the locality in all matters related to local government administration. Their requests were typically related to local government authority and the duties and power of local officials.

The remainder of this chapter examines the opinion characteristics for each of the years selected in this study. The description for each year is prefaced by a brief discussion of the political context of that year, including organizational changes that took place within the Attorney General's Office, general changes in the orientation of the office, and key pieces of legislation passed by the General Assembly that may have influenced the number and types of opinion requests. The opinion characteristic description for each year is also supplemented by a brief discussion of the various topics addressed within the opinion categories. A more substantive analysis of the general impact of the opinions and of specific opinions is offered in Chapter 5.

1972 Virginia Attorney General Opinions (Andrew P. Miller)

In 1971, Virginia's new constitution, the product of several years work by the General Assembly and the Constitutional Council, went into effect.² Among the many changes brought about by the new document was a reduction of the total number of

Articles from seventeen to twelve, two hundred and twenty-six sections to one hundred eighty three, and 35,000 words to 18,000 words (Morris and Sabato, 1998). The new constitution deleted many antiquated sections, consolidated others, and reorganized the administrative apparatus of the state. The new constitution was not without its critics who charged that the document continued to utilize non-modernized language with too many technical and legal motifs (Morris and Sabato, 1998). Questions regarding the reorganization efforts and consolidations/deletions of the 1971 Constitution and their affect on the *Code of Virginia* occupied much of the attorney general's opinion writing process well into 1972, as reflected by the volume of opinions issued.

During this time, the General Assembly also conducted a complete revision of the state's Alcohol and Beverage Control regulations, Driving Under the Influence laws, and the Implied Consent law (*Acts of the General Assembly of the Commonwealth of Virginia 1971 Regular Session,, Vol. 2*). Other actions contributing to the heavy workload also included the state plan to assume enforcement duties of the U.S. Department of Labor's safety and health laws and extensive revisions to Virginia's Medical Practice Act (*1971-72 Annual Report of the Attorney General of Virginia*). In response to these changes, the Technical Assistance Unit of the Attorney General's Office began periodic mass mailings of memoranda on law to police officers across the state in the form of the *Peace Officer* newsletter and to prosecutors and judges in the *Virginia Prosecutor* newsletter (*1971-72 Annual Report of the Attorney General of Virginia*). The Technical Assistance Unit also began the practice of mailing opinions of the Virginia Supreme Court to all judges and Commonwealth's Attorneys within 48 hours of the decision (*1972-73 Annual Report of the Attorney General of Virginia*).

TABLE 4. 1972 Virginia Attorney General Opinions by Category

Opinion Category	Number of Opinions
Specific Statutory Interpretation	265
Local Government Unit Authority	69
Local Officials – Duties, Power, and Authority	26
Virginia Constitution Interpretation	24
Conflict of Interest	19
Criminal Law/Criminal Procedure	15
Qualifications for Office/Employment	14
Administrative Discretion	14
Validity of Local Ordinance	14
Local/State Law Conflict	13
Judicial Power	11
Specific Federal Statute Interpretation	11
Civil Rights/Civil Liberties	10
General Assembly Legislative Powers	8
Local Charter/Ordinance Interpretation	8
Liability/Immunity	7
Clarification of Prior Attorney General Opinion	4
General Administration	3
Conflict of State Laws	2
Legality of Pending Legislation	1
Effect of Legislation	1
Common Law Interpretation	1
State Agency Authority	1
TOTALS	541

As shown in Table 4 above, the majority of Attorney General Opinions in 1972 (49%) dealt with interpreting the meaning of and/or application of specific statutes within the *Code of Virginia*, such as changes to the alcoholic beverage control laws, motor vehicle laws, and Virginia’s Medical Practice Act. The second largest category of opinions (13%) dealt with questions regarding local government authority, primarily the powers of counties and boards of supervisors affected by changes to the Constitution of Virginia. The third largest category (5%) concerned questions about specific powers, duties, and authority of local government officials also affected by constitutional revisions. The fourth largest category of opinions (4%) provided answers to questions

regarding the interpretation of specific sections found within the newly framed Constitution of Virginia, particularly elections and powers of the General Assembly.

TABLE 5. 1972 Virginia Attorney General Opinions by Requestor

Source of Request	Number of Requests
Commonwealth's Attorney	152 (28%)
State Executive Branch Official	81 (15%)
Member, House of Delegates	81 (15%)
Member, Virginia Senate	48 (9%)
Circuit Court Clerk	32 (6%)
Commissioner of Revenue	30 (6%)
Local Treasurer	22 (4%)
County/Town/City Attorney	20 (4%)
Juvenile and Domestic Relations Court Judge	19 (3%)
Circuit Court Judge	13 (2%)
General District Court Judge	11 (2%)
Local Electoral Board	11 (2%)
Sheriff	8 (1%)
Justice of the Peace	6 (1%)
Governor	2 (< 1%)
Clerk, Supreme Court of Virginia	1
Clerk, Virginia Senate	1
Local Registrar	1
Lieutenant Governor	1
Clerk, Board of Supervisors	1
TOTALS	541

As shown in Table 5 above, the largest percentage of opinion requests (28%) came from Commonwealth's Attorneys, who requested opinions primarily related to changes in the criminal law and procedure sections of the *Code of Virginia*. State executive branch officials constituted the second largest source of opinion requests (15%) along with House of Delegates Members (15%), with an emphasis on administrative discretion and statutory interpretation, respectively. The third largest percentage of opinion requests came from Virginia Senate Members (9%), also requesting opinions primarily related to statutory interpretation. Circuit Court Clerks and local Commissioners of Revenue accounted for the fourth largest percentage of opinion

requests (6% each). The questions submitted by both groups concerned interpretations of statutes related to recordation fees and tax assessments and/or exemptions, respectively. The fifth largest source of opinion requests (4% each) was local treasurers, with an emphasis on taxation statutes, and county/town/city attorneys, who requested opinions primarily dealing with local government authority.

1976 Virginia Attorney General Opinions (Andrew P. Miller)

In the period prior to 1976, the Virginia Attorney General's Office continued to expand and underwent its first reorganization efforts under the new constitution. In 1973, the office was reorganized into four main divisions – Civil I, Civil II, Criminal, and Transportation (*1973-74 Annual Report of the Attorney General of Virginia*). In 1976, the Civil III Division was added, creating five internal divisions (*1975-76 Annual Report of the Attorney General of Virginia*). This period was also marked by an increased effort to better serve the state and provide more expedient legal assistance by stationing assistant attorneys general within many state agencies (e.g. regional welfare offices, Department of Corrections, Department of Highways and Transportation). In an effort to stem the large number of opinion requests from Commonwealth's Attorneys relating to prosecutorial discretion, the Attorney General was successful in getting the General Assembly to change the language related to opinion requests from Commonwealth's Attorneys requiring each request be accompanied by the Commonwealth's Attorney's own opinion on the issue (*Acts of the General Assembly of the Commonwealth of Virginia 1976 Regular Session, Vol. 2*).

This period was also marked by several major changes to the Code of Virginia and new legislative initiatives. In 1974, the Virginia General Assembly revised the

state's Anti-Trust Act in order to bring the law into accord with the new constitution (*Acts of the General Assembly of the Commonwealth of Virginia 1974 Regular Session, Vol. 2*). That same year, the General Assembly abolished the Justice of the Peace system in Virginia and replaced it with a magistrate system (*1973-74 Annual Report of the Attorney General of Virginia*). The following year, 1975, saw a new property tax reform bill passed into law which changed the rates of assessments and exemption categories for tangible personal and business property (*Acts of the General Assembly of the Commonwealth of Virginia 1975 Regular Session, Vol. 2*). In 1975, the newly revised criminal law and criminal procedure codes went into effect (*Acts of the General Assembly, 1975*). Not surprisingly, the changes made by the General Assembly and the re-codification of Title 18.1 of the criminal code and Title 19.1 of the criminal procedure code increased the number of opinion requests related to the interpretation and application of the revised codes.

As a result of the vast number of changes in Virginia law and the increasing number of opinion requests being handled by the Attorney General's Office, the Office expanded its educational outreach efforts in an attempt to be more proactive. In 1975, the Attorney General's Office held its first conference for local school officials to provide seminars and explanations on a variety of education-related legal issues (*1974-75 Annual Report of the Attorney General of Virginia*). The Technical Assistance Unit continued to expand its publication efforts in 1975 by creating the *Virginia Magistrate*, a monthly newsletter containing summaries of legal issues intended for magistrates across the Commonwealth, and *The Civil Digest*, a collection of opinions and court decisions related to civil law, which was mailed to local government officials (*1975-76 Annual Report of*

the Attorney General of Virginia). In 1976, the Technical Assistance Unit completed its work on and published a new training manual for Commonwealth's Attorneys, replacing the outdated 1972 edition (p. vi).

TABLE 6. 1976 Virginia Attorney General Opinions by Category

Opinion Category	Number of Opinions
Specific Statutory Interpretation	133 (40%)
Local Government Unit Authority	39 (12%)
Local Officials – Duties, Power, and Authority	20 (6%)
Qualifications for Office/Employment	20 (6%)
Virginia Constitution Interpretation	13 (4%)
Ordinance Validity	13 (4%)
Judicial Power	11 (3%)
Criminal Law/Procedure	10 (3%)
State Agency Authority	9 (3%)
Federal Statute Interpretation	9 (3%)
Effect of Legislation	6 (2%)
Local Ordinance Interpretation	5 (2%)
Liability/Immunity	5 (2%)
Rulemaking	5 (2%)
Conflict State Laws	4 (1%)
Conflict of Interest	3 (1%)
Conflict Between State/Federal Law	3 (1%)
Administrative Discretion	3 (1%)
Civil Rights/Civil Liberties	3 (1%)
State Officials – Duties, Powers, Authority	2 (1%)
Legality of Pending Legislation	2 (1%)
Legislative Power	2 (1%)
Constitutionality of State Law	2 (1%)
Conflict Between Local/State Law	1
General Administration	1
Judicial Ethics	1
Contracting Out	1
Contract Interpretation	1
Interpretation of Virginia Supreme Court Opinion	1
TOTALS	328

As shown in Table 6 above, the highest percentage of opinions issued in 1976 dealt with questions of specific statutory interpretation (40%). Aside from answering questions concerning the definitions of specific terms, phrases, or concepts found within the *Code of Virginia*, opinion topics in this category covered a wide-range of issues,

including clarifications on tax exemptions, allowable fees for certain types of document recordation, application of and definitions found within Virginia's Freedom of Information Act, and application of Virginia's Worker's Compensation Act. *The* second largest group of opinions was concerned questions regarding the authority and power of local governmental units (12%). Topics covered in this category of opinions dealt primarily with the authority of Boards of Supervisors over setting zoning regulations, budget appropriations, and control over localized welfare programs; and with the authority of local School Boards over matters related to the operation of school systems.

The third largest category of opinions dealt with questions regarding local officials' duties and powers (6%), and qualifications for public office or employment (6%). Topics related to local officials' duties and powers included police authority over civil matters, transportation of prisoners, and delegation powers. Questions concerning the (in) compatibility of public offices and residency requirements made up the majority of issues related to qualifications for public office and/or employment. The fourth largest percentage of opinions (4%) answered questions regarding an interpretation of the Constitution of Virginia, including the propriety of appropriations to church affiliated organizations and voter qualifications; and assessing the validity of local ordinances related to zoning and taxation.

The fifth largest percentage of opinions (3% each) dealt with questions concerning judicial power, criminal law and procedure, state agency authority, and interpretations of federal statutes. Topics related to judicial power included sentencing discretion, appointment powers, and use of contempt. Questions regarding criminal law and procedure covered a wide range of issues including juvenile proceedings and

detention, the use of bifurcated trials, and the burden of proof in adjudicating habitual offenders. Topics concerning state agency authority included the appointment powers of certain public commissions, the sale of publicly owned land, and university police powers. Lastly, questions related to the application and meaning of the Soldiers' and Sailors' Civil Relief Act constituted the bulk of requests for an interpretation of federal statutes.

TABLE 7. 1976 Virginia Attorney General Opinions by Requestor

Source of Request	Number of Requests
Member, House of Delegates	61 (19%)
Commonwealth's Attorney	60 (19%)
Commissioner of Revenue	36 (11%)
Member, Virginia Senate	35 (11%)
Circuit Court Clerk	27 (8%)
State Executive Branch Official	27 (8%)
County/Town/City Attorney	26 (8%)
General District Court Judge	20 (6%)
Local Treasurer	12 (4%)
Juvenile and Domestic Relations Court Judge	12 (4%)
Sheriff	7 (2%)
Local Electoral Board	2 (1%)
Governor	1
Local Registrar	1
Executive Secretary, Virginia Supreme Court	1
TOTALS	328

As shown in Table 7 above, the largest percentage of opinion requests came from House of Delegates Members (19%) and Commonwealth's Attorneys (19%), predominantly concerning issues of statutory interpretation and local government authority. Commissioners of Revenue (11%) and Virginia Senate Members (11%) constituted the second largest source of opinion requests. The majority of questions asked by Commissioners of Revenue dealt with statutory interpretation relating to taxation (definitions and exemptions) with Senators asking questions primarily related to the effect of particular pieces of legislation and legislative power, in addition to those

concerning statutory interpretation and local government authority. The third largest percentage of opinion requests came from circuit court clerks (8%), state executive branch officials (8%), and County/Town/City attorneys (8%). Most questions fell within the statutory interpretation category for Circuit Court Clerks, mostly related to filing definitions and fees. State executive branch officials' questions included issues relating to rulemaking, while county/town/city attorneys made inquiries regarding the duties and powers of local officials. General District Court judges constituted the fourth largest source of opinion requests (6%), followed by local treasurers (4%) and Juvenile and Domestic Relations Court judges (4%). Again, most of these questions asked for an interpretation of a specific code section, with the judges' questions more concerned with criminal statutes and treasurers' questions relating to tax statutes. There were seven requests from local sheriffs, two from local electoral boards, and one each from the governor, local registrar, and Executive Secretary of the Virginia Supreme Court.

1980 Virginia Attorney General Opinions (John Marshall Coleman)

The years leading up to 1980 were defined by a growing popular resistance on the part of citizens to the growth of government (Morris and Sabato, 1998). In 1977, the Attorney General's Office actually returned \$120,000 earmarked for five new positions to the General Assembly in an effort to limit the growth of the state government (*1977-78 Annual Report of the Attorney General of Virginia*). No reorganization efforts were undertaken by the Office of Attorney General during this period and in 1980, the total number of attorneys working in the office was reduced by ten percent (*1980-81 Annual Report of the Attorney General of Virginia*). Growing citizen concern also prompted

passage of Virginia's Consumer Protection Act in 1977. That same year, new legislation was passed by the General Assembly which created a new set of investigatory, licensing, and disciplinary proceedings for all independent state regulatory boards (*Acts of the General Assembly of the Commonwealth of Virginia 1977 Regular Session, Vol. 2*). These changes in the law prompted an increase in legal services to and opinion requests from many of the regulatory boards.

This period of citizen rights culminated in 1978 with the passage of Proposition 13 in California. The shockwaves of this landmark referendum would reverberate throughout the Commonwealth and other states for years to come. As a result of Proposition 13 and the Virginia Property Tax Reform Act of 1975, the years between 1977 and 1980 saw an increase in the number of tax related opinion requests (*1979-80 Annual Report of the Attorney General of Virginia*). In 1977, the General Assembly also passed Virginia's Animal Welfare Act and completed the re-codification of Title 32 of the Virginia Code dealing with public health (*Acts of the General Assembly, 1977*). During the same time period, the price of precious metals also rose which led to an increase in burglaries across the Commonwealth (*1980-81 Annual Report of the Attorney General of Virginia*). As a result of this upswing in burglary, the Attorney General's Office saw an increase in the number of opinion requests regarding the validity of local ordinances regulating gem dealers in an attempt to curb the fencing of stolen goods.

This period was also marked by increased antagonism between Virginia and the federal government, as evidenced by an increase in litigation pitting Virginia against the federal government. During this period, there were challenges to Virginia laws regarding the exclusion of the press from certain trials, the enforcement of OSHA regulations, and

land use regarding mining. Losses in the first and third cases resulted in revisions to Virginia's criminal procedure laws and mining regulations (*1978-79 Annual Report of the Attorney General of Virginia*). Virginia settled its lawsuit with the U.S. Department of Labor over the enforcement of OSHA regulations, and opted to revise its original enforcement plan of 1972 rather than cede regulatory enforcement authority back to the Department of Labor (*1980-81 Annual Report of the Attorney General of Virginia*).

TABLE 8. 1980 Virginia Attorney General Opinions by Category

Opinion Category	Number of Opinions
Specific Statutory Interpretation	131 (45%)
Local Government Unit Authority	42 (14%)
Local Officials – Duties, Power, and Authority	14 (5%)
Rulemaking	12 (4%)
Judicial Power	10 (3%)
State Agency Authority	9 (3%)
Qualifications for Office/Employment	9 (3%)
Local Ordinance Interpretation	7 (2%)
Criminal Law/Procedure	7 (2%)
Conflict Between State Laws	7 (2%)
Local Ordinance Validity	6 (2%)
Civil Law/Procedure	5 (2%)
Effect of Legislation	5 (2%)
Legality of Pending Legislation	5 (2%)
Civil Rights/Civil Liberties	5 (2%)
Liability/Immunity	4 (1%)
Conflict of Interest	4 (1%)
Legislative Power	3 (1%)
Virginia Constitution Interpretation	2
Constitutionality of State Law	2
Lieutenant Governor – Duties, Powers, Authority	2
Conflict Between State/Federal Law	1
Conflict Between Local/State Law	1
General Administration	1
Prior Attorney General Opinion	1
Contract Law	1
Conflict Between Local/Federal Law	1
Commonwealth's Attorney Opinion	1
TOTALS	292

As shown in Table 8 above, the largest percentage of opinion requests concerned questions of specific statutory interpretation (45%). In addition to the questions

requesting definitions, opinions in this category dealt with two statutes in particular, Virginia's Conflict of Interest Act and Virginia's Freedom of Information Act. The second largest percentage of opinion requests were questions regarding the specific authority and powers of local governmental units (14%). While questions regarding the powers of Boards of Supervisors and School Boards constituted the majority of topics in this opinion category, the powers and authority of Industrial Development Authorities (IDAs) were also being questioned, particularly in connection with financing economic development projects. The third largest category of opinions was those dealing with the duties, powers, and authority of local government officials (5%). More specifically, topics in this category included requirements for Sheriffs and Deputy Sheriffs related to process service and representation obligation of Commonwealth's Attorneys to local school boards.

