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Robert L. Woodahl position paper on the office of attorney general

Robert L. Woodahl

EXHIBIT A

POSITION PAPER OF ATTORNEY GENERAL ROBERT L. WOODAHL
BEFORE THE CONSTITUTIONAL CONVENTION EXECUTIVE COMMITTEE
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The office of Attorney General must be viewed in the context of the government of which it is a part. Its powers, duties and operations will be influenced by whether the office is constitutional or statutory, elective or appointive, and by the relationship to the executive, legislative and judicial branches.

In the state of Montana, the office of Attorney General is three-fold in responsibility, obligation and operation. First, he is the chief legal officer for the state of Montana; secondly, he is the chief law enforcement officer in the state of Montana; and, thirdly, he is a member of the important state boards that, in conjunction with the Governor, direct and supervise the operation of state government.

The office of Attorney General is constitutional in 44 states. It is based only on statute in six states; namely, Alaska, Kentucky, Hawaii, Indiana, Oregon and Wyoming.

The Attorney General is popularly elected in 42 states. He is appointed by the Governor in six states; namely, Alaska, Hawaii, New Hampshire, New Jersey, Pennsylvania and Wyoming. In the state of Maine, he is selected by the Legislature and in Tennessee by the Supreme Court.

The Attorney General is the most prevalent elective official in state government, with the exception of the Governor, who is elected in all states. The Treasurer is elected in 40 states, the Secretary of State in 39, the Lieutenant Governor in 38, the Auditor in 29, and the Superintendent of Public Instruction in 24.

Historically, the Attorney General has been an appointive, rather than elective, official. In England, he was appointed by the Crown and only incidentally acquired elective status through a seat in Parliament. In Colonial America, the

Attorney General was usually appointed by the Governor.

Recommendations for an appointive Attorney General were submitted to the New York Constitutional Conventions in 1867, 1894, 1914, 1938 and 1967, but were not adopted. The New Jersey Constitutional Convention of 1947 continued the practice of Gubernatorial appointment as did the Pennsylvania Constitution of 1968. The 1961-62 Michigan Constitutional Convention extensively debated the issue of election vs. appointment, and eventually accepted the elective status for the Attorney General.

The Case for Appointment

Proponents of an appointive Attorney General usually base their arguments primarily on the need to strengthen the executive. They hold that fragmentation leads to irresponsibility, but a single chief executive can be held accountable through the electoral system and, as a consequence, can make the administration more responsive. Proponents of an appointive Attorney General argue that his function is to advise the Governor, and the Governor should be permitted to choose his advisors. They believe that the two officials are more likely to maintain the close and harmonious relationship that is necessary for effective liaison if the Attorney General is appointed.

Advocates of appointment also contend that the elective process may not assure professional competence. The pressures of politics and the time involved in campaigning limit an Attorney General's abilities to serve effectively, and many highly competent people would not be willing to undergo the election process.

The Case for Election

The arguments for an elective Attorney General have been most eloquently summarized by Attorney General Louis J. Lefkowitz

of New York in a position paper submitted to the New York Constitutional Convention in 1967. General Lefkowitz reviewed the Attorney General's duties in some detail, pointing out they were predicated on his role as an independent official, and concluded that:

> "To sum it up - an elected Attorney General has a measure of independence and a sense of personal and direct responsibility to the public. The elected official has a natural and impelling desire to be creative and to exercise broader initiative in the service of the public. He is free of the fear of dismissal by any superior official if he should exercise contrary independent judgment. He is in the best position to render maximum service to the People and impartial advice to the Governor, the Legislature and State departments and agencies. He can appear in Court without fear or favor - an attorney in the fullest and finest sense of the word."

An equally strong position in favor of election was taken by Attorney General William J. Scott before the recent Illinois Constitutional Convention; he stressed the Attorney General's roles of "government watchdog" and "attorney for the people" as requiring independence from the Governor. General Scott's two predecessors concurred in this position.

The primary argument for an elective Attorney General is that he is an attorney for all of the people, and should be chosen by them. He is the Governor's advisor but not exclusively; the Governor is merely one among many clients. By making the Attorney General directly responsible to the electorate, he remains subject to the ultimate source of power and will be more responsive to public needs. It is furthermore argued that the Attorney General has important administrative and legal functions, such as programs in consumer protection and environmental control. In executing these functions, an Attorney General is acting as an advocate for the people, not as agent of the executive branch. His duties usually include prosecution of election violations, collection of debts, and bringing of suits in the name of the people; these responsibilities are outside the scope of the Governor's duties.

Another argument against the concept of the Attorney General as counsel to the Governor is that the legislative branch may also rely on him for advice, and such is the case in Montana. In some states, Montana included, he also has a responsibility toward the judicial branch; thus, he should not be responsible to any single branch of government but can serve to strengthen checks and balances within the system. He should not be an advocate for a particular administration, but should be free to oppose policies which he considers inconsistent with the law and to investigate apparent wrongdoing.

A delegate to the 1920 Constitutional Convention in Nebraska stated:

> "If there is any man who holds office in this state and who should be elected by, and responsible to the people of the state, it should be the Attorney General. The head of the state may have good judgment in his appointment, he may be able, from his experience, to appoint an excellent man to act as Attorney General, but I do not believe, under ordinary circumstances, that the judgment of one man is better than the combined judgment of the electors of the State of Nebraska on that proposition, and an Attorney General should be a check upon all the officers in the state, and he should be free, if necessary, to proceed against any department or against any officer in the state. I do not want his hands tied; I do not want him to be responsible to any individual or to any particular department. I want him free in the discharge of his duties."

Conclusion

In conclusion, therefore, members of the executive committee of the Montana Constitutional Convention, after weighing all the arguments on both sides of this issue, it is my position that the office of Attorney General in this state should be a constitutionally elective office.