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## People Ex. Rel. Scott v. Briceland: Powers of the Attorney General Revisited, 11 J. Marshall J. Prac. & Proc. 441 (1978)

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## CASENOTE

### PEOPLE EX REL. SCOTT v. BRICELAND: POWERS OF THE ATTORNEY GENERAL REVISITED

Both the 1870 Illinois Constitution and the 1970 Illinois Constitution provided, in similar language, for an Attorney General,<sup>1</sup> and fixed his powers and/or duties as those that "may be prescribed by law."<sup>2</sup> The first case extensively to discuss those duties "prescribed by law" under the 1870 constitution was *Fergus v. Russel*,<sup>3</sup> where the Illinois Supreme Court said that the Attorney General had all of the powers of his English predecessor at common law.<sup>4</sup> The court concluded that the Attorney General was the law officer of the state and its sole representative in the courts in any action in which the state was the real party in interest.<sup>5</sup> This interpretation is in sharp contrast to decisions of other states having similar or identical constitutional provisions regarding the powers and/or duties of the Attorney General.<sup>6</sup> With the comprehensive revision of the 1870 constitution

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1. ILL. CONST. art. V, § 1 (1870) provides:

The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction and attorney general, who shall, each, with the exception of the treasurer, hold his office for the term of four years from the second Monday of January next after his election, and until his successor is elected and qualified. They shall, except the lieutenant governor, reside at the seat of government during their term of office, and keep the public records, books and papers there, and shall perform such duties as may be prescribed by law.

ILL. CONST. art. V, § 1 (1970) provides: "The Executive Branch shall include a Governor, Lieutenant Governor, Attorney General, Secretary of State, Comptroller and Treasurer elected by the electors of the State. They shall keep the public records and maintain a residence at the seat of government during their term of office."

2. ILL. CONST. art. V, § 1 (1870); see note 1 *supra* for text of section.

ILL. CONST. art. V, § 15 (1970) provides: "The Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law."

3. 270 Ill. 304, 110 N.E. 130 (1915).

4. *Id.* at 342, 110 N.E. at 145.

5. *Id.*; see text accompanying notes 94-95 *infra*.

6. See *People v. Miner*, 2 Lans. 396 (N.Y. 1886) (faced with a constitutional provision providing that the duties of the Attorney General "shall be such as now are or may hereafter be prescribed by law," the court held that the legislature could withdraw any of his common law powers); *State v. Davidson*, 33 N. Mex. 664, 275 P. 373 (1929) (since the office of Attorney General was of statutory origin, the fact that he was subsequently made a constitutional officer did not confer upon him the common law duties of his English counterpart); see also *Julian v. State*, 122 Ind. 68, 23 N.E. 691 (1890) (Attorney General has only such power as is delegated to him by statute); *Cosson v. Bradshaw*, 160 Iowa 296, 141 N.W. 1062 (1913) (Attorney General has only those powers conferred

by the Sixth Illinois Constitutional Convention, and the subsequent adoption of the Illinois Constitution of 1970, questions were raised as to the continued vitality of the *Fergus* decision.

At the time of the adoption of the 1970 constitution, no decision had extended the duties of the Attorney General to prosecution of administrative proceedings.<sup>7</sup> Included in the 1970 constitution was a mandate to the General Assembly to enact legislation to provide for and maintain a healthful environment.<sup>8</sup> Even though enacted prior to the adoption of the constitution, the Environmental Protection Act<sup>9</sup> was considered to be a fulfillment of this constitutional mandate.<sup>10</sup> The Environmental Protection Act created the Environmental Protection Agency (EPA), which was directed to administer and enforce the Act.<sup>11</sup> The Act specifically directed the EPA to prepare and present all administrative actions before the Illinois Pollution Control Board.<sup>12</sup> The Attorney General was given enforcement responsibilities, but not at the administrative level.<sup>13</sup>

In *People ex rel. Scott v. Briceland*,<sup>14</sup> the Illinois Supreme Court was confronted with the issue of whether the exclusion of the Attorney General from the preparation and presentation of administrative actions before the Pollution Control Board was

upon him by statute); *State v. Seattle Gas & Elec. Co.*, 28 Wash. 488, 495, 68 P. 946, 949 (1902) (merely because the Attorney General was given the name of his English counterpart did not mean that he was to have the same powers, the court stating, "[t]here is nothing in a mere name.")