The fourth largest percentage of opinions was those concerning rulemaking (4%). Half of the opinion requests in this category came from the Virginia Bar Association regarding its authority to set regulations governing attorney ethics and real estate practices. The fifth largest category of opinions concerned questions of judicial power (3%), state agency authority (3%), and qualifications for public office and employment (3%). Most of the issues concerning judicial power were related to questions regarding jurisdiction of juvenile cases. Questions of procurement and Game and Fisheries regulations constituted the majority of topics related to state agency authority, while residency requirements and questions regarding the compatibility of public offices dominated the qualifications category of opinions.

TABLE 9. 1980 Virginia Attorney General Opinions by Requestor

Source of Request	Number of Requests
Member, House of Delegates	72 (25%)
Commonwealth's Attorney	62 (21%)
State Executive Branch Official	37 (13%)
Member, Virginia Senate	31 (11%)
County Attorney	23 (8%)
General District Court Judge	14 (5%)
Sheriff	14 (5%)
Circuit Court Clerk	9 (3%)
Commissioner of Revenue	7 (2%)
Local Treasurer	6 (2%)
Juvenile and Domestic Relations Court Judge	6 (2%)
Executive Director, Virginia Bar Association	5 (2%)
Circuit Court Judge	3 (1%)
Local Electoral Board	3 (1%)
TOTALS	292

As shown in Table 9 above, the largest percentage of opinion requests came from House of Delegates Members (25%), and included requests for opinions concerning local charter interpretation, the constitutionality of state laws, and legislative power in addition to requests for statutory interpretation and clarification on local government authority which made up the majority of opinion categories. Requests from Commonwealth's Attorneys constituted the second largest percentage of opinion requests (21%) and included questions related to criminal law and procedure, immunity and liability, and judicial power in addition to the majority of questions relating to statutory interpretation and local government authority. The third largest percentage of requests came from state executive branch officials (13%) and covered such categories as civil rights and civil liberties, effect of legislation, and state agency authority. Members of the Virginia Senate constituted the fourth largest percentage of opinion requests (11%), followed by county attorneys (8%). In addition to the standard requests regarding statutory interpretation, the Senators' questions fell within the conflict of laws and Virginia

Constitution interpretation categories, while county attorneys inquired about ordinance validity and local government authority.

1984 Virginia Attorney General Opinions (Gerald L. Baliles)

The years between 1981 and 1984 saw the Attorney General's Office go through its first reorganization effort since 1976. The Attorney General's Office was reorganized into four divisions – Division of Finance and Transportation, Division of Criminal Law Enforcement, Division of Human and Natural Resources, and Division of Judicial Affairs (*1981-82 Annual Report of the Attorney General of Virginia*). Most of the Attorney General's opinion writing function was placed under the Opinions and Regulations Section of the Division of Judicial Affairs. This period also marked the beginning of office automation and the widespread use of computers.

This time period was also marked by numerous revisions to existing laws and the passage of new legislative initiatives. In 1981, Virginia passed its first seizure laws related to drug interdiction (*Acts of the General Assembly of the Commonwealth of Virginia 1981 Regular Session, Vol. 2*). The Economic Recovery Tax Act of 1981 made vast changes to the corporate tax structure in Virginia, which resulted in an increase of tax related opinion requests over the next several years (*1982-83 Annual Report of the Attorney General of Virginia*). In 1982, the Attorney General played a leading role in the passage of a new anti-crime legislation package. This package included such items as revising existing jurisdictional laws to allow for more cooperation and coordination of law enforcement activities, the establishment of regional grand juries, and widespread changes in many criminal penalties, particularly related to drug offenses (*1982-83 Annual*

Report of the Attorney General of Virginia). 1983 saw the passage of two significant pieces of legislation by the General Assembly – the Public Procurement Act and the Comprehensive Conflict of Interest Act – which contributed greatly to opinion requests regarding procurement procedures and conflict of interest questions (*Acts of the General Assembly of the Commonwealth of Virginia 1983 Regular Session, Vol. 2*).

Beginning in 1982, the Attorney General's Office renewed its emphasis on preventative legal assistance by providing specialized training sessions, briefings, and seminars across the Commonwealth on such issues as Virginia's Conflict of Interest Act, Virginia's Freedom of Information Act, the Administrative Procedure Act, and recent Virginia Supreme Court decisions (*1981-82 Annual Report of the Attorney General of Virginia*). The Office's attempt at disseminating legal information via its various monthly newsletters aimed at different practitioners and specialists was hampered by a loss of federal funding for such publications (*1984-85 Annual Report of the Attorney General of Virginia*). In 1984, the *Law Digest*, which consolidated all prior specialized publications, was first published as a quarterly newsletter containing discussions of key legal concerns, profiles of the various Divisions within the Attorney General's Office, and summaries of all formal Attorney General Opinions issued during the quarter (*The Law Digest, Vol. 1, No. 1*).

TABLE 10. 1984 Virginia Attorney General Opinions by Category

Opinion Category	Number of Opinions
Specific Statutory Interpretation	78 (39%)
Local Government Unit Authority	30 (15%)
Local Officials – Duties, Power, and Authority	10 (5%)
Conflict of Interest	8 (4%)
Criminal Law/Procedure	7 (3.5%)
Ordinance Validity	7 (3.5%)
State Agency Authority	5 (2.5%)
Virginia Constitution Interpretation	5 (2.5%)
Judicial Power	5 (2.5%)
Federal Statute Interpretation	5 (2.5%)
Civil Law/Procedure	4 (2%)
Conflict Between State/Federal Law	4 (2%)
Qualifications for Office/Employment	4 (2%)
Rulemaking	4 (2%)
Legality of Pending Legislation	2 (1%)
Administrative Discretion	2 (1%)
Prior Attorney General Opinion	2 (1%)
Constitutionality of State Law	2 (1%)
U.S. Supreme Court Opinion Interpretation	2 (1%)
Legal Consequences of Actions	2 (1%)
State Officials – Duties, Powers, Authority	1
Effect of Legislation	1
Conflict Between Local/State Laws	1
Conflict Between State Laws	1
Local Ordinance Interpretation	1
Civil Rights/Civil Liberties	1
Legislative Power	1
Liability/Immunity	1
Professional Ethics	1
Administrative Hearings	1
Federal Agency Authority	1
TOTALS	199

As shown in Table 10 above, the largest percentage of opinion requests concerned questions of statutory interpretation (39%) related to such topics as Virginia's Freedom of Information Act, the Land Use Taxation Act, and the Public Procurement Act. The second largest category of opinions dealt with questions of local governmental unit authority (15%). Opinions in this category covered a range of topics such as use of Damage Stamp Funds, prisoner work release programs, and solid waste removal. The

third largest percentage of opinions concerned the duties, powers, and authority of local government officials (5%) and covered topics such as recordkeeping, disclosure of information, and process service. The fourth largest category of opinion requests concerned conflict of interest issues (4%) including board membership, public procurement, and the compatibility of public offices. The fifth largest percentage of opinion requests dealt with issues of criminal law and procedure (3.5%), such as forfeiture and drunken driving laws, and local ordinance validity (3.5%) related to firearms, special use permits, and human waste regulation.

TABLE 11. 1984 Virginia Attorney General Opinions by Requestor

Source of Request	Number of Requests
Member, House of Delegates	49 (25%)
Member, Virginia Senate	27 (14%)
County/City/Town Attorney	27 (14%)
State Government Official	19 (10%)
Commonwealth's Attorney	15 (8%)
Commissioner of Revenue	15 (8%)
Circuit Court Clerk	14 (7%)
General District Court Judge	11 (5%)
Sheriff	11 (5%)
Local Treasurer	4 (2%)
Local Electoral Board	3 (1%)
Circuit Court Judge	2 (1%)
Juvenile and Domestic Relations Court Judge	1
Executive Secretary, Virginia Supreme Court	1
TOTALS	199

As shown in Table 11 above, the largest percentage of opinion requests came from House of Delegates Members (25%). Members of the Virginia Senate (14%) and county/city/town attorneys (14%) constituted the second largest percentage of opinion requests. The third largest percentage of opinion requests came from state executive branch officials (10%). Commonwealth's Attorneys and Commissioners of Revenue constituted the fourth largest percentage of opinion requests (8% each), followed by circuit court clerks (7%).

In addition to requests for statutory interpretation, which constituted the main category of opinion request for all requestors, House of Delegates Members requested opinions regarding the validity of existing state laws, judicial power, and ordinance validity. Members of the Virginia Senate submitted questions concerning conflicts of interest, local government authority, and proposed legislation, while county attorneys inquired about local government authority and qualifications for public office and/or employment. State executive branch officials requested opinions on rulemaking, state agency authority, and conflicts of interest. Commonwealth's Attorneys submitted questions primarily concerning criminal law and procedure, while Commissioners of Revenue inquired about the application of various federal statutes related to delinquent tax payments. Finally, Circuit Court Clerks requested opinions dealing with such topics as foreign powers of attorney and un-ordained ministers' ability to perform marriage rites in the Commonwealth.³

1988 Virginia Attorney General Opinions (Mary Sue Terry)

The year 1986 heralded the election of the first female Attorney General in Virginia's history, Mary Sue Terry, who would serve two consecutive terms before resigning office in 1993 to run for governor. The years between 1985 and 1988 saw a continued increase in opinion requests stemming from the Public Procurement Act of 1983, as many state agencies and localities continued to struggle with the changes in the law (*1985-86 Annual Report of the Attorney General of Virginia*). Many localities during this period were going through a renewed process of consolidation and annexation following a ten year moratorium, necessitating a number of opinions on how to reorganize their public services and government offices. In 1987, the voters in Virginia

approved the first lottery referendum, which would eventually lead to a number of changes in Virginia's education finance laws. In 1987, the *Law Digest* became a monthly publication and the Attorney General's Office was able to increase the timely dissemination of opinions, court decisions, and other legal issues. In 1988, the Attorney General's Office made all of its opinions since 1977 accessible via LEXUS-NEXUS and WESTLAW further contributing to the timely and expedient dissemination of the opinions (*1988-89 Annual Report of the Attorney General of Virginia*). In 1989, the *Law Digest* began running its annual "Legislation Affecting Criminal Justice Summary" for the benefit of all judges, prosecutors, and magistrates on the mailing list (*Law Digest, Vol. 6, No. 7*).

Legislatively, 1987 was significant for the changes made to the Comprehensive Conflict of Interest Act. The Act was revised and re-codified as two separate pieces of legislation, the State and Local Government Conflict of Interests Act and the General Assembly Conflict of Interests Act (*Acts of the General Assembly of the Commonwealth of Virginia 1987 Regular Session, Vol. 2*). More significantly to the Attorney General, Chapter 40, § 2.1-639.23 of the *Code of Virginia* separated conflict of interest opinions as an official function and codified them as unofficial opinions meaning that they would no longer be published as part of the *Annual Report of the Office of Attorney General*. They have, however, continued to be published monthly in the *Law Digest*.

TABLE 12. 1988 Virginia Attorney General Opinions by Category

Opinion Category	Number of Opinions
Specific Statutory Interpretation	89 (43%)
Local Government Unit Authority	29 (14%)
Criminal Law/Procedure	12 (6%)
Local Officials – Duties, Power, and Authority	11 (5%)
Judicial Power	8 (4%)
State Agency Authority	6 (3%)
Local Ordinance Validity	6 (3%)
Liability/Immunity	5 (2%)
Qualifications for Office/Employment	4 (2%)
Conflict Between State/Federal Law	4 (2%)
Federal Statute Interpretation	4 (2%)
Virginia Constitution Interpretation	3 (1.5%)
Civil Law/Procedure	3 (1.5%)
General Administration	3 (1.5%)
Effect of Legislation	2 (1%)
Legality of Pending Legislation	2 (1%)
Administrative Discretion	2 (1%)
Civil Rights/Civil Liberties	2 (1%)
Local Ordinance/Charter Interpretation	2 (1%)
Prior Attorney General Opinion	2 (1%)
Constitutionality of State Law	2 (1%)
Conflict of Interest	1
Legislative Power	1
Contracting Out	1
Rulemaking	1
State Officials – Duties, Powers, Authority	1
TOTALS	206

As shown in Table 12 above, the largest percentage of opinion requests concerned questions of statutory interpretation (43%) and covered topics such as local taxation, gambling, motor vehicle safety, and asbestos removal. The second largest category of opinions was those dealing with local governmental unit authority (14%), including topics such as antismoking ordinances, corporal punishment, and regional jail boards. The third largest percentage of opinion requests concerned questions of criminal law and procedure (6%) on topics such as juvenile sentencing, capital appeals, and forfeiture hearings. The fourth largest category of opinion requests was those dealing with the duties, power, and authority of local government officials (5%) and covered topics related

to the administration of oaths and courtroom security. The fifth largest percentage of opinion requests concerned questions of judicial power (4%), including topics such as sentencing discretion and jurisdiction over certain types of offenses.

TABLE 13. 1988 Virginia Attorney General Opinions by Requestor

Source of Request	Number of Requests
Member, House of Delegates	53 (26%)
County/City/Town Attorney	27 (13%)
Commonwealth's Attorney	24 (12%)
Commissioner of Revenue	21 (10%)
Member, Virginia Senate	20 (10%)
General District Court Judge	13 (6%)
State Government Official	13 (6%)
Circuit Court Clerk	8 (4%)
Circuit Court Judge	8 (4%)
Sheriff	8 (4%)
Local Treasurer	6 (3%)
Juvenile and Domestic Relations Court Judge	5 (2%)
TOTALS	206

As shown in Table 13 above, the largest percentage of opinion requests came from House of Delegates Members (26%) and included inquiries concerning immunity and liability, administrative discretion, and local government authority. County/city/town attorneys (13%) constituted the second largest percentage of opinion requests, primarily related to local government authority and ordinance validity. The third largest percentage of opinion requests came from Commonwealth's Attorneys (12%) and included subjects such as criminal law and procedure, judicial power, and statutory interpretation. Commissioners of Revenue and Virginia Senate Members constituted the fourth largest percentage of opinion requests (10% each), covering such categories as local duties and civil rights and civil liberties, respectively. The fifth largest percentage of opinions was requested by General District Court Judges and state executive branch officials (6% each). The judges' inquiries included clarifications of prior Attorney General Opinions

and statutory interpretation, while state executive branch officials requested opinions concerning state agency authority and statutory interpretation related to topics such as substance abuse counseling and the certification of auctioneers.

1992 Virginia Attorney General Opinions (Mary Sue Terry)

The Attorney General's Office underwent another reorganization effort in 1992 with the creation of the Division of Public Safety and Economic Development bringing the total number of divisions within the Office to five (*1992 Annual Report of the Attorney General of Virginia*). This period was also marked by an increasing antagonism between the Attorney General, Mary Sue Terry, and the new Governor, Douglas Wilder, over a variety of issues, such as government reorganization and budget appropriations (*Almanac of Virginia Politics, 10th Edition, 1992*). During this period, the Office of Attorney General, under Terry's stewardship, took a more proactive approach to consumer protection, particularly in the area of using litigation to regulate insurance premiums and coverage (*1992 Annual Report of the Attorney General of Virginia*).

The years leading up to 1992 were also marked by an increase in legislative activity. In 1990, the General Assembly enacted 976 new pieces of legislation into law. Of these, 127 dealt exclusively with counties, cities, and towns (*Acts of the General Assembly of the Commonwealth of Virginia 1990 Regular Session, Vol. 2*). Additionally, there were approximately 1,500 amendments and changes made to the *Code of Virginia*. The following year, 1991, saw 723 new pieces of legislation enacted into law, of which 75 dealt exclusively with counties, cities, and towns (*Acts of the General Assembly of the Commonwealth of Virginia 1991 Regular Session, Vol. 2*). This year also saw over 1,200 changes made to the *Code of Virginia*, including the re-codification of Title 24.1 dealing

with state and local election law and Title 65.1 related to Virginia's Worker's Compensation Act (*Acts of the General Assembly of the Commonwealth of Virginia 1991 Regular Session*). Additionally, the General Assembly amended the operating charters of 23 Virginia localities.

In 1992, the Virginia General Assembly made numerous amendments to Virginia's Freedom of Information Act, particularly related to public record disclosure exemptions. The General Assembly also passed the Public Facilities Act, which allowed localities to tap into the state sales tax revenue stream to pay for the cost of bonds issued to finance public facilities (*Acts of the General Assembly of the Commonwealth of Virginia 1992 Regular Session*). The Act also established a state-level review board with the authority to promulgate necessary regulations and approve local applications for funding. The General Assembly also made over 1,200 changes to the *Code of Virginia* and amending 21 local government charters. The 1992 legislative session further resulted in 78 new pieces of legislation dealing specifically with localities, including new zoning procedures and new laws for the disposal of solid waste.

TABLE 14. 1992 Virginia Attorney General Opinions by Category

Opinion Category	Number of Opinions
Specific Statutory Interpretation	19 (29%)
Local Government Unit Authority	12 (18%)
Local Officials – Duties, Power, and Authority	6 (9%)
Criminal Law/Procedure	5 (8%)
Virginia Constitution Interpretation	4 (6%)
Local Ordinance/Charter Interpretation	4 (6%)
Judicial Power	4 (6%)
Prior Attorney General Opinion	3 (4%)
Civil Law/Procedure	2 (3%)
State Officials – Duties, Power, and Authority	1 (1%)
Effect of Legislation	1 (1%)
Conflict Between State/Federal Law	1 (1%)
Conflict Between State Laws	1 (1%)
Local Ordinance Validity	1 (1%)
Constitutionality of State Law	1 (1%)
Non-profit Administration	1 (1%)
TOTALS	66

As shown in Table 14 above, the largest percentage of opinions dealt with questions of statutory interpretation (29%) and covered such topics as local tax assessments, veterinary regulations, and concealed weapons laws. The second largest category of opinions was those dealing with local government authority (18%), including questions regarding local tobacco taxes, ordinance authority, and use of noncompetitive bids in public procurement. The third largest percentage of opinions concerned questions of local official duties, power and authority (9%) and addressed topics such as the disclosure of information and requiring inmates to reimburse jails for non-emergency medical care. The fourth largest category of opinions was those dealing with criminal law and procedure questions (8%), including use of plea agreements and search warrants. The fifth largest percentage of opinions (6% each) concerned questions regarding an interpretation of the Virginia Constitution, including separation of powers; local ordinance or charter interpretation, including an anti-cruising ordinance aimed at curbing

juvenile delinquency; and judicial power, including judicial authority of work release programs.

