

Denise Garrison McElvein
FILED
MAY 13 2013
CLERK
SUPREME COURT

COMMONWEALTH OF KENTUCKY, SUPREME COURT
No. 2012-SC-402-DG

COMMONWEALTH OF KENTUCKY, APPELLANT,

Appeal from Powell Circuit Court
v. Hon. Frank Allen Fletcher, Judge
Indictment Nos. 09-CR-133-002 & 09-CR-143

FLOYD GROVER JOHNSON, APPELLEE.

BRIEF OF AMICI CURIAE ATTORNEYS GENERAL OF MISSOURI, ET AL., IN
SUPPORT OF APPELLANT COMMONWEALTH OF KENTUCKY

Respectfully submitted,
CHRIS KOSTER
Missouri Attorney General
Denise Garrison McElvein
DENISE GARRISON MCELVEIN
Assistant Attorney General
JAMES R. LAYTON
Solicitor General
LINDA LEMKE
Assistant Attorney General
P.O. Box 861
St. Louis, MO 63188
(314) 340-7861

CERTIFICATE OF SERVICE

I certify that a copy of this brief has been served this 29th day of April, 2013, as follows, by mailing to: the trial judge, Hon. Frank Allen Fletcher, Judge, Breathitt County Judicial Center, P.O. Box 946, Jackson, KY 41339-0946; Hon. Emily Holt Rhorer, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601; Hon. Jack Conway, Office of the Attorney General, 1024 Capital Center Drive, Frankfort, KY 40601; Hon. Darrell Herald, Commonwealth Attorney, 1140 Main Street, P.O. Box 744, Jackson, KY 41339; and Ian G. Sonogo, Assistant Commonwealth's Attorney, Eighth Judicial Circuit, 1001 Center Street, Suite 205, Bowling Green, KY 42101-2191.

Denise Garrison McElvein
Denise Garrison McElvein

(Counsel for amici listed on next page)

Dustin McDaniel
Arkansas Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201-2610

John W. Suthers
Attorney General of Colorado
1300 Broadway, 10th Floor
Denver, CO 80203

Joseph R. Biden, III
Attorney General of Delaware
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

David M. Louie
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

Lisa Madigan
Illinois Attorney General
100 W. Randolph St., 12th Floor
Chicago, IL 60601

Tom Miller
Iowa Attorney General
Hoover State Office Bldg.
1305 E. Walnut
Des Moines, IA 50319

Derek Schmidt
Office of Kansas Attorney General
120 SW 10th Avenue, 2nd Floor
Topeka, KS 66612-1597

James D. "Buddy" Caldwell
Louisiana Attorney General
Office of the Attorney General
1885 North Third Street
Baton Rouge, LA 70802

Janet T. Mills
Attorney General of Maine
State House Station 6
Augusta, ME 04333

Martha Coakley
Attorney General
One Ashburton Place
Boston, MA 02108

Bill Schuette
Michigan Attorney General
P. O. Box 30212
Lansing, MI 48909

Jim Hood
Mississippi Attorney General
Post Office Box 220
Jackson, MS 39205

Michael A. Delaney
Attorney General of New
Hampshire
33 Capitol Street
Concord, New Hampshire 03301

Gary K. King
Attorney General of New Mexico
P. O. Drawer 1508
Santa Fe, New Mexico 87504-1508

Wayne Stenehjem
Attorney General of North Dakota
600 E. Boulevard Avenue
Bismarck, ND 58505-0040

John E. Swallow
Utah Attorney General
350 North State Street, Suite 230
P.O. Box 142320
Salt Lake City, UT 84114-2230

INTRODUCTION

The attorneys general of Missouri, Arkansas, Colorado, Delaware, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Mississippi, New Hampshire, New Mexico, North Dakota, and Utah tender the following Amicus Curiae Brief in support of the Commonwealth of Kentucky's appeal from the order of the Court of Appeals reversing the trial court's order denying Appellee Johnson's motion to dismiss the indictment against him.