7. See text accompanying notes 101-07 *infra*.

8. ILL. CONST. art. XI, § 1 (1970); see note 35 *infra* for text of section.

9. ILL. REV. STAT. ch. 111½, §§ 1001-1054 (1975).

10. *City of Chicago v. Pollution Control Board*, 59 Ill. 2d 484, 490, 322 N.E.2d 11, 15 (1974):

Our analysis of the constitutional proceedings compels us to conclude that the provisions of the Environmental Protection Act, and the rules and regulations adopted pursuant thereto, are not inconsistent with the provisions of the Constitution and the clear intention expressed by the constitutional convention concerning the area of environmental protection.

11. ILL. REV. STAT. ch. 111½, § 1004(a) (1975) provides:

There is established in the Executive Branch of the State Government an agency to be known as the Environmental Protection Agency. . . . The Director . . . shall employ and direct such personnel, and shall provide for such laboratory and other facilities, as may be necessary to carry out the purpose of this Act. . . .

12. *Id.* at § 1004(e); see note 24 *infra* for text of section. See also *Immell, Pollution Control in Illinois—The Role of the Attorney General*, 23 DE PAUL L. REV. 961, 965 (1974) [hereinafter cited as *Immell*] ("it is the function of the [EPA] to initiate enforcement actions"); *Klein, Pollution Control in Illinois, The Formative Years*, 22 DE PAUL L. REV. 759 (1973) [hereinafter cited as *Klein*] (claiming that the EPA is directed to prosecute enforcement proceedings to the exclusion of the Attorney General under the Act); text accompanying note 32 *infra*.

13. See notes 30-31 and accompanying text *infra*; see also *Immell, supra* note 12, at 972-73 (outlining the powers of the Attorney General under the Act).

14. 65 Ill. 2d 485, 359 N.E.2d 149 (1976).

an unconstitutional usurpation of the Attorney General's powers. The Attorney General contended that he was empowered to prosecute these actions under the constitution as interpreted by *Fergus*. Conversely, the EPA contended that it was directed by statute to prosecute these actions. By holding that the Attorney General was the only state official authorized to represent the state in administrative proceedings before the Pollution Control Board,<sup>15</sup> the court established that this broadened interpretation of *Fergus* was incorporated into, and became the essence of, section 15 of the Illinois Constitution of 1970.<sup>16</sup> The decision in *Briceland* effectively quells any and all historical arguments that might successfully challenge the extent of power held by the Attorney General, giving him an impregnable claim to powers that he should not have.

#### FACTS AND PROCEDURAL HISTORY

In May of 1976, defendants Briceland and Diver, as Director and Deputy Director, respectively, of the Illinois Environmental Protection Agency, filed five separate enforcement actions before the Illinois Pollution Control Board without the authorization of the Illinois Attorney General. Prior to this, a political agreement had been forged between the Governor and the Attorney General. Under this agreement, all proposed enforcement actions were to be sent to the Attorney General, who had the option to prosecute the actions.<sup>17</sup> If he chose not to prosecute, the EPA was allowed to litigate with its own attorneys.<sup>18</sup> Upon learning of the unauthorized filing of the enforcement actions, the Attorney General advised the defendants that they had no legal right to litigate the actions.

When the EPA refused to halt the litigation, the Attorney General brought suit seeking (1) a declaratory judgment that he was the only state officer who could present enforcement actions before the Pollution Control Board; (2) an injunction restraining

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15. *Id.* at 500, 359 N.E.2d at 157.

16. *Id.*

17. Brief for Defendant-Appellant at 9-14, *People ex rel. Scott v. Briceland*, 65 Ill. 2d 485, 359 N.E.2d 149 (1976) (outlining the agreement made in February, 1971, between former Governor Ogilvie and Attorney General Scott, empowering the Attorney General to represent the EPA in those actions which the Attorney General chose and otherwise allowing the EPA to use its own attorneys); see, e.g., Klein, *supra* note 12, at 772 (showing the effects on the EPA of the Attorney General's demand to represent the EPA).