TABLE 15. 1992 Virginia Attorney General Opinions by Requestor

Source of Request	Number of Requests
Member, House of Delegates	16 (24%)
Member, Virginia Senate	11 (17%)
Commissioner of Revenue	8 (12%)
County/City/Town Attorney	7 (11%)
General District Court Judge	4 (6%)
Circuit Court Clerk	4 (6%)
Local Treasurer	4 (6%)
Commonwealth's Attorney	3 (4%)
Circuit Court Judge	3 (4%)
State Official	2 (3%)
Sheriff	2 (3%)
Local Electoral Board	1 (1%)
Executive Secretary, Virginia Supreme Court	1 (1%)
TOTALS	66

As shown in Table 15 above, the largest percentage of opinion requests came from House of Delegates Members (24%), with an emphasis on statutory interpretation and local government authority. Members of the Virginia Senate constituted the second largest percentage of opinion requests (17%) and included inquiries regarding judicial power and interpretations of the Virginia Constitution. The third largest percentage of opinion requests came from local commissioners of revenue (12%) and primarily dealt with the disclosure of tax information and specific statutory tax exemptions. County/city/town attorneys constituted the fourth largest percentage of opinion requests (11%), with an emphasis on local government authority. The fifth largest percentage of opinion requests came from General District Court judges, Circuit Court clerks, and local treasurers (6% each) and covered such topics as use of fines for courthouse construction, use of additional jurors at civil trials, and types of tax exempt property, respectively.

1996 Virginia Attorney General Opinions (James S. Gilmore)

The years between 1993 and 1996 saw the Attorney General's Office shift its priorities to emphasize criminal law and public safety with the election of James Gilmore, a former Commonwealth's Attorney. The Office went through another extensive reorganization effort in 1994 replacing the old five divisions with five new divisions – Division of Criminal Law, Health, Education, and Social Services Division, Civil Litigation Division, Government Operations Division, and Local and Intergovernmental Affairs Division (*1994 Annual Report of the Attorney General of Virginia*). The bulk of the Attorney General's opinion writing function was placed in a newly created Opinions and Local Government Section within the Local and Intergovernmental Affairs Division (p. *ii*). During this time, there was a renewed emphasis on criminal justice related legislative activities within the Attorney General's Office including juvenile justice reform, passage of the Crime Victims' Bill of Rights, the abolition of parole, and the right of appeal for the Commonwealth in certain criminal cases. In addition to legislative activities, this period also saw a continued focus on instigating litigation on behalf of the state.

This period also saw two major pieces of legislation, one federal and one state, which had an impact on local and state government. The National Voter Registration Act of 1993, also known as the Motor Voter Act, was passed by Congress, which allowed for voter registration at local branches of the Department of Motor Vehicles. The Comprehensive Services Act was passed by the General Assembly and consolidated most public welfare funding and services (*Acts of the General Assembly of the Commonwealth of Virginia 1993 Regular Session*). Nineteen ninety six saw two significant

developments in regard to the utility and insurance industries in Virginia. Trigon Blue Cross and Blue Shield of Virginia, the state's largest provider of health insurance, changed its status from a non-profit to a for profit entity and American Electric and Power (AEP) instituted a major rate increase which triggered involvement of the State Corporation Commission (*1996 Annual Report of the Attorney General of Virginia*). In both cases, the Attorney General's office was involved in litigating and providing advice during each step of the process.

TABLE 16. 1996 Virginia Attorney General Opinions by Category

Opinion Category	Number of Opinions
Specific Statutory Interpretation	36 (41%)
Local Government Unit Authority	15 (17%)
Judicial Power	7 (8%)
Local Officials – Duties, Power, and Authority	6 (7%)
Criminal Law/Procedure	6 (7%)
Civil Law/Procedure	3 (3%)
Virginia Constitution Interpretation	2 (2%)
Effect of Legislation	2 (2%)
Local Ordinance/Charter Interpretation	2 (2%)
State Agency Authority	1 (1%)
Conflict of Interest	1 (1%)
Conflict Between Local/State Law	1 (1%)
Qualifications for Office/Employment	1 (1%)
Administrative Discretion	1 (1%)
Local Ordinance Validity	1 (1%)
Federal Statute Interpretation	1 (1%)
Civil Rights/Civil Liberties	1 (1%)
U.S. Constitution Interpretation	1 (1%)
TOTALS	88

As shown in Table 16 above, questions concerning specific statutory interpretation, such as the Public Procurement Act and various statutory tax exemptions, constituted the largest percentage of opinions (41%). The second largest category of opinions was those dealing with questions of local government authority (17%), including issue such as discretionary use of 911 system tax revenues and local government appointment powers. The third largest percentage of opinions concerned

questions of judicial power (8%) and addressed issues such as sentencing discretion and drug forfeitures. The fourth largest category of opinions was those dealing with the duties, power, and authority of local government officials (7%) and questions concerning criminal law and procedure (7%). Topics in these two categories included the use of minors as undercover agents, transportation of prisoners, and the distribution of forfeited drug assets. The fifth largest percentage of opinions dealt with questions regarding civil law and procedure (3%) and covered topics such as allowable fees and costs associated with wage garnishments.

TABLE 17. 1996 Virginia Attorney General Opinions by Requestor

Source of Request	Number of Requests
Member, House of Delegates	25 (28%)
County/City/Town Attorney	16 (18%)
General District Court Judge	11 (12%)
Member, Virginia Senate	10 (11%)
State Official	5 (5.5%)
Commissioner of Revenue	5 (5.5%)
Commonwealth's Attorney	4 (4.5%)
Circuit Court Clerk	3 (3%)
Sheriff	3 (3%)
Juvenile and Domestic Relations Court Judge	2 (2%)
Circuit Court Judge	2 (2%)
Local Electoral Board	1 (1%)
Members, House of Delegates and Senate	1 (1%)
TOTALS	88

As shown in Table 17 above, the largest percentage of opinion requests came from House of Delegates Members (28%). Requests from House of Delegates Members were primarily concerned with statutory interpretation, charter interpretation, and local government authority. County/city/town attorneys constituted the second largest source of opinion requests (18%) with an emphasis on local government authority and statutory interpretation related to zoning and tax assessments. The third largest percentage of opinion requests came from General District Court judges (12%) and included inquiries

regarding civil law and procedure, judicial power, and statutory interpretation. Members of the Virginia Senate constituted the fourth largest source of opinion requests (11%), with requests focusing on local government authority and statutory interpretation. The fifth largest percentage of opinion requests came from state executive branch officials and local commissioners of revenue (5.5% each). Requests from state executive branch officials dealt primarily with issues of public procurement, while commissioner of revenue inquiries focused on tax definitions and exemptions.

2000 Virginia Attorney General Opinions (Mark Earley)

The period between 1997 and 2000 saw the Attorney General's Office once again involved in a number of high profile lawsuits. Nineteen ninety eight heralded the closure of Virginia's involvement in a multi-state class action suit against the major tobacco companies, ending in a multi-million dollar settlement (*1998 Annual Report of the Attorney General of Virginia*). The following year, 1999, found the Attorney General's Office unsuccessfully arguing to preserve the Virginia Military Institute's all-male status before the U.S. Supreme Court (*1999 Annual Report of the Attorney General of Virginia*). In 2000, Virginia's Attorney General participated in several multi-state consumer protection class action law suits against such national companies as Nine West, CIBA Vision, Mylan Laboratories, Publisher's Clearinghouse, and Equinox (*2000 Annual Report of the Attorney General of Virginia*).

The legislative and policy focus of the Attorney General's Office shifted from general criminal justice system overhauls, to consumer protection, technology crimes, and specific crime activity in order to address new and emerging concerns related to changes in the use of information technology. During the 2000 General Assembly

legislative session, the Attorney General's Office introduced bills related to identification fraud, computer crimes, gang activity, and date rape drugs (*2000 Annual Report of the Attorney General of Virginia*). The Office was also instrumental in preserving the City of Richmond's Project Exile, a program aimed at prosecuting and securing mandatory prison terms for offenses involving illegal handguns (p. iv). During this time, the General Assembly completed work on and passed into law Virginia's version of Megan's Law, which established an on-line registry of sex offenders (*Almanac of Virginia Politics, 16th Edition, 1998*). In 1999, the General Assembly also completed its multi-year project of revising Virginia's Freedom of Information Act (*1999 Annual Report of the Attorney General of Virginia*).

TABLE 18. 2000 Virginia Attorney General Opinions by Category

Opinion Category	Number of Opinions
Specific Statutory Interpretation	27 (33%)
Local Government Unit Authority	12 (15%)
Local Officials – Duties, Power, and Authority	5 (6%)
Criminal Law/Procedure	4 (5%)
Civil Law/Procedure	3 (4%)
Effect of Legislation	3 (4%)
U.S. Constitution Interpretation	3 (4%)
State Agency Authority	2 (2.5%)
Virginia Constitution Interpretation	2 (2.5%)
Legality of Pending Legislation	2 (2.5%)
Qualifications for Office/Employment	2 (2.5%)
Local Ordinance Validity	2 (2.5%)
Judicial Power	2 (2.5%)
Legislative Power	2 (2.5%)
Liability/Immunity	2 (2.5%)
Conflict of Interest	1 (1%)
Conflict Between State Laws	1 (1%)
General Administration	1 (1%)
Local Ordinance/Charter Interpretation	1 (1%)
Prior Attorney General Opinion	1 (1%)
Legality of Private Association Rule	1 (1%)
Contracting Out	1 (1%)
Other Agency Opinion Interpretation	1 (1%)
TOTALS	81

As shown in Table 18 above, the largest percentage of opinions issued in 2000 concerned questions regarding specific statutory interpretation (33%), including Virginia's Freedom of Information Act, Virginia's Non-Stock Corporation Act, and the Campaign Finance Disclosure Act. Opinions dealing with local government authority made up the second largest percentage of opinions (15%) and covered topics such as multi-jurisdictional exercise of power, road abandonment, and use of surplus property taxes. The third largest percentage of opinions issued this year concerned questions regarding the duties, powers, and authority of local government officials (6%), including topics such as police discretion and providing internet access to court records. Questions concerning criminal law and procedure, such as vehicle impoundments and concealed weapons, constituted the fourth largest percentage of opinions (5%). The fifth largest category of opinions issued was those dealing with civil law and procedure (4%), the effect of legislation (4%), and interpretations of the Constitution of the United States (4%). Topics included dischargeable debts allowed under bankruptcy filings, changes in the Food and Beverages Tax, and opening school board meetings with a prayer, respectively.

TABLE 19. 2000 Virginia Attorney General Opinions by Requestor

Source of Request	Number of Requests
Member, House of Delegates	29 (36%)
County/City/Town Attorney	11 (14%)
Member, Virginia Senate	11 (14%)
Commissioner of Revenue	7 (9%)
Commonwealth's Attorney	5 (6%)
Circuit Court Clerk	5 (6%)
State Official	4 (5%)
General District Court Judge	3 (4%)
Sheriff	2 (2.5%)
Members, House of Delegates and Senate	2 (2.5%)
Juvenile and Domestic Relations Court Judge	1 (1%)
Circuit Court Judge	1 (1%)
TOTALS	81

As shown in Table 19 above, the largest percentage of opinion requests came from House of Delegates Members (36%), with an emphasis on local government authority and statutory interpretation. County/city/town attorneys constituted the second largest source of opinion requests (14%), along with Members of the Virginia Senate (14%). County attorneys requested opinions primarily related to local government authority, while Senators requested opinions concerning statutory interpretation. The third largest percentage of opinion requests came from local commissioners of revenue (9%) and included requests for tax-related opinions. Commonwealth's Attorneys and Circuit Court clerks constituted the fourth largest source of opinion requests (6% each), with an emphasis on police discretion and internet access to court records, respectively. The fifth largest percentage of opinion requests came from state executive branch officials (5%), primarily related to statutory interpretation.

Comparison of Opinions Within Selected Years

In looking at the years selected for study, several similarities are apparent, one of which is the relative consistency in the top opinion categories for each year. Opinions answering questions of statutory interpretation are dominant in each year, with repeated questions regarding the same code sections, such as Freedom of Information, Public Procurement, and the various tax sections related to localities. Issues of local government authority are also prevalent, particularly questions concerning the powers of Boards of Supervisors, School Boards, local commissions, and local economic development organizations. A third popular category of opinion requests are those seeking clarification and guidance regarding the duties, powers, and authority of local

government officials, such as the constitutional offices of Sheriff, Commissioner of Revenue, and Circuit Court Clerk, in addition to other public offices such as Deputy Sheriffs, police officers, and school superintendents. Questions related to criminal law and procedure are also prevalent each year, due primarily to changes in the criminal code sections regarding drunk driving, juvenile processing, and prosecutorial discretion. The fifth category of opinions most frequently issued are those concerning the limits and extent of judicial power among the various courts in Virginia. The majority of these questions are the result of changes in judicial sentencing discretion and appointment authority.

Another similarity is found in the source of opinion requests, primarily those from General Assembly Members (House and Senate), Commonwealth's Attorneys, state executive branch officials, Commissioners of Revenue, and County Attorneys. Although the General Assembly has tried to limit the statutory authority granted to Commonwealth's Attorneys to request opinions, there have been no changes to the statutes authorizing others from requesting opinions. As mentioned previously, the majority of opinion requests from General Assembly Members related to local government administration are, in fact, proxy questions submitted to representatives by constituent officials in their districts.

There are, however, noticeable differences in the opinions between the selected years. Aside from the differences in categorical topics, the most obvious difference is in the number of opinions issued each year. A number of external factors contribute to the disparity found between the years, such as legislative activity on the state and local level. The large number of opinions issued in the early part of the 1970s is not surprising

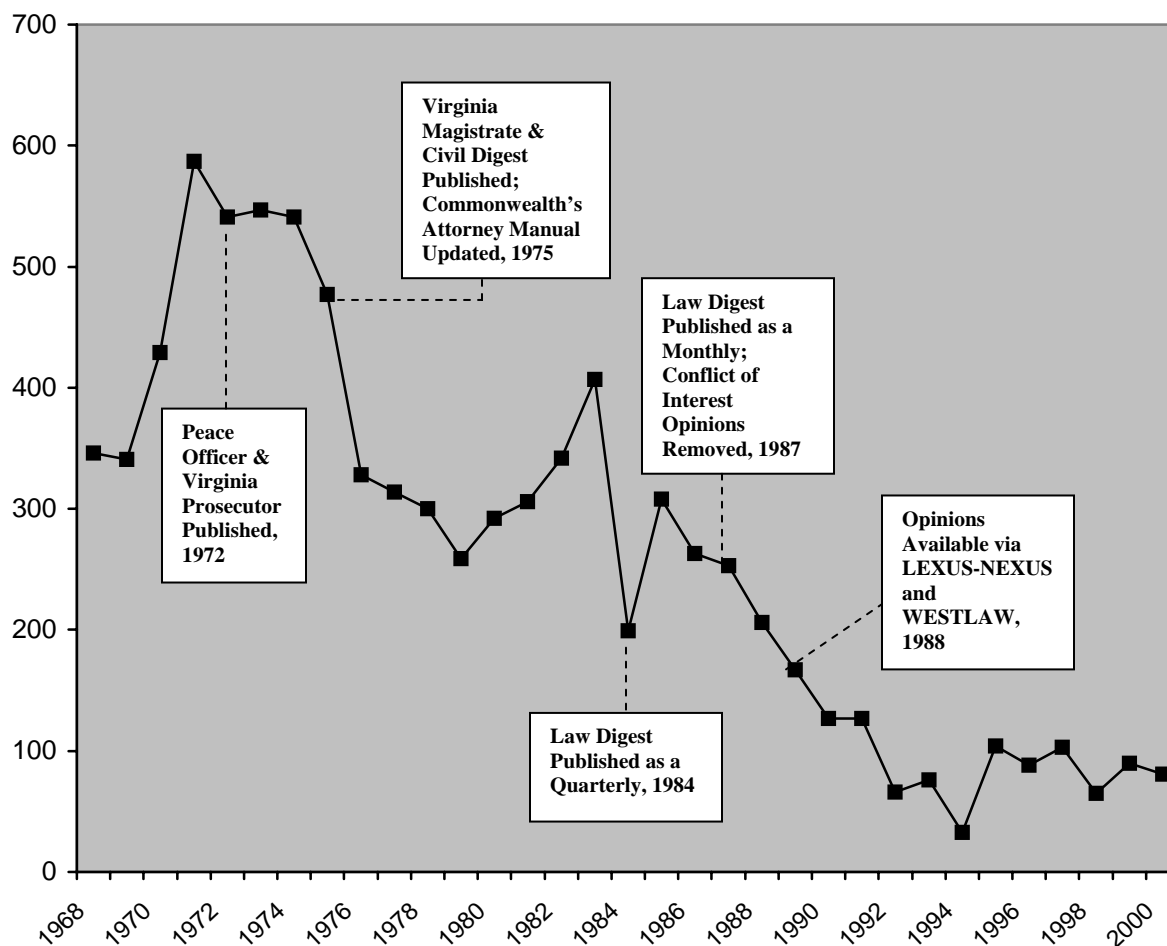
considering the fact that the new constitution went into effect in 1971. The new constitution also required the General Assembly to recode, amend, or delete large portions of the *Code of Virginia*, in addition to the regular business of passing new laws. During the early and mid-1980s, certain progressive localities took the lead in passing new ordinances related to taxes, zoning, and economic development, all of which required review for compliance with state laws and Dillon’s Rule. The table below presents a snapshot of major statutory and policy changes prior to or during the years selected that influenced the number and types of opinions requested.