STATEMENT CONCERNING ORAL ARGUMENT

The Kentucky Attorney General will ably represent the interests of amici attorneys general in this matter and amici do not request to be heard unless this Court should so request.

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STATEMENT OF PURPOSE AND INTERESTS

With respect to his common law powers, the Attorney General of Kentucky is certainly not unique. The vast majority of state attorneys general derive much of their authority from the common law. Thus the attorneys general—including the *amici*—have an interest in ensuring that the courts not only in their own states but throughout the United States properly interpret the common law.

Here, the Kentucky Court of Appeals has addressed the relationship between the common law authority of the state's attorney general and Kentucky statutes that address prosecutorial authority of other officials. In doing so, the Court of Appeals has read the statutes expansively and the common law narrowly—so narrowly, in fact, that the attorney general, the state's chief law enforcement officer, is deprived of the ability to look at whether a state law has been violated. Reading statutes that say nothing whatsoever about the attorney general to restrict his authority in that fashion significantly diminishes the attorney general's ability to protect the interests that his office has long been charged with protecting—interests in the life and safety of state residents, as well as interests in ensuring the appropriate enforcement of state statutes.

When courts of one state reach back to the common law as it was adopted by other states, as the Court of Appeals does, in part, the declarations that address shared common law heritage concern us all. Hence

the *amici*, as attorneys general who also rely on ancient common law authority to fulfill the role assigned to them, have an interest in the declaration of common law by the Commonwealth of Kentucky.

ARGUMENT

State attorneys general with common law authority retain those broad powers, including investigatory powers, unless expressly revoked or delegated exclusively to another entity.

The holding of the Court of Appeals extinguishes common law powers possessed by the office of the attorney general, even though no statute expressly requires this result.

In Missouri, as in many other states, the office of the attorney general is established or recognized by the state's constitution. Mo. Const. Art. IV, § 12. But in Missouri, no powers or duties of the office are enumerated there. Rather, as in most other states, the office of the attorney general has all the powers and duties the office possessed at common law. *Ex parte Young*, 209 U.S. 123, 160-61; 28 S.Ct. 441, 454 (1908) (rejecting argument that no statute gave the Minnesota Attorney General a certain duty; Minnesota Supreme Court had held that the office possessed common law powers: "It would seem to be clear that the attorney general, *under his power existing at common law*, and by virtue of these various statutes, had a general duty imposed upon him, which includes the right and the power to enforce the statutes of the state, including, of course, the act in question, if it were constitutional."), *emphasis added*; *State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 136 (Mo. banc 2000) ("The absence of a provision for specific powers for the attorney general in our constitution vests the office with all of the powers

of the attorney general at common law.”); *State ex rel. Barrett v. Boeckeler Lumber Co.*, 257 S.W. 453, 456 (Mo. banc 1924) (“It is generally held in this country that the office of Attorney General is clothed, in addition to the duties expressly defined by statute, with all the powers pertaining thereto under the common law.”); see § 1.010, Mo. Rev. Stat. 2000 (“The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, of a general nature ... are the rule of action and decision in this state”); 7A C.J.S. § 26 (2004) (powers of attorney general are “ordinarily deemed as broad as the common law, unless restricted or modified by constitution or statute”).¹