18. Brief for Defendant-Appellant at 9-14, *People ex rel. Scott v. Briceland*, 65 Ill. 2d 485, 359 N.E.2d 149 (1976). *But see* Immel, *supra* note 12, at 968-69 (claiming that the Attorney General has never declined to prosecute cases because he differed with the Director's policy decisions).

the EPA from prosecuting actions before the Pollution Control Board; and later, (3) an order holding defendants Briceland and Diver personally liable for all funds expended by the EPA in prosecuting actions before the Pollution Control Board. Defendants counterclaimed for a declaration that they were entitled to representation by counsel other than the Attorney General in the instant action. Both parties moved for summary judgment, with the individual defendants also moving to dismiss the personal liability count.

From the summary judgment of the Circuit Court of Sangamon County,<sup>19</sup> a direct appeal was taken to the Illinois Supreme Court.<sup>20</sup> Both parties appealed from portions of the circuit court decision.<sup>21</sup> The supreme court, speaking through Justice Ryan, unanimously affirmed the decision of the circuit court in all respects.

#### SUPREME COURT OPINION

##### *Environmental Protection Act*

The Illinois Supreme Court initially was confronted with the issue of whether the Environmental Protection Act<sup>22</sup> directed the EPA to prosecute actions before the Pollution Control Board. This examination was undertaken to comply with the canon of statutory construction which dictates that a court will not pass upon a constitutional dispute when the case may be disposed of on other grounds.<sup>23</sup> Since the EPA was basing its right to litigate on section 4(e) of the Act,<sup>24</sup> which directed the EPA to "pre-

19. Memorandum order of July 13, 1976, and judgment order of July 20, 1976, *People ex rel. Scott v. Briceland*, No. 276-76, Judge Verticchio (granting Attorney General's motion for summary judgment, entering permanent injunction, dismissing defendant director and deputy director in their individual capacities, and entering judgment declaring that defendants were entitled to legal representation by counsel other than the Attorney General).

20. ILL. REV. STAT. ch. 110A, § 302(a) (1975) provides: "Appeals from final judgments of circuit courts shall be taken directly to the Supreme Court (1) in cases in which a statute of the United States or of this State has been held invalid, and (2) in proceedings to review orders of the Industrial Commission."

21. Defendants appealed from the issuance of the injunction and the finding of the circuit court that section 4(e) of the Environmental Protection Act was unconstitutional. Plaintiff appealed from the dismissal of the defendants in their individual capacity and the declaration that the defendants were entitled to counsel other than the Attorney General in the present action.

22. ILL. REV. STAT. ch. 111½, §§ 1001-1054 (1975).

23. See, e.g., *Commissioners of Drainage Dist. No. 5 v. Arnold*, 383 Ill. 498, 507, 50 N.E.2d 825, 829 (1943).

24. ILL. REV. STAT. ch. 111½, § 1004(e) (1975) provides:

The Agency shall have the duty to investigate violations of this Act or of regulations adopted thereunder, or of permits or terms or conditions thereof, to prepare and present enforcement cases before the Board, and to take such summary enforcement action as is pro-

pare and present" enforcement proceedings before the Pollution Control Board, the court embarked upon an examination of that section to determine whether it could be interpreted in such a way as to avoid the constitutional issue.

The court first looked at the definition given the phrase "prepare and present" by the circuit court. The circuit court had found that to "prepare and present" meant to "fully prosecute a grievance through all stages, including the taking of evidence, the making of arguments and all things necessary to its full understanding."<sup>25</sup> The supreme court agreed with this definition,<sup>26</sup> but failed to notice that the authority relied upon by the circuit court neither defined "prepare and present" nor was analogous with the present dispute.<sup>27</sup>

The court attempted to buttress its interpretation by reading section 4(e) in conjunction with other sections of the Act. After examining sections 31(a) and (c),<sup>28</sup> the court decided that the Act placed the responsibility of instituting and proving violations of the Act at the administrative level upon the EPA.<sup>29</sup> The court then examined the sections of the Act delineating the role of the Attorney General,<sup>30</sup> and determined that his enforcement re-

vided for by Section 34 of this Act. (emphasis added).

25. Memorandum order of July 13, 1976, at 3, *People ex rel. Scott v. Briceland*, No. 276-76, Judge Verticchio.

26. 65 Ill. 2d 485, 491, 359 N.E.2d 149, 152 (1976).