TABLE 20. State Code and Policy Changes

Year	Number of Opinions	State Code/Policy Changes
1972	541	<ul style="list-style-type: none"> • New State Constitution (1971) • Revised ABC Regulations • Revised Medical Malpractice Statutes
1976	328	<ul style="list-style-type: none"> • Revised Anti-Trust Legislation • Revised Property Tax Reform Bill • Revised Criminal Code Sections • Restrictions on Commonwealth’s Attorneys
1980	292	<ul style="list-style-type: none"> • VA Consumer Protection Act • New Independent Regulatory Board Proceedings • Re-codification of Public Health Code • VA Freedom of Information Act • VA Conflict of Interest Legislation
1984	199	<ul style="list-style-type: none"> • New Drug Seizure Laws • Economic Recovery Tax Act • Public Procurement Act • Comprehensive Conflict of Interest Act
1988	206	<ul style="list-style-type: none"> • Renewed Local Consolidation/Annexation • Lottery and Gaming Laws • Revised Comprehensive Conflict of Interest Act
1992	66	<ul style="list-style-type: none"> • State/Local Election Law Changes • VA Workers’ Compensation Act • Amendments to Freedom of Information Act • Public Facilities Act
1996	88	<ul style="list-style-type: none"> • National Voter Registration Act • Comprehensive Services Act • Revised Public Procurement Act
2000	81	<ul style="list-style-type: none"> • Revised Freedom of Information Act • Campaign Finance Disclosure Act • VA Non-Stock Corporation Act

The disparity can also be attributed to internal factors related to the expansion and placement of assistant attorneys within many state and field offices, the increasing use of informal opinions, and attempts to increase the publication and dissemination of opinions. As the number of assistant attorneys general placed in state agencies and field offices increased, the need to utilize formal processes of obtaining advice decreased since advice could be rendered on site using more informal means. Although the exact number of informal opinions is unknown, 1984 estimates place the number at close to 1,750 per year (*1984-85 Annual Report of the Attorney General of Virginia*). The increasing use of information technology (i.e. email and cellular phones) makes the use of informal opinions often easier and timely in many cases.

FIGURE 2. Number of Opinions and Publications, 1968-2000



As shown in Figure 2 above, the number of opinions issued has decreased in relation to the dissemination efforts of the Attorney General's Office and the advancement of information technology and internet access. For example, the number of requests from Commonwealth's Attorneys declined from 152 in 1972 to 60 in 1976, following the publication of the *Virginia Prosecutor* in 1972 and the updated Commonwealth's Attorney Training Manual in 1975. The total number of opinions also declined from 407 in 1983 to 199 in 1984, a drop which coincides with the publication of *Law Digest* as a quarterly. When *Law Digest* started being published as a monthly,

another drop in the total number of opinions occurred. Similarly, when the opinions were made available on-line via LEXUS-NEXUS and WESTLAW, the total number of opinion requests also declined.

Another explanation for the overall decrease in the number of opinions can be attributed to an increasing emphasis on and demand for participation in litigation. As the number of criminal prosecutions increased during the mid- to late 1980s, so did the requirement for participation by the Attorney General's Office. The emphasis on litigation was also compounded by an increased participation by the state in various multi-state class action lawsuits related to insurance, consumer protection, and tobacco. Although the exact numbers are difficult to assess, the number of lawsuits in which the Attorney General's Office was involved increased from 5,000 in 1984 to 14,814 in 1992 (*1984 Annual Report of the Attorney General of Virginia; 1992 Annual Report of the Attorney General of Virginia*).

Chapter Summary

As demonstrated above, the Virginia Attorney General has issued opinions on a variety of issues affecting state and local administration across opinion categories and addressed to a host of local and state government actors. Apart from the obvious guidance provided by clarifying statutory language and the application of various *Code of Virginia* statutes, the opinions have also influenced the administration of government through the advice given on local government authority, local official duties, state agency authority, state officials' duties, and judicial power. Although the overall number of official opinions is decreasing, in part due to reorganization efforts, the use of technology

and publications for dissemination, and involvement in litigation, the opinions are still a vital function of the Attorney General's Office.

Chapter Five will continue the second *descriptive* part of this dissertation by utilizing several measures to gauge the impact of the attorney general opinions on public administration, including: 1) how Virginia courts have treated the opinions; 2) legislative tracking to determine the General Assembly's response to the opinions; 3) changes in state agency administrative procedures based on the opinions; and 4) changes in local ordinances, practices, and policies in response to the opinions. Chapter Six will build upon the descriptive aspects of the opinions and present my normative conclusions by using Rohr's regime values framework to illustrate how Virginia's Attorney General Opinions, like Supreme Court opinions, inform public administration via their institutional, dialectic, concrete, and pertinent characteristics. Chapter Six also provides an additional prescriptive aspect of this dissertation by applying Fuller's distinctive competence framework to the descriptive and normative analysis of the Virginia Attorney General Opinions to determine their import to public administrators.

¹ Only "official" published opinions were examined. The Attorney General's Office issues numerous informal opinions throughout each year that are not published. The exact number of informal opinions issued each year is unknown, although 1984 estimates place the number at 1,750 per year (*1984 Annual Report of the Attorney General of Virginia*).

² The 1971 Constitution is the fifth complete revision of Virginia's fundamental law since 1776, other complete revisions having been effective in 1830, 1851, 1870, and 1902 (Howard, A.E. Dick. *Commentaries on the Constitution of Virginia*. Charlottesville: VA, 1975).

³ § 20-26 of the *Code of Virginia* provides that, "Marriages between persons belonging to any religious society which has no ordained minister, may be solemnized by the persons and in the manner prescribed by and practiced in any such society." Accordingly, the Attorney General concluded that if the minister in question complied with § 20-26, then he or she could be authorized to perform the rites of marriage within the Commonwealth.

Chapter Five: Virginia Attorney General Opinions in Action

Wrong laws make short governance – Harding, *Chronicles*

Introduction

Chapter Four represented the second descriptive aspect of this dissertation by presenting a broad descriptive analysis of all Virginia Attorney General Opinions within my stated time frame, concentrating on opinion category, opinion topic, and opinion source. This chapter will provide a more detailed analysis of the selected opinions in five areas: 1) statutory interpretation; 2) local government administration; 3) state government administration; 4) legislation; and 5) state court opinions. The purpose of this chapter is not to catalogue the impact of all 1,801 opinions issued within my selected time frame, as that would be a task beyond the limited scope of this dissertation. Rather, the intent is to demonstrate how Virginia Attorney General Opinions have specifically influenced the state code and the various levels of government throughout the Commonwealth, including localities, state agencies, the General Assembly, and Virginia courts.

By utilizing resulting changes made in the *Code of Virginia*, as well as applicable changes in administrative procedures and Virginia court opinions, this chapter will gauge the impact of the opinions by demonstrating how Virginia Attorney General Opinions represent a significant medium for expounding on, interpreting, and assisting public administrators with implementing state laws. Additionally, this chapter provides examples of how, as Akers (1950) and Morris (1987) contend, these opinions are legal in essence (due to their framing of the issues), administrative in character (in that they are aimed at administering the law in addition to interpreting it), and judicial in effect (particularly when identifying and advising changes in statutory deficiencies).

Statutory Interpretation

As noted in Chapter Four, there were 778 opinions issued during my time frame concerning specific statutory interpretation. These opinions addressed a wide variety of topics, including providing definitions to specific terms within various sections of the *Code of Virginia*, interpreting the appropriate application of specific statutes within the *Code of Virginia* (i.e. Virginia Freedom of Information Act, motor vehicle laws, tax exemptions), and discerning the meaning and potential constitutional impact of certain existing state laws in light of external political changes. Attorney General Opinions in this area evince a substantive influence on the meaning of the law, how the law is to be understood, and how the law should be applied within the context of the facts provided.

One illustrative example of definition assistance can be found in a 1972 opinion in which the Attorney General was asked to define the meaning of “an adult” within § 31-26 of the *Code of Virginia*. This Section, the Virginia Uniform Gifts to Minors Act, defined an adult as a person who had attained the age of twenty-one years (1972-73 Va. AG 264). However, §1-13.42 of the *Code of Virginia*, defined an adult as a person who had attained the age of eighteen. The Attorney General opined that since §1-13.42 defining “an adult” as a person 18 or over did not specifically address § 31-26, an adult for purposes of the Virginia Uniform Gifts to Minors Act continued to be a person of 21 years of age. As a result of this opinion, the General Assembly, during its 1973 Session, passed Senate Bill 627, which amended the age to 18 and struck all instances of 21 within the Virginia Uniform Gifts to Minors Act (*1973 Acts of the Virginia General Assembly*, p. 375). Other examples include defining “commercial or mercantile establishment”

(2000 Va. AG S-47), “asbestos contractors” (1987-88 Va. AG 476), and “criminal justice agency” (1996 Va. AG 105).

An example of the Attorney General providing guidance as to the application of specific statutes can be found in a 1988 opinion where the Attorney General was asked to construe the requirements of § 46.1-309.2, Virginia’s seat belt law. Under the law, police officers could issue a citation for failure to wear safety belt only if cause exists to stop or arrest the operator for another violation. A General District Court Judge inquired as to whether police officers operating a police roadblock for the purpose of checking drivers’ licenses and motor vehicle equipment could issue a citation for failure to wear a seat belt. The Attorney General concluded that, although officers could normally issue a citation for offenses committed in their presence, the statute in question required that a citation for failing to wear one’s seat belt be given only if the officer had cause to stop the driver for another violation (1987-88 Va. AG 445). Because roadblocks are investigatory in function, and drivers are neither stopped nor arrested within the definition of the law, citations may only be given if the driver has committed another specific violation. This interpretation of the seat belt law remains in effect today as the General Assembly has failed to modify the relevant code section.

Another example of this type of opinion can be found in a 1992 Attorney General Opinion in which the Attorney General was asked to construe both the meaning and legislative intent of § 18.2-308a, Virginia’s concealed weapons law. The question was whether off-duty police officers could lawfully carry a concealed weapon outside the boundaries of their jurisdiction and in another Virginia jurisdiction. The Attorney General, in providing a response, pointed out the various changes that the General

Assembly had made to § 18.2-308a over the years, including striking such restrictive language as “while in the discharge of their duties” in the exemption section dealing with police officers (1992 Va. AG 95). The Attorney General concluded that had the General Assembly meant to prohibit off-duty police officers from carrying a concealed weapon outside the boundaries of his or her jurisdiction, they would not have stricken the restrictive language in the code section. The Attorney General’s interpretation has not been challenged to date, nor has the General Assembly attempted to modify the exemption language dealing with off-duty police officers.

As noted above, some statutory opinion requests asked the Attorney General to interpret existing state laws in light of external political developments. One example of this can be found in a 1972 opinion, in which the attorney general was asked to construe section 19.1-315 of the Virginia Code dealing with “non-compensated attorneys” for criminal defendants charged with misdemeanors in light of the U.S. Supreme Court’s ruling in *Argensinger v. Hamlin* (40 US 4679, 1972). The Supreme Court had ruled that indigent defendants charged with misdemeanors that carried jail time had the right to court-appointed counsel. The key question was whether or not the code section had to be amended to allow for the retroactive payment of non-compensated attorneys representing misdemeanor offenders from the date of the Court’s ruling. The Attorney General concluded that the General Assembly did not have to amend the *Code* but could pass legislation that allowed for retroactive payment. During the 1973 Legislative Session, the General Assembly passed Senate Bill 784, which allowed indigent defendants to be appointed counsel for misdemeanors carrying jail time (*1973 Acts of the Virginia General Assembly*, p. 430-32). The law was made retroactive to June 12, 1972, the date of the

Supreme Court ruling, allowing attorneys appointed since that date to bill the state treasury for compensation.

Another similar example is found in a 1976 opinion where the Attorney General was asked to construe the constitutionality of campaign expenditure limits found within Virginia's Fair Elections Practices Act in light of the U.S. Supreme Court's ruling in *Buckley v. Valeo* (1976). At the time, Virginia law imposed criminal penalties on any individual or organization that gave money in excess of \$100 to promote or oppose questions on the election ballot as opposed to a candidate. The Attorney General concluded that, in light of the *Buckley* decision, such limitations had a chilling effect on one's First Amendment right to free speech. As a result of the AG's opinion, the General Assembly deleted all language dealing with expenditures during the 1977 Legislative Session (*1977 Acts of the Virginia General Assembly*). This instance further represents the Attorney General's role of constitutional advice giver, in which the opinion serves as a surrogate to the actual U.S. Supreme Court opinion in aiding the legislature to "get it right" in order to avoid potential legal challenges. Furthermore, Attorney General Opinions in these circumstances provide public administrators the opportunity to seek advice prior to taking action that may be incongruent with both the letter and spirit of the law.

As demonstrated by the above examples and discussion, Attorney General Opinions in the area of statutory interpretation provide interpretations of law that attempt to recognize and expound the implicit intent and ideals behind the words. These interpretations provide meaning to the law beyond simply defining words by linking administrative action to statutory and constitutional intent. However, these opinions do

not limit themselves to attempting to discern the impact of legislative changes and their meaning for public actors. The opinions, like those in other areas discussed elsewhere in this chapter, also monitor judicial opinions, both within the state and within the federal courts, to determine the effect of such decisions on the law of the Commonwealth, and advise specific courses of action to be taken that will ensure conformance to newly recognized constitutional standards and legal principles.

Local Government Administration

During the years I selected, the Attorney General's Office issued 248 opinions concerning local government administration and authority. These opinions cover a broad range of topics, including the powers and authority of local governing boards and commissions in areas such as taxation, program and policy administration, and revenue expenditures. Opinions in this category also include guidance and advice on the use of ordinances and other types of local regulatory power. Other areas include the legality of crime control and prevention, and the creation of debt corporations. As demonstrated by the following examples, Attorney General Opinions in this instance aid in identifying gaps or discrepancies in the law, prevent unconstitutional exercises of power, and provide a legal justification for future action/legislation.

Local Government Powers

One of the most common types of local government opinions dealt with the authorized powers of local governing boards. Often, localities attempt to craft innovative methods to assist in the exercise of their powers. However, the ability to implement such

methods is limited by Virginia's adherence to the Dillon Rule, which states that local government units have only those powers specifically granted to them by the state legislature. In these cases, the Attorney General's opinion writing function serves a dual purpose: 1) to interpret local powers in the context of the *Code of Virginia* and the Virginia Constitution; and 2) to provide a legal justification and framework for further action by the General Assembly. A common example of this can be found in a 1972 Opinion in which a county attorney inquired about the permissibility of imposing an application fee for land use assessments. The Attorney General opined that absent specific statutory authority, a county board of supervisors could not impose such a fee (1972-73 Va. AG 197). In 1973, the General Assembly amended the relevant code section to specifically permit an application fee to accompany an application for a use assessment (*1973 Acts of the Virginia General Assembly*).

Another example is found in a 1972 Opinion concerning the authority of a county board to appropriate funds to operate transportation services. The Attorney General concluded that the General Assembly had not granted county boards the authority to operate transportation services (1972-73 Va. AG 30). In 1974, the General Assembly created such authority in § 15.1-526.2 (which was repealed in 1997 and recodified as §15.2-947). Similarly, the Attorney General was asked whether the Bristol Parking Authority Act granted powers of eminent domain to the Authority. The Attorney General concluded that since the Act contained no explicit grant of such powers, the General Assembly never meant to give the Authority the power of eminent domain (1972-72 Va. AG 185). In this case, the General Assembly did not amend the statute in question.

As noted above, localities would often attempt to implement innovative approaches for maximizing limited revenues in addition to exercising their limited powers. In 2000, the Attorney General was asked about such an approach when a Virginia county inquired as to whether it could create a corporation with the sole authorized purpose to contract debt on behalf of the county. Citing the Dillon Rule, the Attorney General responded that local governments are subordinates of the Commonwealth, possessing only those powers conferred upon them by the General Assembly (2000 Va. AG S-1). Since the General Assembly had not conferred upon counties the ability to create a corporation, no county could create a debt contraction corporation absent express authorization by the General Assembly. To date, the General Assembly has yet to confer such authority.

In addition to the above, a final example of local government authority can be found in a 1988 Opinion, in which a House of Delegates Member inquired as to whether a local school board had the authority to limit or forbid the administration of corporal punishment to students. The Attorney General responded that local school boards had no authority to forbid the administration of reasonable corporal punishment, citing Section 22.1-280 of the Virginia Code which specifically authorized the use of corporal punishment by teachers and principals (1987-88 Va. AG 322). Under the Attorney General's interpretation, since the legislature had granted statutory authority to principals and teachers, local school boards could not limit that authority for any reason. During the 1989 Session of the General Assembly, Section 22.1-280 was repealed, and the General Assembly passed a new law prohibiting the use of corporal punishment in public schools (Section 22.1-279.1, *Code of Virginia*).

Local Regulatory Power

The Attorney General is often asked to issue an opinion as to the ability of local governments to regulate certain types of behavior through their ordinance powers. Although the General Assembly must pass legislation to effect such action, the Attorney General's Opinion often brings attention to the issue and provides a legal basis for enabling legislation. An example of this can be found in a 1976 Opinion, in which the Commonwealth's Attorney for the City of Waynesboro inquired as to the permissibility of localities enacting ordinances that would prohibit the possession of alcoholic beverages in public parks. The Attorney General responded that the applicable Virginia Code statutes specifically prevented cities from adopting such ordinances (1976-77 Va. AG 6). The power to regulate the use, possession, and distribution of alcoholic beverages rested solely with the state, not the localities. This remained the law until 1977, when the General Assembly amended the code sections dealing with alcoholic beverages by passing enabling legislation authorizing cities to adopt such ordinances (*1977 Acts of the Virginia General Assembly*).