¹ See also *Martin v. Thornburg*, 359 S.E.2d 472, 479 (N.C. 1987); *Thompson v. Wainwright*, 714 F.2d 1495, 1500 (11th Cir. 1983) (Florida attorney general has common law powers and those granted by statute); *State v. Jiminez*, 588 P.2d 707, 709 (Utah 1978); *Michigan State Chiropractic Ass’n v. Kelley*, 262 N.W.2d 676, 677 (Mich. App. 1977) (attorney general’s statutory and common law authority is liberally construed); *Attorney General by Anderson v. Rochester Trust Co.*, 115 N.H. 74, 333 A.2d 718, 720 (N.H. 1975); *Lund ex rel. Wilbur v. Pratt*, 308 A.2d 554, 558 (Me. 1973) (attorney general has common law powers, and may, absent express statutory restriction, “exercise all such power and authority as public interests may, from time to time require”); *State ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P.2d 813, 818-19 (Okl. 1973); *State ex rel. Patterson v. Warren*, 180 So.2d 293, 299 (Miss. 1965) (the attorney general “has the powers which were vested in him at common law, and those which have been conferred upon him by statute.”); *State ex rel. Olsen v. Public Service Commission*, 283 P.2d 594, 597-98 (Mont. 1955) (statute giving county attorney power to bring suit did not take away attorney general’s common law power to bring suit), citing *State ex rel. Ford v. Young*, 170 P. 947, 948 (Mont. 1918) (general rule in this country is that, “in the absence of express restrictions, the common-law duties attach themselves to the office” of attorney general, as far as practicable); *O’Regan v. Schermerhorn*, 50 A.2d 10, 15 (N.J. Sup. 1946) (attorney general has all common law powers, and, “in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require.”); *In re Equalization of Assessment of Natural Gas Pipe Lines*, 242 N.W. 609, 610 (Neb. 1932).

These powers and duties are broad; so broad that most legislatures make no attempt to delineate them. *Ex parte Young*, 209 U.S. 123, 160; 28 S.Ct. 441, 454 (finding that holding in state case “held that the attorney general might institute, conduct, and maintain all suits and proceedings he might deem necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights, and that there were no statutory restrictions in that state limiting the duties of the attorney general in such case.”); *State ex rel. Barrett v. Boeckeler Lumber Co.*, 257 S.W. 453, 456 (Mo. banc 1924) (“The duties of the Attorney General at common law were so varied and numerous that they have perhaps never been specifically, enumerated.”); 7A C.J.S. § 26 (2004).²

The attorneys general use their broad common law power to protect the interests of the people of their respective states—in two ways. First, they do so directly, mostly publicly (but not exclusively) by appearing in court to enforce state statutory and common law, either civilly or criminally. Second, they do so indirectly, by standing up—in court or otherwise—for the statutes enacted by the people’s representatives in the legislature. The Court of

² See also *State v. Heath*, 806 S.W.2d 535, 537 (Tenn. App. 1990); *State v. Robinson*, 112 N.W. 269, 272 (Minn. 1907) (office of the attorney general existed early in the United States and England, office is vested by common law with duties so numerous and varied that legislatures do not enumerate the powers, office holds both powers specifically enumerated by statute and those given at common law, statute “imposing specific duties upon county attorneys in the matter of its enforcement is in no proper view a limitation upon, nor does it exclude, the general authority of the Attorney General upon the same subject.”).

Appeals would carve out from that power the ability to even look at whether a state law has been violated. If a state attorney general were held to have lost merely by implication powers that the legislature granted to any other entity, in many states the ability of the office to defend the state and its citizens would be curtailed.

The key to a proper understanding of the relationship between the common law authority of the attorney general and the meaning of legislation is this longstanding rule: in order for the legislature to take away any of the common law powers of the office of the attorney general, the legislature must pass a statute that expressly takes away those powers, or delegates them exclusively to another entity.³ See *State ex rel. McKittrick v. Missouri Public Service Com'n*, 175 S.W.2d 857, 861-62 (Mo. banc 1943) (because statutes creating the Public Service Commission made the commission “exclusive in its field,” the attorney general could not “represent, control or impede the Commission in its functioning,” either directly or by intervention); 7A C.J.S. § 26 (2004). The corollary is that a statute that merely allows another entity to exercise certain powers does not strip the office of attorney general of those