In similar 1988 Opinion, the Attorney General was asked to give his opinion on whether a board of supervisors, using its policing powers, is authorized to enact an antismoking ordinance absent specific enabling legislation. This time, the Attorney General, relying on a number of state and federal precedents regarding local policing powers, opined that localities could, in the exercise of their general police powers, enact an ordinance which "reasonably restricts smoking determined by the board to be injurious to the public health as long as the means employed to regulate smoking is reasonably suited to the achievement of that goal" (1987-88 Va. AG 143). Despite attempts to

restrict this grant of policing power, localities still possess the power to pass ordinances prohibiting smoking in public areas.

Yet another example of an Attorney General Opinion addressing local ordinance power is a 1988 Opinion in which a city treasurer asked whether a local governing body could include language which permitted partial payment schedules for the payment of personal property taxes in an ordinance. The Attorney General replied that, under the Dillon Rule of strict construction concerning the powers of local governing bodies, the Virginia Code did not authorize localities to allow for partial payment schedules in an ordinance (1987-88 Va. AG 429). In 1989, the General Assembly passed House Bill 1678, which amended the relevant code sections to allow localities the flexibility in collecting personal property tax payments via a partial payment schedule (*1989 Acts of the Virginia General Assembly*, p. 1669).

One final example merits inclusion in the discussion because it pertains not to a locality exercising power, but to one seeking to give up power. In 1979, a Member of the House of Delegates inquired about the necessary procedure required for a city to give up its charter. The Attorney General replied that since no city had given up its charter in the last century and that no general law provided for the dissolution of cities, the General Assembly would have to repeal the various acts which constituted the city's charter (1979-80 Va. AG 69). As this was a case of first impression, there was no case law or precedent for the Attorney General to reference. The procedure outlined by the Attorney General remains the process used to this day by cities seeking to give up their charter and revert to town status.

Local Official Actions

In many instances, the Attorney General is asked to issue an opinion on the permissibility of certain actions contemplated by local government officials in the performance of their duties as local government actors. These opinions provide a legal justification not only for what actions an official may take, but an explanation as to why certain actions are not permitted by law by placing such actions within the context of permissible statutory powers. An example of this can be found in a 1984 Opinion in which a sheriff inquired whether a Virginia sheriff could lawfully enter a factory to serve a civil warrant on an employee over objection of the management. The Attorney General responded that absent specific statutory authority, a sheriff could not enter the premises of a third party without permission to serve civil process (1983-84 Va. AG 330). As of today, the General Assembly has not granted such authority.

Another example is found in a 1992 Opinion concerning local jail administration. In this opinion, a local sheriff inquired as to whether a sheriff operating a local jail could lawfully require inmates to reimburse the jail for non-emergency medical care provided at public expense. The Attorney General replied that although the Virginia State Crime Commission recently considered the question at the request of the General Assembly and recommended that such costs be reimbursed, the proposed enabling legislation was never introduced (1992 Va. AG 143). Consequently, sheriffs had no authority to require inmates to reimburse the jail for non-emergency medical care. In 1994, the General Assembly approved Section 53.1-133.01 of the *Virginia Code* which granted statutory authority to sheriffs to require reimbursement for non-emergency medical care.

Often, the development and use of technology outpaces the construction of laws designed to guide administrative behavior in the implementation of technological innovations. In these cases, an Attorney General's Opinion can identify legal gaps and provide the necessary legal framework for new legislation. An example of this is a 1996 Opinion, in which a Circuit Court clerk asked whether state law permitted a clerk to place public records, such as judgment liens, deeds, marriage licenses, wills, and court documents, on-line electronically, making them available on the internet. The Attorney General concluded that, absent language indicating a legislative intent to expand access to public records to include access through the internet, a circuit court clerk had no such authority (1996 Va. AG 84, 85). In response to this opinion, the General Assembly amended the statute during its 1997 Session to expressly authorize a circuit court clerk to provide internet access to non-confidential court records (*1997 Acts of the Virginia General Assembly*, p. 413).

Occasionally, the Attorney General is asked to provide an opinion regarding the use of non-traditional state actors in enforcing the laws of the Commonwealth. For example, in a 1996 Opinion a House of Delegates Member inquired as to whether it was lawful for law-enforcement officers to employ minors as undercover agents in the enforcement of the prohibition against the selling of tobacco products to minors. The Attorney General opined that minors acting in express pursuit of their employment by law enforcement officers, and with their parents' consent, were allowed to be employed as undercover agents (1996 Va. AG 96). The practice of using undercover informants for the purpose of enforcing the Commonwealth's tobacco and alcoholic beverage regulations continues to this day.

Another example of this type of opinion is represented by a 2000 Attorney General Opinion concerning the use of substance abuse programs by school officials. A State Senator inquired as to whether, as a condition to granting excused absences to a pupil suspended for substance abuse, a local school board may require the pupil to participate in a testing and treatment program and impose the costs of the program on the pupil's parents. The rationale behind such an approach was to allow students to make up the work missed rather than suffer academic consequences as a result of a suspension. The Attorney General replied that local school boards lack authority to require parents to pay for testing and treatment programs as a condition to granting excused absences to pupils suspended for substance abuse (2000 Va. AG S-4). The Attorney General continued, stating that despite legislation allowing the State Board of Education to establish and administer such programs, the Board could not authorize a locality to establish a program that would condition a suspended student's participation on the parents' payment of the costs associated with such participation (2000 Va. AG S-4).

Constitutional Advicegiving

The final category of local government administration opinions I shall address are those in which the Attorney General engages in "constitutional advicegiving" by going beyond simply answering the question to laying out a roadmap, if you will, for correcting any potential constitutional defects of local ordinances or governmental action. One example of this type of constitutional advicegiving is found in a 1972 Opinion dealing with powers of the press. Richmond City Commonwealth's Attorney inquired as to whether or not a county board of supervisors or city council could prohibit reporters from

using tape recorders during a public meeting. The Attorney General concluded that public bodies could prohibit the use of recording devices but only upon a showing that the use would distract or disrupt the “true deliberative process” of the governing body (1971-72 Va. AG 56A).

A second example is a 1976 Opinion concerning the permissibility of certain warrantless searches. The Commonwealth’s Attorney for Clarke County inquired as to the power of zoning administrators to conduct warrantless searches when a property owner refuses to consent to entry on the property. The Attorney General, using the U.S. Supreme Court’s holding in *Camara v. Municipal Court of San Francisco* (387 U.S. 523, 1967) and *United States v. Biswell* (406 U.S. 311, 1972) responded that in the absence of consent by the property owner, zoning administrators must obtain a search warrant to determine whether the county’s zoning ordinance has been violated (1976-77 Va. AG 338).

A final example can found in a 1996 Opinion from a county attorney who requested an opinion as to whether the Establishment Clause of the First Amendment prohibits a county from allowing one citizen to place a nativity scene on the front lawn of the county courthouse and another citizen from placing a sign on the same site protesting the placement of religious symbols on public property. The Attorney General, using a litany of Supreme Court Establishment Clause precedents, concluded that neither display would violate the Establishment Clause as long as the county did not expend its own funds or resources in connection with the displays, indicate an endorsement of either view, and placed only reasonable, consistent, and viewpoint neutral restrictions on the time, place, and manner of the displays (1996 Va. AG 28).

As shown in the examples discussed above, Virginia Attorney General Opinions have the effect of educating local administrators and governing bodies as to the basic legal and constitutional principles that should be used in the exercise of their powers and authority. Additionally, these opinions assist those same parties in the execution of their authority by identifying and expounding on the substantive law that is specific to their respective roles within the state's administrative and governing legal structure. The opinions offer not only prohibitions, where necessary, but also the justification for such proscriptions on power and correctives for addressing statutory deficiencies that will enable constitutionally informed action.

State Government Administration

Like their local counterparts, many state agencies request advice from the Attorney General when exercising their powers. These requests included inquiries as to the proper use and application of psychological tests in state hiring, the enforcement of compulsory training standards for peace officers, the proper use of census data, and state commission appointment powers. Although there were only 24 opinions issued in this category, several were particularly noteworthy for their value in organizing interdepartmental relationships and guarding against an unconstitutional state entanglement with religion.

In a 1972 Opinion, the Director of Virginia's Division of Automated Data Processing requested an opinion on the legality of an agreement which was entered into between the Commissioner of the Division of Motor Vehicles and the Superintendent of the Department of State Police that allowed the Division of Motor Vehicles to provide

data processing facilities and services to the State Police. A second question concerned the legal basis possessed by the Division of Motor Vehicles to provide data processing services to cities, towns, and counties. In answering the first inquiry, the Attorney General concluded that while the Division of Automated Data Processing was authorized to perform similar services, it was not the sole agency authorized by statute to provide data processing services. The Attorney General pointed to other code sections which authorized the State Police to enter into agreements with other state agencies for services (1972-73 Va. AG 154). Therefore, the agreement was both legal and proper. As to the second question, the Attorney General concluded that the code sections relating to the provision of services to other political subdivision, intended to confer upon the Division of Automated Data Processing the responsibility for providing such services, not the Division of Motor Vehicles. As a result, the Division of Motor Vehicles was barred from providing data processing services to local government units, but the agreement with the State Police continued.

Another example of interdepartmental relationships is found in a 1980 Opinion concerning state procurement laws. The Director of Virginia's Department of General Services requested an opinion as to whether the Division of Purchases and Supply could delegate to state agencies the authority for procurement of printing from commercial sources or other state agencies without requisition upon the Division. The Attorney General concluded that § 2.1-458, 2.1-460, and 2.1-442 of the *Virginia Code* authorized the Division to establish regulations for all purchases to made by any department, division, officer or agency of the state, requiring that all printing, binding, etc., be purchased upon requisition issued by the Division (1979-80 Va. AG 284). Therefore, the

Division could not delegate the authority absent a requisition. During the 1981 Session of the General Assembly, the code was amended by adding "...except as the Division may otherwise provide" which provided the necessary statutory authority for the Division to delegate authority for procurement of printing from commercial sources without requisition.

Finally, in a 1976 Opinion, a House of Delegates Member inquired as to whether the Virginia Department of Vocational Rehabilitation could make payments, on behalf of handicapped Virginia students, to St. Andrew's Presbyterian College in Laurinburg, North Carolina. St. Andrew's had special facilities which would enable severely handicapped students to acquire a college degree. The payments in question would defray the costs of tuition, books, room and board, personal attendants, and other institutional fees. The Attorney General concluded that Article IV, Section 16 of the Constitution of Virginia prohibits "...any appropriation of public funds...to any church or sectarian society...or institution of any kind whatsoever which is entirely or partly, directly or indirectly, controlled by any church" (1976-77 Va. AG 31). Therefore, the Virginia Department of Vocational Rehabilitation was prohibited from making any payment of public funds to St. Andrew's Presbyterian College.

As Terry (1995) postulated, the organization and administration of the bureaucracy has a profound impact on its capacity for service. The manner in which agencies of the Commonwealth interact with one another in the provision and coordination of services is vital. Opinions in this area serve to aid state administrators in coordinating their efforts so as not to offend constitutional or statutory norms and expectation. In essence, these are polycentric disputes concerning the interaction of

multiple centers of power within the state's administrative apparatus, and not necessarily issues of rights or faults. As such, attorney general opinions are well-suited to contend with these issues due to their distinctive competence (which I will discuss in greater detail in Chapter Six).

Effect on Legislation

The following section will detail how Attorney General Opinions have exerted an influence on both the exercise of legislative power and the coordination of existing and proposed laws. Major subcategories within this broad classification of opinions include: general legislative power, conflict of laws (local-state, state-state, state-federal), and effect of legislation (proposed and on the books). The Attorney General is consulted on most matters related to the exercise of legislative power (i.e. internal organization, the constitutionality to act under certain circumstances). The Attorney General also provides guidance to the legislature in identifying and correcting defects in the *Code of Virginia*, allowing the General Assembly to amend or repeal the offending statutes, or pass new legislation to bring the *Code* into constitutional compliance. Finally, the Attorney General provides insight on the potential impact of legislation that the General Assembly has either passed or is considering. In these cases, the Attorney General's input allows for a better fit with existing statutes and allows the legislature to see the broader implications of such legislation on general administration and to prevent possible legal challenges.

Internal Operations

In 1972, the Director of Virginia's Division of Statutory Research and Drafting requested an opinion concerning the authority of legislative standing committees to issue subpoenas. The Attorney General concluded that the General Assembly failed to specifically cloak its committees with subpoena power, therefore, standing committees could not avail themselves of subpoena power unless specifically granted by their respective houses in the General Assembly (1972-73 Va. AG 212). During the following year's legislative session, both the House and the Senate granted limited subpoena power to a select number of standing committees in order to facilitate the gathering of necessary information between legislative sessions.

Another example of the Attorney General's influence on internal legislative operations can be found in a 1980 Opinion concerning the power of the General Assembly to establish independent legislative commissions with limited powers. A House Member inquired about the General Assembly's authority to establish an ethics commission to investigate and report on complaints concerning the conduct of its members. The commission would be composed of four citizen appointees and a retired judge authorized to investigate ethics complaints concerning General Assembly members, report factual findings, and make advisory recommendations on appropriate disciplinary action to the General Assembly. The Attorney General concluded that since the committee would have only advisory authority, the proposed committee would not constitute an improper delegation of legislative authority (1980-81 Va. AG 186). Therefore, the General Assembly could legally establish an ethics commission. Although the General Assembly was given the blessings of the Attorney General, the ethics

commission was never established. Instead, all violations are handled by either the Senate or House Ethics Advisory Panels which are made up of representatives from each respective house.

Proposed Legislation

As noted above, often the Attorney General is consulted and asked to issue an opinion on legislation that has been introduced in either House or is pending a vote during the legislative session. The logic behind such consultation is for the General Assembly to receive guidance as to how new legislation might affect existing statutes and to the constitutionality of proposed bills which may or may not be within the expressed constitutional authority of the General Assembly.

The first example of this type of opinion comes from the 1972 Session of the General Assembly. A Senator inquired whether the General Assembly could properly enact a bill which would provide that no annexation suit could be instituted by any city against any county between February 1, 1971 and January 1, 1976, and that any suit so instituted would be stayed. The request pointed out that several annexation suits had been instituted since February 1, 1971, which would be affected by the legislation. The Attorney General concluded that Article VII, Section 2 of the Constitution of Virginia authorized the General Assembly to provide by law both the authority for and the suspension of boundary changes for city governments (1971-72 Va. AG 15) . Since special annexation courts are a creature of statute enacted pursuant to that authority, the General Assembly could prevent annexation suits and stay existing ones. The General Assembly immediately passed House Bill 328, which prohibited the filing of and stayed

any annexation suits within the expressed time frame, but exempted all suits on annexation instituted prior to January 1, 1971 (*1972 Acts of the Virginia General Assembly*, p. 997-98). The Attorney General was consulted again on other legislation dealing with issues of annexation, this time after-the-fact. In a 1976 Opinion, the Attorney General concluded that two separate bills enacted by the General Assembly amending existing law pertaining to the determination of boundary lines and annexation proceedings were constitutional in light of the Virginia Supreme Court's rulings in two related cases (1975-76 Va. AG 330).

In addition to issues involving boundary disputes within the Commonwealth, the Attorney General's opinion was also sought on the constitutionality of new state taxes. A House of Delegates Member asked for an opinion on the constitutionality of the proposed Virginia Coal Mining Tax Act, which would institute a license tax on coal mining. The main area of constitutional concern was Article X, Section 4 of the Constitution of Virginia, which segregated to the localities the power to levy property taxes on real estate and tangible personal property, including "coal and other mineral lands." The Attorney General concluded that the Virginia Coal Mining Tax Act would be constitutional because the bill would only tax the privilege of coal mining, much like the state taxes the privilege of operating a motor vehicle (1975-76 Va. AG 370). Since the tax was not on property but on the use of said property, there would be no problems under the uniformity provision of Article X. Armed with the necessary constitutional justification, the Act was passed into law during the 1976 Session of the General Assembly.

The General Assembly also sought the Attorney General's guidance on implementing new state laws. In 1984, a Senator requested an opinion on the

constitutionality of the Innovative Technology Authority Act of 1984, part of which would authorize the Governor to provide for the formulation of a nonstock corporation to carry out the purposes of the Act. The main area of concern was Article IX, Section 6 of the Virginia Constitution which prohibited the General Assembly from creating such private, nonstock corporations. The Attorney General concluded that the Act did not create a nonstock corporation, but merely authorized the Governor to form one (1983-84 Va. AG 63). Since there is no constitutional prohibition on the Executive creating such an entity, the Act would be constitutional. As a result, the General Assembly passed the Innovative Technology Authority Act on May 14, 1984 (*1984 Acts of the Virginia General Assembly*).

The advice of the Attorney General was also instrumental in the creation of local and regional authorities. In 1988, the Attorney General was asked to provide an opinion as to the constitutionality of several bills which would create the Virginia Coalfield Economic Development Authority. The concern among the General Assembly was that such an authority would violate the constitutional limitations on the creation of local debt. The Attorney General concluded that the local revenues paid into the Authority Fund would not create constitutionally defined debt because state-mandated and involuntary obligations are not considered the type of debt that is forbidden (1987-88 Va. AG 110). Accordingly, the General Assembly passed House Bill 587 and 749 which created the Virginia Coalfield Economic Development Authority (*1988 Acts of the Virginia General Assembly*).

Attorney General opinions were also used to guide the legislature in its exercise of organizing the state's local governing system. In 1984, several members of the

General Assembly requested an opinion on the constitutionality of legislation introduced during the 1984 Session relating to a bill that would amend several sections of the *Code of Virginia* in order to authorize the creation of a “two-tier” local government, consisting of a consolidated county within which exists a “tier city”. A tier city would have the powers of both a town and a city. The main area of concern was whether or not a “tier city” would fit within the constitutional definitions of subordinate units of government. The Attorney General responded that Article IV, Section 14 of the Constitution of Virginia allows the General Assembly to organize, empower, consolidate, and dissolve local governments by general law or special act (1983-84 Va. AG 176). The Attorney General further stated that nothing in the Constitution negates the authority of the General Assembly to provide by law for such local government forms as it deems appropriate or forbid the creation of other local units not explicitly defined. Upon receipt of the Attorney General’s opinion, the General Assembly passed Senate Bill 70 and 71, which created the tier city form of government and established the first tier city charter in Staunton (1994 *Acts of the Virginia General Assembly*, p. 1487-1500).

Another example of an Attorney General Opinion’s influence on the formulation of new legislation is found in a 1988 Opinion, in which the Attorney General defined the constitutional parameters of legislative power. The Attorney General was asked for an opinion on whether legislation providing a credit against individual and corporate income tax for the purchase and installation of load covers for coal trucks would be special legislation prohibited by Article IV, Section 14 of the Constitution of Virginia. The Attorney General concluded that the General Assembly could, using their policing powers to protect public health and the economic health of an industry, create such a tax

credit, and since the legislation would affect all persons or business similarly situated throughout the state, the bill in question would not be special legislation (1987-88 Va. AG 108). The General Assembly passed House Bill 1435 during the 1989 Session which added “coal trucks” to the statute effectively creating a tax credit for the purchase and installation of load covers (1989 *Acts of the Virginia General Assembly*, p. 786).

In 2000, several members of the General Assembly requested an opinion on whether the legislature could create an entity to which revenues from Virginia’s class action tobacco settlement could be deposited rather than depositing the revenues in the state treasury. The Governor submitted his Innovative Progress plan to secure the tobacco settlement revenues to the General Assembly, part of which included selling forty percent of the settlement payments to a public nonstock corporation to fund the issuance of bonds to raise the necessary monies to buy the state’s right and title to the authorized portion of the stream of revenues contemplated by the settlement. The Attorney General concluded that the legislature could create such an entity because the state’s right to the revenue stream could be considered an accounts receivable asset, and as such, the legislature could create a nonstock corporation charged with recovering the assets (2000 Va. AG S-23). Consequently, the General Assembly created the Virginia Tobacco Settlement Foundation during its 2000 Session (2000 *Acts of the Virginia General Assembly*).

Correcting legislative defects

In addition to issuing opinions which, in effect, provide a legal and constitutional justification for legislative action, Attorney General Opinions also aid the legislature in

correcting legislative defects brought about by inconsistent statutory language or external changes in the law. An example of this is found in a 1984 Opinion, in which a House Member inquired as to whether the 1983 Appropriations Act was in violation of Article IV, Section 12 of the Constitution of Virginia which stated that no law shall embrace more than one object. Two items in the 1983 Appropriations Act had the effect of abolishing a state agency created elsewhere in the *Code of Virginia* and transferring the functions of the abolished agency to another state agency. The idea behind the prohibition on a law embracing more than one object is found in *Commonwealth v. Brown*, 91 Va. 762, 21 S.E. 357 (1895) in which the Virginia Supreme Court stated that the ban was needed to prevent members of the legislature and the people from being misled by the title of a law. The Attorney General, citing *Brown*, concluded that the prohibition was not intended to obstruct honest legislation or compel the multiplication of laws. All that is required is that the provisions be congruous and have a natural connection to one another (1983-84 Va. AG 66). The Attorney General concluded that the provisions under question in the Appropriations Act did not amend the organization of Virginia's government in a manner contrary to standards established by *Brown* and were constitutional.

Similarly, in 1988, a House of Delegates Member asked whether Virginia's zoning enabling statutes specifically authorized the City of Fairfax to assess a civil penalty for a violation of the City's zoning ordinance. The Attorney General responded that under the enabling legislation at that time, only eleven classes of localities were authorized to impose civil penalties for violations of a zoning ordinance, with Fairfax not being one of the expressly authorized localities (1987-88 Va. AG 211). Consequently,

absent specific statutory authority, the city could not impose civil penalties for violations of its own ordinances, rendering the city with the ability to pass zoning laws but no method of enforcing them. During the 1989 Session of the General Assembly, House Bill 1381 was passed, which amended the zoning statutes by deleting the specific locality language and replacing it with “...any county, city, or town” (*1989 Acts of the General Assembly*, p. 826).

Another example is found in a 1984 Opinion where the County Attorney for Smith County inquired whether a board of supervisors, in appropriating money from its damage stamp fund for rescue squads and fire departments, could base the appropriations on the preceding calendar year’s revenues. The Attorney General, pointing to the plan language in the code, opined that such an action would be in conflict with the law, although other related code sections would make it permissible. He further advised that the matter be brought to the attention of the legislature (1983-84 Va. AG 168). The General Assembly, in 1985, amended the code, adding language that would permit using a prior year’s revenue as a basis for current budget appropriations (*1985 Acts of the General Assembly of Virginia*, p. 358).

Virginia’s criminal code is especially susceptible to a variety of inconsistencies due to the large number of amendments, recodifications, and court opinions that affect it. A good example of this is found in a 1984 Opinion, in which a House Member requested an opinion on the potential conflict between two sections of the *Code of Virginia* dealing with a warrantless arrest for an alleged shoplifting misdemeanor not committed in an officer’s presence. One section authorized police officers to arrest adults without a warrant, but another section did not grant the same authority to arrest juveniles under

similar circumstances. The Attorney General concluded that the statute concerning juveniles created a specific law governing the arrest as to that group over the more general provisions of the adult statute (1983-84 Va. AG 218). During the 1984 Session of the General Assembly, House Bill 361 was passed, which granted authority to police officers to make a warrantless arrest of juveniles for an alleged shoplifting not committed in the officer's presences (*1984 Acts of the Virginia General Assembly*, p. 878).

Often, as noted earlier in this chapter, the advance of technology often outpaces the construction of new laws, resulting in unenforceable and outmoded statutory language. In 1996, the Attorney General was asked for an opinion as to whether a cellular telephone could be considered a portable communications device similar to a beeper, the possession of which is prohibited on public or private school grounds. The Attorney General responded that the clear language of § 18.2-332.1 of the *Code of Virginia* prohibits only portable communication devices *similar* (emphasis added) to beepers (1996 Va. AG 92). Although a cellular phone is a portable communications device, it is not similar to a beeper within the meaning of the statute. Therefore, cellular phones could not be banned using § 18.2-332.1. The General Assembly responded by striking "similar portable communications device" from the statute and replaced it with "or other portable communications device", effectively banning the possession of cellular phones on school grounds (*1997 Acts of the Virginia General Assembly*).

Not only are there inconsistencies that must be corrected within the *Code of Virginia* itself, but also inconsistencies between the *Code* and legislatively approved city charters. In one such instance, the Attorney General was asked for an opinion on the legality of legislation authorizing the City of Virginia Beach to conduct a direct popular

election for members of the city school board. The Attorney General concluded that the General Assembly had failed to properly amend the city's charter, which was a necessary step in authorizing the direct election of school board members (1992 Va. AG 101). During the 1993 Session, the General Assembly passed House Bill 1301 which amended the City of Virginia Beach Charter to allow for the direct election of school board members (*1993 Acts of the General Assembly*, p. 787-68).

Constitutional Advicegiving

Just as Attorney General Opinions often engage in constitutional advicegiving to public administrators in the exercise of their duties, these opinions also provide legislators with similar advice for correcting constitutionally defective legislation to prevent potential legal challenges. An example of this is a 1976 Opinion on the sale of obscene materials. A Virginia Senator inquired as to whether the General Assembly could pass legislation which would require magazines such as "Playgirl" and "Penthouse" to be displayed only in adult bookstores. The Attorney General, citing the U.S. Supreme Court's reasoning in *Miller v. California*, 413 U.S. 15 (1973), *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) concluded that in order to comport with constitutional standards, the General Assembly would have to craft the statute in such a way as to only prohibit the viewing of such materials by minors (1975-76 Va. AG 145). To require that such magazines be displayed only in adult bookstores would be an unconstitutional assumption that they are obscene. The subsequent law concerning the display of adult magazines reflects the advice of the Attorney General, by mandating that

the magazines be displayed out of reach of minors and any nudity or sexual language be obscured.

As demonstrated by the above examples of how the Attorney General can influence legislation through the opinion writing function, opinions in this category have the effect of making the General Assembly more mindful of the constitutional limits placed on the means available to them in designing policies and programs using the legislative process. These opinions also provide a legal impetus for action by navigating the often times complex maze of constitutional and statutory requirements. Furthermore, Attorney General Opinions in this area serve as a mechanism for mediating and making sense of the often fluid legal and constitutional limits on legislative power by guiding the exercise of legislative authority and passage of laws. It is in this category of opinions where one can clearly see the substantive impact that attorney general opinions have on both the law on the books (by granting meaning to statutory language) and the law in action (by providing a legal justification for exercising authority).

Judicial Influence

The final area of Attorney General influence that I examined is the affect that the opinions had on the state's judiciary. The Attorney General is often asked to issue an opinion on the exercise of judicial power by the state's judges. Examples of these opinions include questions on jurisdictional issues and the ability of state courts to hear certain types of cases, the use of a court's contempt powers, criminal sentencing, and the general administration of courts (i.e. authority over work release programs, court closings, and regulation bondsmen). Again, like opinions in the categories discussed

above, the Attorney General's advice allows for the proper administration of justice and prevents against possible constitutional violations. The Attorney General's opinion mediates between the law on the books and the application of that law by those charged with administering it. More importantly, in the case of the state judiciary, Attorney General Opinions can educate judges on the changes wrought by the construction of new laws, specifically where the development of case law to provide reasoned guidance is outpaced by changes in the political environment and state code.

It is one thing to ask for an opinion because one needs advice, it is quite another to sit in judgment on whether or not the advice rendered is both sound and applicable. In order to gauge how the opinions issued within my time frame were treated by judges in terms of their legal value in deciding cases, I conducted a search of all cases handed down by the Virginia Supreme Court, the Court of Appeals, and the various circuit courts in which the judges made a ruling as to the legal soundness and applicability of an attorney general's opinion. The parameters for such a search were limited to only those cases in which an attorney general's opinion from one of the years within my time frame was used by one or more of the parties as justification for their argument. With these limitations, I was able to identify eight Virginia Supreme Court cases, three Virginia Court of Appeals cases, and two circuit court cases in which an Attorney General's Opinion was utilized. The results of my analysis found that, in the majority of cases, courts across the Commonwealth appeared very deferential to Attorney General Opinions, often adopting the legal rationale of the Attorney General for the court's own opinion.

VA Supreme Court and Attorney General Opinions

In *Johnson v. Prince William Cnty School Bd.*, 241 Va. 383, 404 S.E.2d 209 (1991), the Virginia Supreme Court upheld a two-prong test that the Attorney General found was the appropriate standard for determining entitlement to a religious exemption from compulsory school attendance. In the trial court, one of the points of discussion was the opinion of the Attorney General (1984-85 Va. AG), which provided the basis for the school board's denial of Johnson's exemption. The Virginia Supreme Court found that the school board, by following the Attorney General's opinion, correctly denied the exemption and affirmed the trial court's action in upholding that decision.

In *City of Winchester v. American Woodmark*, 250 Va. 451, 464 S.E.2d 148 (1995), the Virginia Supreme Court cited a failure on the part of the General Assembly to modify the Attorney General's interpretation of the phrase "machinery and tools" (1985-86 Va. AG 316) in affirming a lower court's ruling that American Woodmark should have the taxes that Winchester subjected to property outside the definition refunded to them. The Court declared that the General Assembly's failure to make corrective amendments evinces legislative acquiescence in the Attorney General's interpretation.

This line of reasoning was also the basis for the Court's ruling in *Browning-Ferris v. Commonwealth*, 225 Va. 157, 300 S.E.2d 603 (1983), wherein the justices found that the legislature's failure to amend the Attorney General's interpretation of what constitutes "waste" in relation to motor vehicle transporters (1979-80 Va. AG 259). The Court concluded that the lack of any corrective amendments to the statute as construed by the Attorney General constituted legislative approval.

In *County of Chesterfield v. BBC Brown Boveri*, 238 Va. 64, 380 S.E.2d 890 (1989), the Virginia Supreme Court adopted the reasoning of a 1984 Attorney General Opinion (1984-85 Va. AG 364, 366) in which the Attorney General held a business engaged in manufacturing and ancillary non-manufacturing activities to be a manufacturer for tax purposes and exempt from the payment of business license taxes. The Court adopted the Attorney General's definition of the term "substantial" and likewise the Attorney General's conclusion that manufacturing constituted a substantial portion of BBC's business activity.

In *Children, Inc. v. City of Richmond*, 251 Va. 62, 466 S.E.2d 99 (1996), the Court adopted the conclusions of two Attorney General Opinions (1983-84 Va. AG 362; 1977-78 Va. AG 416) which stated that charitable tax exemptions available under the 1902 Constitution of Virginia were continued by grandfather clause to the 1972 Constitution of Virginia. The exemptions created by statute were available only to organizations that existed on July 1, 1971. As a result, the Court ruled that Children, Inc. was entitled to tax relief because it was a recognized and incorporated organization prior to the 1971 deadline.

In spite of the cases above, the Virginia Supreme Court does not always defer to the reasoning put forth by an Attorney General Opinion. In *LeMond v. McElroy*, 239 Va. 515, 391 S.E.2d 309 (1990), the Virginia Supreme Court was asked to decide whether the Virginia Freedom of Information Act required disclosure of confidential financial statements reflecting the amount paid out of public funds to settle a lawsuit against a sheriff. The Attorney General had issued an opinion stating that settlement agreements and associated accounting documents compiled specifically for use in one

dimension of litigation fall within the allowable exceptions for protection against public disclosure. The Supreme Court disagreed, ruling that the accounting records were not compiled specifically for litigation. Instead, the Court concluded that they were documents generated in connection with the payment process after the mutual agreement to settle and, as such, were not protected from disclosure.

In *Underwood v. Henry County School Board*, 245 Va. 127, 427 S.E.2d 330 (1993), the plaintiff, Underwood, cited two Attorney General Opinions (one from my sample year 1976) in support of her position that the Henry County School Board failed to give her timely notice that her temporary teaching contract would not be renewed. Unfortunately, the Court found that neither supported her position. Indeed, both supported the opposite view.

In addition to the cases above which cited Attorney General Opinions written within my sample years, the Virginia Supreme Court cited opinions from other years in a number of cases. In twelve cases, the Virginia Supreme Court upheld and adopted the reasoning used by the Attorney General.¹ In another case, the Court cited an Attorney General Opinion as justification for its ruling.² An Attorney General Opinion was used by the Court to discern legislative history and intent concerning suspended sentencing in another case.³ The Court also ruled in another case that the actions taken by a county supervisor following an Attorney General Opinion represented a proper discharge of his duties.⁴ Finally, in four cases, the Virginia Supreme Court rejected the rationale used in an Attorney General Opinion as improper or irrelevant to the case facts at hand.⁵

Virginia Court of Appeals and Attorney General Opinions

In *Diggs v. Commonwealth*, 6 Va. App. 300, 369 S.E.2d 199 (1988), Diggs was convicted of operating a moped on a public highway after his operator's license had been revoked. Diggs argued that a moped is not "self-propelled machinery or equipment" within the meaning of the *Code of Virginia*. In affirming Diggs' conviction, the Court of Appeals cited three prior Attorney General Opinions (1984-85 Va. AG 215; 1977-78 Va. AG 265; 1975-76 Va. AG 251) which consistently held, without contrary legislative response, that one whose license is suspended or revoked cannot legally operate a moped on public highways during the period of suspension or revocation.

In *Gay v. Commonwealth*, 10 Va. App. 229, 391 S.E.2d 737 (1990), Gay was convicted of speeding while driving on a United States Naval Base located within the cities of Virginia Beach and Norfolk. He argued that the city of Virginia Beach lacked jurisdiction over the offense because it occurred on federal property. In affirming Gay's conviction, the Court of Appeals relied on an Attorney General Opinion (1987-88 Va. AG 443), which concluded that under the terms of the cession statute, Virginia retained concurrent criminal jurisdiction over the property constituting the Naval base.

Although the above cases indicate favorable treatment of Attorney General Opinions, there was one instance in which the Court of Appeals found itself in complete disagreement with the Attorney General's interpretation. In *Sylvestre v. Commonwealth*, 10 Va. App. 253, 391 S.E.2d 336 (1990), the defendant was convicted of uttering a bad check. Sylvestre argued that the evidence was insufficient to sustain the conviction and that the evidentiary presumption of fraudulent intent was unconstitutionally applied to her because the Commonwealth never established that she received notice from the payee of

the check. In arguing to uphold the conviction, the Commonwealth pointed to an Attorney General Opinion (1979-80 Va. AG 42) which concluded that the code section under which Sylvestre was charged presumed intent to defraud for any person who issues bad checks was constitutional. The Court of Appeals disagreed, stating that the presumption of intent was unconstitutional absent additional evidence proving that the defendant acted with fraudulent intent. Accordingly, Sylvestre's conviction was overturned.

In addition to the above cases, my research uncovered eight other Virginia Court of Appeals cases in which Attorney General Opinions from years outside my sample were cited with varying degrees of success. In seven cases, the Court of Appeals either upheld or adopted in part or whole the interpretation and reasoning of Attorney General Opinions.⁶ The Court of Appeals rejected the rationale utilized by the Attorney General Opinion in only one case.⁷

Virginia Circuit Courts and Attorney General Opinions

In *Commonwealth v. Payne*, 19 Cir. L135516 (1995), Payne attacked the validity of the ordinance under which he was convicted stating that the minutes of the Fairfax City Council meeting at which the ordinance was adopted did not reflect the name of each member voting and how he or she voted. Although the names of those present had been recorded and the vote in favor of the ordinance was unanimous, Payne argued that this was in violation of Article VII, Section 7 of the Constitution of Virginia which requires that the name of each member voting and how they voted on any ordinance or resolution be recorded. The court disagreed, relying on an Attorney General Opinion

(1971-72 Va. AG 42) which concluded that if a board of supervisors votes unanimously and attendance at the meeting has already been recorded, there is no need to once again record the names of those voting. To require the city clerk to record each member's individual vote would be unnecessarily redundant.