³ Although legislatures may take common law powers away from the office of the attorney general using express statutes, there are limits to this legislative power—the attorney general is part of the executive branch of government, and the legislative branch may not so limit the authority of the office “so as to leave it an empty shell.” *Johnson v. Commonwealth ex rel. Meredith*, 165 S.W.2d 820 (Ky. App. 1942); *Fieger v. Cox*, 734 N.W.2d 602, 611-13 (Mich. App. 2007) (circuit court’s limiting of the attorney general’s investigation constituted a violation of separation of powers); 7A C.J.S. § 29 (2004) (power of the legislature to “increase, alter, or abridge the powers and duties of the attorney general” is subject to constitutional limitations).

common law powers. *State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d at 136. Rather, the statute's result is that both the entity and the attorney general are authorized to use those powers—the entity by force of statute, and the attorney general by right of the common law power with which the office has been invested.⁴

One of the common law powers of the office of the attorney general is to investigate crimes. *In re Henry C. Eastburn & Son, Inc.*, 147 A.2d 921, 924 (Del. 1959) (attorney general's "power and duty to investigate, upon information received, possible violations of the criminal law is undoubted."); 7A C.J.S. § 68 (2004) ("The attorney general generally has the power and, in some instances, the duty, to investigate possible violations of the criminal law ..."). Therefore, where another statute merely grants authority to a certain entity to investigate crimes, that grant of authority does not, by itself, strip the office of the attorney general of its common law authority to investigate crimes.

Missouri provides an example. Missouri statutes grant to sheriffs and other officers authority to investigate crimes occurring within the geographical limits of the municipality that employs them. *See, e.g.*, § 57.100, Mo. Rev. Stat. 2000 (general duties include apprehending suspects); § 57.110,

⁴ That result is consistent with the requirement that statutes in derogation of the common law be strictly construed. *E.g.*, *16 Jade Street, LLC v. R. Design Const. Co.*, 728 S.E.2d 448, 454 (S.C. 2012); *Henry v. Continental Cas. Co.*, 381 S.W.3d 802, 810 (Ark. 2011).

Mo. Rev. Stat. 2000 (has duties of a conservator of the peace); § 57.270, Mo. Rev. Stat. 2000 (sheriff's deputies have power and duties of sheriff). Missouri statutes also grant to certain state agencies powers to investigate certain violations of state law. *See, e.g.*, § 260.210.4, Mo. Rev. Stat. 2000 (Department of Natural Resources investigates illegal dumping); § 290.240.1, Mo. Rev. Stat. 2000 (Department of Labor investigates violations of prevailing wage law). As discussed above, under the common law, such general grants of authority do not deprive the Missouri Attorney General of the common law power to investigate crimes that occur anywhere in the state. Nor do they take away the Attorney General's power to cooperate with these entities in investigating crimes, by offering expertise and additional resources.

The alternative is at the very least troubling. It would mean that the state's chief law enforcement officer is barred from investigating possible violations of a substantial swath of state laws. The logic of the Court of Appeals decision would leave such investigation *solely* to the single person given statutory authority to proceed after an investigation—here, and often, a locally elected prosecutor. Even the possibility of investigation by the attorney general that would justify judicial appointment of a special prosecutor to replace the local prosecutor in a particular case would be effectively precluded. And based on what? Not on any legislative declaration that the attorney general cannot do what has been his job under the common

that the attorney general cannot do what has been his job under the common law for literally centuries, but on a legislative declaration that another prosecutor has authority to file and pursue charges of the commission of a particular crime. This court should reject such a problematic approach to the interaction between legislative enactment and the common law.

CONCLUSION

For the reasons stated above, the Court should reject the reasoning of the Court of Appeals and preserve the authority of the Attorney General of Kentucky—and, by implication, attorneys general of other states—to at the very least investigate whether and how a state law has been violated.

Respectfully submitted,

CHRIS KOSTER
Missouri Attorney General



DENISE GARRISON MCELVEIN
Assistant Attorney General
Kentucky Bar No. 82118

JAMES R. LAYTON
Solicitor General

LINDA LEMKE
Assistant Attorney General

P.O. Box 861
St. Louis, MO 63188

(314) 340-7861

(314) 340-7029 (facsimile)

Denise.McElvein@ago.mo.gov