In *Stone v. Bedford County School Board*, 9 Va. Cir. 460 (1981), Stone sued the Bedford County School Board for breach of contract as a result of not giving him timely notice of what his salary would be. The court adopted in whole the Attorney General's interpretation of the "teacher tenure statute", which concluded, in part, that a continuing contract does not mean a contract the terms of which may never change so long as the teacher continues to teach, rather, employment itself, and not a certain salary, is the guarantee of continuing contract status (1976-77 Va. AG 246).

In addition to the two cases cited above, a search of the various Virginia Circuit Courts found 19 cases in which the court's decision was influenced by an Attorney General Opinion. In sixteen cases, the courts upheld and/or adopted the rationale used in the Attorney General Opinion as the basis for their decision.⁸ Circuit courts throughout the state disagreed with the rationale of an Attorney General Opinion in only three cases.⁹

Overall, Virginia Attorney General Opinions have fared quite favorably in Virginia Courts, often being adopted in part or in whole by the court in handing down a judgment. In those cases where the Attorney General's rationale is upheld, the courts grant additional legitimacy to Attorney General Opinions. What some observers might dismiss as judicial laziness, I would argue represents both judicial recognition and evidence that Attorney General Opinions possesses a distinctive competence in interpreting addressing many issues related to local and state administration. Attorney

General Opinions provide a legal justification for judges to utilize in reviewing statutes and administrative actions. In this sense, the opinions are not merely an optional source of information for judges to utilize in making their decisions, they create legal reasoning and judicial precedent in the same way that court opinions do.

Chapter Summary

Public administrators are often called on to make decisions and use their discretion in implementing policies that promote the public interest within both existing and new policy areas (Thompson, 1974; Rohr, 1986). Administrators and officials may be dealing with the application of new laws and new policies, for which there is no precedent or guiding principle. In response, legislatures may attempt to craft new statutory guidelines and exercise their powers via innovative legislative approaches. Attorney general opinions, in these cases, can provide both a legal and a normative basis for an administrator's decision, and for future legislation. New policy areas often reflect new political issues. In these cases, attorney general opinions provide an effective sounding board against which innovative policies can be tested for legality and congruence with existing statutes and obligations. Furthermore, attorney general opinions provide a medium through which legal or constitutional defects of both state action and legislative changes can be identified before going into effect, thereby heading off any potential legal challenges and, unlike adjudication, leaving any solutions in the hands of the legislature.

As demonstrated in this chapter, Virginia Attorney General Opinions have influenced both the language and meaning of state law, guided the exercise of local

government authority, assisted in the coordination and organization of the state bureaucracy, left a lasting mark on legislation, guarded against abuses of constitutional rights and powers, and afforded courts across the Commonwealth with a body of legal reasoning that has formed the basis for the courts' jurisprudence in a number of legal areas. Attorney General Opinions have often filled the void left by gaps in statutory authority by providing guidance when governing structures and arrangements are marked by blurred lines of authority and new policy areas outpace the construction of new laws and the development of judicial case law to provide guidance. Even if one could argue that Attorney General Opinions, by themselves and absent judicial deference, offer little more than non-binding legal clarification and advice; it is difficult to deny the substantive impact that many of these opinions have on all levels of state government as evidenced by the numerous examples provided in this chapter.

Attorney general opinions are but one of many sources of authority on the law. What distinguishes them from other sources is the Attorney General's position within government, the expertise available within the office, and the opinions themselves which not only provide specific answers to specific questions, but go beyond that to provide administrators with a better understanding of legislative history and intent, and how the law operates in conjunction with other duties and other laws. In short, opinions provide a view of the "law in action" as opposed to the law on the books. Attorney general opinions are not designed to transform administrators into lawyers because public administrators should be better than lawyers, versed with perspectives that go beyond the law and take into account legislative, managerial, and public perspectives. Rather, they

are designed and function to bring government action in line with statutory and constitutional requirements.

The fact that Virginia Attorney General Opinions play a role in constitutional and legislative matters further highlights the link between public administration's more traditional executive role and its often unrecognized judicial and legislative roles (Rohr, 2000; Rosenbloom, 2000). Attorney general opinions represent public administration's responsibility to engage in legal and constitutional interpretation as well as its responsibility to implement the law in a fashion representative of legislative intent. Attorney general opinions highlight the centrality of a full written court opinion, constitutional article, or statute by checking the natural tendency to focus on the bottom line and helps explain the reasons behind an opinion or law (Kaytal, 1993). Instead of focusing on the aid a written opinion or statute gives, attorney general advicegiving shows how the opinion or law in question serves the systemic interest of providing guidance to the interested reader (Kaytal, 1993). In this sense, Virginia Attorney General Opinions represent an advicegiving device through which the attorney general can give persuasive advice that administrators, legislators, and judges will hear; and which will ingrain itself in the laws and policies of the Commonwealth.

Chapter Six concludes this dissertation by illustrating the normative value of Virginia Attorney General Opinions within the frameworks of Fuller's distinctive competence and Rohr's regime values. Here, I will emphasize what I consider to be the distinctive competence of the opinions in addressing statutory, local, state, and legislative issues, as well as how the opinions inform public administration via their institutional, dialectic, concrete, and pertinent characteristics. Chapter Six will conclude by offering

some conclusions regarding the contribution of state attorney general opinions to public administration, lessons learned from these contributions for public administrators, and areas identified for further research on the subject.

¹ *Commonwealth v. Arlington County Board*, 217 Va. 558, 232 S.E.2d 30 (1977); *Arlington County v. White*, 259 Va. 708, 528 S.E.2d 706 (2000); *Va. Dpt. of Labor v. Westmoreland Coal Co.*, 233 Va. 97, 353 S.E.2d 758 (1987); *Commonwealth v. Stanley*, 232 Va. 57, 348 S.E.2d 231 (1986); *Deal v. Commonwealth*, 224 Va. 618, 299 S.E.2d 346 (1983); *Albemarle County v. Marshall, Clerk*, 215 Va. 756, 214 S.E.2d 146 (1975); *Lee Gardens v. Arlington County Board*, 250 Va. 534, 463 S.E.2d 646 (1995); *Norfolk Airport Authority v. Nordwall*, 246 Va. 391, 436 S.E.2d 436 (1993); *Delta Air Lines v. County Bd. of Arlington*, 242 Va. 209, 409 S.E.2d 130 (1991); *Thomson v. Robb*, 229 Va. 233, 328 S.E.2d 136 (1985); *Ambrogi v. Koontz*, 224 Va. 381, 297 S.E.2d 660 (1982); *Sanitation Comm. v. Chesapeake*, 218 Va. 696, 240 S.E.2d 819 (1978).

² *Va. Society for Human Life v. Caldwell*, 256 Va. 151, 500 S.E.2d 814 (1998).

³ *In Re: Dept. of Corrections*, 222 Va. 454, 281 S.E.2d 857 (1981).

⁴ *Beckett v. Board of Supervisors*, 234 Va. 614, 363 S.E.2d 918 (1988).

⁵ *Twietmeyer v. City of Hampton*, 255 Va. 387, 497 S.E.2d 858 (1998); *Town of Madison v. Ford*, 255 Va. 429, 498 S.E.2d 235 (1998); *Cumbee v. Myers*, 232 Va. 371, 350 S.E.2d 633 (1986); *County Board v. Brown*, 229 Va. 341, 329 S.E.2d 468 (1985).

⁶ *Commonwealth v. Brown*, 28 Va. App. 781, 508 S.E.2d 916 (1999); *Jenkins v. Commonwealth*, 13 Va. App. 420, 411 S.E.2d 841 (1991); *Virginia Bd. of Medicine v. VPTA*, 13 Va. App. 458, 413 S.E.2d 59 (1991); *Ramirez v. Commonwealth*, 20 Va. App. 292, 456 S.E.2d 531 (1995); *Flaherty v. Commonwealth*, 14 Va. App. 148, 415 S.E.2d 867 (1992); *Bray v. Commonwealth*, 9 Va. App. 417, 388 S.E.2d 837 (1990); *Hohman v. Commonwealth*, 96 Vap UNP 0815954a (1996).

⁷ *Frere v. Commonwealth*, 19 Va. App. 460, 452 S.E.2d 682 (1995)

⁸ *Debrew v. LEXUS*, 19 Cir. L154017 (1997); *Commonwealth v. Megel*, 19 Cir. CR93115 (1998); *Morrison v. Virginia Commonwealth Univ.*, 13 Cir. HE10844 (1995); *Jones v. Withrow*, 23 Cir. JA301 (1985); *Commonwealth v. Lakatos*, 19 Cir. Cr81781 (1993); *Echols v. Board of Supervisors*, 20 Cir. L15190a (1994); *McLane Co., Inc. v. Stafford County*, 45 Va. Cir. 180 (1998); *Commonwealth Transportation Commissioner of Virginia v. John J. Baxter, et al.*, 44 Va. Cir. 148 (1997); *Commonwealth v. Miller*, 31 Va. Cir. 271 (1993); *Commonwealth of Virginia v. Eubanks, Sisk, and Shifflett*, 26 Va. Cir. 344 (1992); *Commonwealth v. Ruiz*, 22 Va. Cir. 68 (1990); *Commonwealth v. Mitchell*, 10 Va. Cir. 271 (1987); *Bennett v. Henrico County*, 19 Va. Cir. 482 (1978); *Ticonderoga Farms, Inc., et al. v. Loudon County, et al.*, 54 Va. Cir. 542 (2001); *Robertson, et al. v. City of Alexandria*, 46 Va. Cir. 6 (1998); *Andrews, et al. v. Warren County Board of Supervisors, et al.*, 37 Va. Cir. 128 (1995).

⁹ *Commonwealth v. Hyatt*, 2 Va. Cir. Cr952466 (1995); *R&B Tysons Corner v. County of Fairfax*, 19 Va. Cir. L134034 (1996); *Douglas MacArthur West, et al. v. James S. Gilmore, III, et al.* (2002).

Chapter Six: Summary and Implications

The law must be stable, but it must not stand still. - Roscoe Pound

Introduction

In Chapter One, I discussed how the litigation role of state attorneys general often overshadows their less visible opinion writing function. Opinions issued by state attorneys general cover a vast range of subjects to offer guidance to public officials in the performance of their duties. By reconciling statutory ambiguity and offering legal and constitutional advice, these opinions leave a lasting mark on local and state administration, public policy, and legislation. By virtue of their position at the nexus of the executive, legislative, and judicial branches of state government, state attorneys general can shape the development of law by facilitating dialogue aimed at understanding the purpose, intent, and effect of law.

In my review of the literature, I noted a lack of attention to the opinion writing function of state attorneys general. That most of the literature concerning state attorneys general would focus on litigation and adjudication is not surprising considering the dominance of these approaches in the legal discourse of the United States. I also wrote about the limitations of adjudication in solving administrative and policy problems related to the trends of devolution and judicialization. As noted, the development of guiding case law is often outpaced by changes in state and local authority, expanded programmatic responsibility, and blurred governmental boundaries. Attorney general opinions, in this environment, can provide a normative basis for administrative action and for future legislation, in addition to correcting existing constitutional defects that may result in litigation. The advice presented in attorney general opinions serves as an

authoritative reference and provides instruction on the effect of a given law or policy without the time, expense, and, often negative, consequences of an adversarial hearing.

In Chapter Three, I wrote about the role that extra-judicial advicegiving plays in France as embodied in the Council of State. The advice provided by the Council of State goes beyond issues of legality to take into account the concern and desire for effective administration. The far reaching influence of such an institution has spawned copies elsewhere in Europe, but the United States lacks a comparable federal level institution. While the Office of Legal Counsel within the U.S. Attorney General's Office does issue opinions, their effect is muted by several systemic and agency cultural aspects specific to the federal government in the United States. However, the Office of Attorney General in Virginia does exhibit similar traits to the Council of State, particularly in its blending of advicegiving and litigation functions.

In Chapter Four, I presented a broad descriptive analysis of Virginia Attorney General Opinions from select years between 1972 and 2000, which concentrated on the types of issues addressed and the sources of opinion solicitation. Chapter Five provided a more detailed analysis of the opinions selected, specifically focusing on their affect on the state code, state and local administration, legislation, and the courts. My findings indicate that these opinions have influenced many facets of public administration and legislation in Virginia, from determining the appropriate legal and constitutional boundaries of local and legislative authority to providing a legal and constitutional rationale for new and innovative means of implementing policy. Additionally, the opinions have ingrained themselves into the legal fabric of judicial thought and reasoning

across the Commonwealth, often adopted in whole, or in part, by judges at every appellate level.

The final chapter of this dissertation will revisit the frameworks of Fuller and Rohr from Chapter Two to emphasize what I view as the distinctive competence of Virginia Attorney General Opinions in addressing state and local administrative issues, as well as the normative values expressed by the opinions and their import for public administration. The chapter will conclude with a few thoughts on how state attorney general opinions contribute to the governing dialogue, followed by future avenues of state attorney general opinion research.

Distinctive Competence

State and local administrative agencies are often significantly involved in the formulation of public policies, providing expertise on implementation, promulgating regulations, and bringing administrative action to bear in enforcing and monitoring programs. However, state and local administrators often work in a complex environment marked by unclear lines of authority while attempting to accommodate both state and federal policy objectives and systems of accountability (Lowry, 1992). Many state legislatures, because of their limited sessions and inadequate staff assistance, leave the interpretation and implementation of complex technical legislative matters to other branches and officials. Without the traditional administrative controls provided by a full-time legislature, the question then becomes, to whom do administrators turn to for assistance and legal interpretation when legislation or regulatory schemes are unclear? As noted in Chapter Two, the tendency to look to adjudicative processes as a means of

solving administrative problems is problematic for several reasons, such as issues of justiciability, standing, or lack of precedent. While no system of law can be perfectly drafted and free of defects, deficiency in both the words and application of the law is problematic.

Fuller (1969) defines law as the enterprise of subjecting human conduct to the governance of rules. In his writings, Fuller described what he termed the “inner morality that makes law possible,” which consisted of a set of eight formal criteria that are deduced from the very meaning of law (Boyle, 1993, p. 372). The criteria identified by Fuller (1969) are as follows:

1. A system of law must achieve rules
2. These rules must be publicized and made available to the parties expected to observe the behavior.
3. Retroactive legislation undercuts the integrity of rules.
4. The rules must be made understandable.
5. There can be no contradictory rules.
6. Rules must not require conduct beyond the powers of the affected party.
7. There can be no frequent changes in the rules that result in behavioral disorientation.
8. There can be no incongruence between the rules as announced and their actual administration.

The obligation to obey the law depends on the same criteria. Fuller (1969) argues that, “...there can be no moral obligation to obey a legal rule that does not exist, is kept secret, came into existence after one acts, is unintelligible, contradicted by another rule, commanded the impossible, or changed every minute (p. 39).” In short, the law must be defined as a concept by the same criteria that cause it to give rise to obligation. Any law that violated one of these principles, Fuller argued, could not be legitimately called law.

By making enforceability dependent on the particular social understandings in which behavior is embedded, Fuller implies a kind of reciprocity between government

and citizens found within the Declaration of Independence. Breach of the bond or reciprocity ends the obligation of the citizen to obey the commands of the state. The cords used to bind the state are also the guide ropes for the citizenry and this legal cordage should be woven from rules (Boyle, 1993, p. 393). From this, one could reasonably assume that the same reciprocity holds true within the government. Public administrators cannot be expected to abide by nor effectively administer contradictory, unclear, or unreasonable rules. Yet, the obligation to obey carries with it the responsibility to understand. In order to understand, Fuller suggests the use of purposive interpretation as a means of resolving discrepancies between the language and application of the law. Under this approach, any legal dispute must be answered by an exploration of the purpose and intent of a legal rule. Purposive interpretation dispels the notion that there are core meanings to words that allow one to interpret the law without recourse to consideration of purpose or policy (Boyle, 1993, p. 374). Understanding goes beyond simply the “law on the books” to take into account the “law in action.”

This type of purposive interpretation is precisely what Virginia Attorney General Opinions provide. The purpose of issuing published, written opinions is to provide effective legal advice to state and local agencies or officials, and represent a “...written commitment to respect for the laws, a commitment to the equal justice of the citizens, and a means to anticipate potential legal problems and prevent them from arising (*Annual Report of the Attorney General*, 1972, 1976, 1980, 1984, 1988, 1992, 1996, 2000).” The opinion writing function of the Virginia Attorney General revolves around answering, identifying, and correcting deficiencies in what could be considered the inner morality of Virginia law. Often, there are no deficiencies, but by providing a legal justification as to

why, the opinions free public administrators from fear, absolve perceived sins, and provide a basis for action. Like the French Council of State, the opinion writing function of the Virginia Attorney General serves to improve the administration of government in addition to providing advice as to the legality of proposed legislation.

The distinctive competence of Virginia Attorney General Opinions rests not only on the central, coordinating position held by the Office within state government; but in the very purpose and nature of the opinion writing function – to provide clarity, resolve ambiguity, and affect responsible administration. As state and local administrators cope with the daily challenges of governance they will be expected to balance the demand for efficiency with the need for responsibility. Legislative, regulatory, and statutory ambiguity, coupled with the demand for governmental response to social and political changes, necessitates competent guidance on administrative matters. The tendency to turn to adjudicative processes for answers to the difficult task of coordinating governmental efforts has produced a mixed result of conflicting interpretations and standards. Virginia Attorney General Opinions have sought to guide administrators through this maze of contradictory precedent by reconciling ambiguity and providing insight into how the actions of public officials and governmental entities should be guided.

State attorneys general exert an influence similar to that of the courts through interpreting statutes, rules, regulations, and administrative decisions. However, unlike courts, which are often separated and constitutionally insulated from the political and administrative realities of the modern administrative state, state attorneys general operate at the intersection of executive, legislative, and judicial processes. State attorneys

general regularly interact with all major political figures in every phase of state policymaking, giving them a unique perspective on administrative and constitutional issues (Morris, 1987). As such, state attorneys general possess a distinctive competence, by virtue of their location and specialization, in addressing normative issues regarding state and local administration. Attorney general opinions play a vital role in protecting and promoting Fuller's (1969) "inner morality" of law through their use of purposive interpretation as a means of facilitating understanding.

Regime Values Application

In *Ethics for Bureaucrats* (1989), Rohr writes about the critical importance for public administrators, at all levels, to be cognizant of the ethical norms demanded of them in their governing activities. These "regime values", as defined by Rohr, are the political values brought into being by the ratification of the U.S. Constitution, and are normative for bureaucrats because of their oath to uphold the Constitution (p. 68). Rohr lists several sources where one can find these values, but his preference is decisions of the U.S. Supreme Court because they expose administrators to several conflicting interpretations of American values through their four, interrelated characteristics. These characteristics – institutional, dialectic, concrete, and pertinent – provide a useful framework for comparing the Attorney General Opinions used in previous chapters to Supreme Court decisions to illustrate the role and influence that extra-judicial opinions can have on public administration. As I shall discuss below, Virginia Attorney General Opinions also possess institutional, dialectic, concrete, and pertinent characteristics which aid in their transmission of regime values.

Supreme Court decisions are *institutional* in the sense that they represent a history of values as they apply to all citizens, allowing the reader to distinguish between stable principles and passing fads (Rohr, 1989, p. 77). The self-referential nature of Court decisions reflects an understanding that the Justices are part of a historically fashioned institution, and seeks to establish a continuity of jurisprudence through a reliance on established principles. However, Rohr cautions readers to examine what the Court has opined on a single issue at other points in time to avoid “becoming imprisoned by...historical circumstances (1989, p. 78).” Many of the Court’s decisions are often issued on subjects that defy historical reference and precedent, and as such, the Court must reinterpret familiar principles in light of new factual circumstances (Rohr, 1989, p. 78). Similarly, Jerome Frank, offers a more Freudian take on the misuse of precedent by arguing that a fixation on precedent is little more than the subconscious desire for an intellectual father who would take painful choices out of our hands (Boyle, 1993, p. 381).

Virginia Attorney General Opinions represent a much narrower history of state and local values, as opposed to the broader representation found in Supreme Court decisions. Virginia Attorney General Opinions also demonstrate a connection the institutional history of the office through their self-referential style. Similar to the Supreme Court’s conscious use of “this Court decided in...” when referring to prior opinions, Virginia Attorney General Opinions utilize the phrase, “a prior Opinion of this Office issued in...” when referring to opinions issued in previous years, indicative of Attorneys General consciously not distancing themselves from their predecessors in an attempt to display a continuity of institutional jurisprudence. The Attorney General is often called upon to define the original meaning of words, phrases, and concepts found

within specific statutes, pieces of legislation, state and federal court opinions, and his/her own prior opinions. Much like court opinions, Attorney General Opinions are often issued on subjects that defy historical or precedential reference, and as such, must reinterpret familiar principles in light of changed circumstances. Examples of this characteristic can be found in opinions dealing with Virginia's use of the legislative veto, city reversion to town status, whether or not cell phones are portable communications devices similar to beepers, and how Virginia courts should implement U.S. Supreme Court rulings on matters such as search and seizures and counsel for indigent defendants.

Supreme Court opinions are *dialectic* in that they often consist of concurring and dissenting opinions. The dialectic nature of the opinions offers the reader an opportunity to observe a dialogue or debate concerning key issues within a formal context. The opinions offer insight into how different Justices construe certain laws and policies, and provide administrators with alternative ways of looking at the same problem and offer the reader an opportunity to reflect on his/her own views and legal/policy constructions. Often, as situations change, the opinions reflect new policy statements. This is especially evident when they break from previous interpretations of law, or break new ground in establishing benchmarks for future policymaking decisions and statutory construction.

Virginia Attorney General Opinions do not benefit from concurring and/or dissenting opinions. However, the absence of multiple voices within the opinion does not preclude its dialectic potential. Rohr concludes that it should make no difference whether legal opinions present a single, unified legal position or interpretation without the benefit (or distraction) of concurring and dissenting opinions. What matters, ultimately, is the wisdom and integrity of the opinion (Rohr, 1989, p. 81). Virginia Attorney General

Opinions often include the reasoning of past attorneys general, state and federal courts, and the General Assembly in addition to the current Attorney General's rationale. The public and formal context of the opinions affords interested public administrators a window into the issues facing other state agencies and localities. The opinions also offer insight into how the implementation of state law affect different localities or agencies; how different officials construe the influence of certain laws or policies; and provide alternative ways at addressing similar problems. Rather than being bland assertions of law, these opinions have an added reflective value for readers. Like Supreme Court decisions, Virginia Attorney General Opinions can shape attitudes and influence the exercise of administrative discretion. Examples of this can be seen in multiple opinions concerning the immunity and liability of public officials, as well as those opinions seeking to balance the demands for open government, as represented in Virginia's Freedom of Information Act, with the need for governmental privilege and privacy.

The third characteristic is that the opinions are *concrete*. Justices may soar to the highest abstractions in discussing broad concepts, but at the end of the day, they must apply their wisdom to an immediate and concrete situation (Rohr, 1989, p. 81). In addition to providing theoretical discourse, Court opinions often provide instructions on how to put regime values to practical use (p. 81). Unlike Supreme Court Opinions, Virginia Attorney General Opinions rarely consist of lofty expositions on legal theory. In the rare instance they do, it is ultimately and explicitly connected to the question of law at hand. Like Supreme Court decisions, Virginia Attorney General Opinions resolve ambiguity, address specific questions, and demonstrate what certain values (i.e. due process and Dillon's Rule) mean in practice and in relation to the facts presented.

Attorney General Opinions are particularly instructive for establishing parameters for the responsible exercise of discretion when there is a lack of rules and a lack of specific guidelines governing policy implementation. In the absence of legislative instruction or relevant case law, the Attorney General Opinion may be the only authoritative word and carry great normative weight.

The final characteristic identified by Rohr is that Supreme Court opinions are *pertinent*. Many of the political issues of the day find their way into the Courts. As Rohr (2002) observes, one look at the major moral and religious arguments in American history reveals the Constitution of the United States front and center in the debate, with the Supreme Court as final arbitrator (p. 167). Supreme Court opinions often address variations on the same issue in a number of opinions over time. As Rohr has suggested, administrators can examine cluster opinions of the Court on a given issue to get a feel for the argument occurring within and between the Justices that constitute the Court at a given time and across terms. Supreme Court opinions provide an opportunity for administrators to reflect on how the values espoused in such writings inform the exercise of their duties in the public governance process, and the potential consequences of both action and inaction.

Virginia Attorney General Opinions also offer public administrators on the state and local level the opportunity to reflect how values, such as religious freedom and freedom of conscious, inform their duties. For example, in a 1984 Opinion, local school boards were given a lesson on how the values of religious consciousness and the public's interest in compulsory educational attendance were to be reconciled (1984-85 Va. AG). Likewise, the Attorney General has provided advice on a number of issues relating to

separation of powers (i.e. legislative veto; data processing services; information systems mergers), federalism (particularly the unique brand of intrastate federalism found in Dillon's Rule), and due process (i.e. juvenile rights; warrantless searches; student drug testing).

Regime values are important because they offer a method of encouraging responsibility that supplements our traditional reliance on elections, appellate procedures, judicial review, and the "representative" character of bureaucracy in a demographic sense (Rohr, 1989, p. 85). Regime values aim at developing an understanding of responsibility that includes an informed patriotism and sound judgment on the part of public administrators (p. 85). Opinions, whether they are issued by courts or attorneys general, represent another chapter in the ongoing governance dialogue, a dialogue aimed at discovering both the proper social ordering and the morals, or regime values, implicit within that order.

Implications for Public Administration

There has been much written concerning the important role that public administrators play in facilitating dialogue between citizens and government. For instance, Thomas Barth (1996) stresses the need for agential leaders who can create institutions that are both deliberative and educational (p. 173-4). Others, such as Richard Dagger (1997) and William Lowry (1992), argue that the states have a higher tendency to foster responsive programs if they possess dynamic institutions that foster high degrees of citizen awareness. Similarly, Fuller (1969) opined that through communication we "...inherit the achievement of past human efforts (p. 186)." Fuller goes on to state that

the one central and indisputable principle of substantive natural law, upon which our system of government is based, is that we open up, maintain, and preserve the integrity of communication channels through which we convey our perceptions, feelings, and desires (p. 186).

As public administration moves into the twenty-first century, the role of government is becoming more uncertain. Governmental functions, historically considered the sole purview of one level of government are being delegated, or devolved, at an alarming rate. Newly gained (and oftentimes imposed) responsibility and authority on the state and local levels present new challenges to service delivery and citizen expectation. Even those functions once considered inherently governmental are being parceled out to the non-profit and private sectors. The resulting shift of public sector resources and the utilization of new and innovative institutions to manage them often present conflicting perspectives on both rights and responsibilities. Even academic and public administration trends, such as New Public Management, often collide headlong with constitutional values, or ignore them altogether (Rohr, 2002). In order to avoid and mediate value conflicts and legal problems, we need to find, study, and utilize those institutional mechanisms that can facilitate a normative-based and constitutionally informed dialogue.

Attorney general opinions are not a panacea for the problems noted above, but they do offer public administrators direct guidance and a means of framing issues using a legal and constitutional lens. In mediating value conflicts, these opinions offer a proactive return to constitutional and legislative intent. Attorney general opinions offer guidance on the “what if” as well as the “what now” types of questions. Unlike

adjudication, the channels of communication provided by attorney general opinions are the result of a non-confrontational process. While there are some limited statutory barriers to seeking the attorney general's advice, they are not as cumbersome as the procedural barriers associated with adjudication; nor are the opinions rendered "after the fact." The opinion writing function of the Virginia Attorney General represents an inclusive, institutionalized, ongoing dialogue between all branches and all levels of government. It is this inclusive characteristic of Virginia Attorney General Opinions that adds to their distinctive competence in addressing legal and administrative issues.

State attorneys general are trained in and experienced at interpreting and applying the law to a multitude of facts and circumstances. Additionally, state attorneys general are versed in management, and as such, are not constitutionally and politically insulated and separated from the day-to-day realities of public administration. These factors add weight to the administrative knowledge and expertise provided by attorney general opinions, particularly on issues related to state and local administration. As a result of this broader knowledge and experience base, coupled with the non-adversarial nature of the opinions, I would argue that attorney general opinions are more collegial and offer the same degree of value and legal protection as court opinions, but with the added value of administrative knowledge and praxis.

As noted earlier in Chapter Two, one of the most commented on aspects of the American political system is the tendency for both citizens and government officials to turn to legal advice. O'Leary and Wise (1991) illustrate the increasing trend towards a "legalized" society and the need for public administrators to be well versed in constitutional law. While the U.S. Constitution and its state counterparts are silent on the

subject of who bears the ultimate responsibility for constitutional interpretation, it is well settled that each branch of the government, and each public administrator, has the responsibility to actively engage in constitutional interpretation (Rosenfeld, 1993; Rosenbloom, et. al, 2001; Rohr, 2002). As noted by Norton Long (1996), and echoed by David Rosenbloom (2000), public administration serves a thinking role in government – it is not just an instrument to be wielded by the political branches. Attorney general opinions present a dialogue aimed at stimulating the collective brain of governance and provide public administrators the opportunity to “do good” rather than “avoid[ing] evil” (Rohr, 1989, p. 73). The regime values framework advocated by Rohr (1989) is based on the notion of educating civil servants, both in school and in their training, as to the normative expectations that accompany public service. As I have contended throughout this dissertation, attorney general opinions can also educate students and public administrators by affording them the opportunity to think and reflect, while facilitating dialogue and providing an authoritative reference source for administrators to examine both the legality and the normative implications of their actions.

Areas of Future Research

Research in this area, apart from litigation, is virtually non-existent. The lack of substantive, current research on the opinion writing function of state attorneys general provides a rather fertile ground for further research. This dissertation, while valuable in establishing a conceptual framework and providing a sampling of opinions issued in Virginia during the modern era and how they have influenced public administration, lacks a certain degree of depth and focus in specific policy areas. One immediate project

of interest would be utilize my existing methodology and data to examine opinions issued in a specific policy area, such as environmental law, education, or Dillon's Rule, to present a deeper picture of attorney general jurisprudence. A narrow policy examination such as this would enable me to develop a more robust picture of attorney general opinion influence within and between policy areas over time to determine how public officials have put into practice the policy advice of various attorneys general and how this advice has shaped the delivery of services, the development of legislation, program management, and related Virginia court cases. The use of additional software, such as NUD*IST, would also be of value in this endeavor. This type of research project could then be replicated using other policy areas and expanded further to include other states.

Another exploratory project focused on Virginia would be to conduct a survey of state and local officials to determine the extent of their use of both formal and informal attorney general opinions. Are the published opinions read? If not, why; if so, how often? How useful do officials find the opinions, both formal and informal, in providing guidance and instruction? I would envision a two-stage project, the first being a survey of those officials granted statutory authority to request opinions to determine their reasons for initiating the process, their satisfaction with the opinions issued, and general thoughts on opinion content and usefulness. The second stage of the project would involve a survey of public administrators not authorized to request an opinion (such as county administrators, city managers, etc.) but to whom the opinions have value. This project would be of immense value in both determining the perceived value of attorney general opinions across governmental levels and measuring the impact of the opinions directly, in addition to the measures employed in this dissertation. A survey such as this

would also provide insight into reasons why the attorney general's advice is followed or ignored, and could be conducted in a similar fashion to gauge the direct influence of attorney general opinions in other states.

Another project would examine the influence that political party affiliation has on attorney general opinions within Virginia. What, if any, is the relationship between the party affiliation of the attorney general and the number and types of requests? Do Democrats tend to request more opinions from a Democrat attorney general than Republicans do and vice versa? Does party affiliation of the current attorney general influence his/her decision to either adhere to or overturn the opinion of a prior attorney general of a different party? Are there discernable differences in the advice given by Democrat and Republican attorneys general within the same policy area? By focusing on these types of questions, I would be able to contribute to the literature concerning political party influence on a state level beyond the more routine focus on elections and policy.

A final project of interest would be to expand my scope beyond Virginia to examine other state attorneys general, resulting in a comparison of the opinion writing function between those states that elect the attorney general and those in which the attorney general is appointed. This project is of interest because it would allow me to measure the degree to which selection method influences attorney general advicegiving in both form and function. For example, what would the substantive differences be, if any, in the opinions issued by an attorney general appointed by the governor versus that of an attorney general appointed by the legislature or the state judiciary? Does selection method affect the nature of the advice? Does selection method influence the manner in

which attorney general opinions are treated by state legislatures or judicial officials? Does selection method affect the types of issues the attorney general is presented with or the source of opinion requests? The answers to these questions would provide greater insight into the structural and socio-political factors surrounding attorney general opinions and how these factors affect the overall influence of attorney general opinions in their respective states.

Summary

The purpose of this dissertation was to examine several assumptions I had about Virginia Attorney General Opinions. The first of these assumptions was that the opinion writing function operated in a manner similar to that of the French Council of State. The Virginia Office of the Attorney General and the Council of State represent institutions employing both adjudicative and advisory procedures aimed at improving government administration. The opinions issued by each institution shape legislation, inform public policy, and guide administrative behavior. As demonstrated in Chapter Three, the U.S. Attorney General's Office of Legal Counsel does issue opinions related to federal government administration, however, the impact of these opinions is muted by various political and structural arrangements not found at the state level in Virginia. As a result, the Office of Attorney General in Virginia represents a more comparable institution, outside of the judiciary, to the Council of State, particularly related to the opinion writing function.

The second purpose for writing this dissertation was to demonstrate that Virginia Attorney General Opinions are instructive for state and local administrators, in that they

represent another vehicle for making administrators aware of the legal and ethical norms demanded of them in their positions. Virginia Attorney General Opinions not only reflect the broader regime values expressed by the U.S. Constitution and resultant federal law, but the specific values reflected in the Constitution of Virginia and the *Code of Virginia*. My analysis of the opinions from the years selected indicates that the opinions are instructive for state and local administrators, as well as judges and legislators. Apart from the often administrative and legal mundane questions of statutory interpretation, the opinions I examined addressed issues of fundamental constitutional rights, governmental power, and the ethical responsibilities of public officials.

A final, yet interrelated, assumption guiding this dissertation was that state attorney general opinions, in many instances, may be preferable over other types of administrative and judicial interpretation due to the "distinctive competence" of state attorneys general. Fuller (1969) defines "distinctive competence" as a set of conceptual and practical mechanisms, built into the design of each legal institution, specifically designed to address particular problems or issues. State attorneys general, by virtue of their institutional design, possess a unique ability to resolve statutory and constitutional ambiguity, and aid in the furtherance of effective and normative administration. This observation, at least as far as Virginia is concerned, is supported by the breadth and scope of opinion topics, as well as the cross-sectional representation of solicitations from all parts and levels of government throughout the Commonwealth.

I began this chapter with a quote from Roscoe Pound. The essence of this quote is that if the law is to have any value, it must be viewed as kinesthetic. In other words, the law in action and how it is applied or modified depending on factual circumstances

and contextual changes, matters just as much as what the law says. Court opinions offer the reader an opportunity to see what the law looks like in action and its subsequent consequences. Attorney general opinions, by contrast, offer the reader an opportunity to see what the law *would* look like in action and its *potential* consequences in addition to the after the fact application of the law. Attorney general opinions offer both a retrospective and a prospective lens for legal behavior, positing both the real and the imagined. Attorney general opinions give administrators a kinesthetic view of the law.

The role and function of law in modern society is increasingly important, not only to those who administer it, but also to those who are governed by it as well (Fuller, 1969). The citizen must, of necessity, accept on faith that government is operating fairly and according to the rules. Because faith plays such an important role in the functioning of any legal system, a single dramatic disappointment or persistent disregard of faith can undermine the moral foundations of a legal order, both for those subject to it and those who administer it (Winston, 1981). Increasingly, citizens, and to a greater extent, the judiciary, are demanding that government not only be efficient, effective, and economical, but responsive, responsible, and representative as well. In sum, public administration is expected to obey and abide by the rule of law while meeting the increasing demands of modern governance. In fulfilling these expectations, it is my hope that public administrators and those researchers writing within the field will expand the scope of their search for legal and normative guidance to include extra-judicial forms of advicegiving, like that found in attorney general opinions, to aid in the governing process.

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