27. *Hughes Tool Co. v. NLRB*, 147 F.2d 69, 73 (5th Cir. 1945) (involving an interpretation of section 9(a) of the National Labor Relations Act, 29 U.S.C.A. § 159(a) (1973), which provides in part: "Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer." The Board found that a "presentation of [a grievance] would include the taking of evidence, the making of argument, and all things necessary to its full understanding.")

28. ILL. REV. STAT. ch. 111½, §§ 1031(a) and (c) (1975) provide in pertinent part:

(a) If such investigation discloses that a violation may exist, the Agency shall issue and serve upon the person complained against a written notice, together with a formal complaint. . . .

(c) In hearings before the Board under this Title the burden shall be on the Agency or other complainant to show either that the respondent has caused or threatened to cause air or water pollution or that the respondent has violated or threatens to violate any provision of this Act or any rule or regulation of the Board or permit or term or condition thereof.

See also Currie, *Enforcement Under the Illinois Pollution Law*, 70 Nw. U.L. Rev. 389, 449-54 (1975) (examining prosecution under the Environmental Protection Act).

29. 65 Ill. 2d 485, 491, 359 N.E.2d 149, 152 (1976).

30. *Id.* at 491-92, 359 N.E.2d at 152:

Section 42 (Ill. Rev. Stat. 1975, ch. 111½, par. 1042) provides for the imposition of civil penalties for violation of the Act which are to be recovered in actions brought by the Attorney General or the State's Attorney of the county in which the violation occurred. Similarly, section 43 (Ill. Rev. Stat. 1975, ch. 111½, par. 1043) allows the Attorney General to institute actions for injunctive relief in certain cases, and section 44 (Ill. Rev. Stat. 1975, ch. 111½, par. 1044) directs that the Attorney General, or the local State's Attorney,

sponsibilities encompassed only actions before the courts, not at the administrative level.<sup>31</sup> The court concluded that section 4(e) directed the EPA to institute and prosecute enforcement proceedings before the Pollution Control Board.<sup>32</sup> Since the activity of the defendants was found to be within the statute, the court was forced to test the constitutionality of the statute.

### *Constitutional Statute Exception*

One of the grounds urged by the EPA for upholding the constitutionality of the statute was that section 4(e) fit within one of the two exceptions to the exclusive powers of the Attorney General. These exceptions were first promulgated in *Fergus v. Russel*,<sup>33</sup> where the supreme court held that the Attorney General's constitutional powers could be diminished "where the Constitution or a constitutional statute may provide."<sup>34</sup> The EPA contended that section 4(e) fit within the "constitutional statute" exception, as it had been enacted in contemplation of article XI, section 1 of the 1970 constitution.<sup>35</sup>

The only prior case to address the "constitutional statute" exception to which *Fergus* referred was *Stein v. Howlett*,<sup>36</sup> which involved an attempt to delegate to the Secretary of State power to render advisory opinions interpreting the Illinois Governmental Ethics Act.<sup>37</sup> The argument was made that the statute granting the power to render advisory opinions had been enacted pursuant to the constitutional provision enumerating the powers of the Secretary of State,<sup>38</sup> and was therefore such a "constitu-

shall enforce the criminal penalties of the Act. The Attorney General is also given the sole authority to bring actions for *mandamus*, injunction or other appropriate relief against public bodies under the terms of section 46. Ill. Rev. Stat. 1975, ch. 111½, par. 1046(a).

31. *Id.* at 492, 359 N.E.2d at 152.

32. *Id.*

33. 270 Ill. 304, 110 N.E. 130 (1915).

34. *Id.* at 342, 110 N.E. at 145.

35. ILL. CONST. art. XI, § 1 (1970) provides: "The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. *The General Assembly shall provide by law for the implementation and enforcement of this public policy.*" (emphasis added). See text accompanying notes 9-10 *supra*.

36. 52 Ill. 2d 570, 289 N.E.2d 409 (1972).

37. ILL. REV. STAT. ch. 127, § 604A-106 (1971) provides in pertinent part:

Upon the request of any person subject to this Act, the Secretary of State shall render an advisory opinion in writing, certified by him, on questions concerning the interpretation of Article 4A of this Act. The Secretary of State may employ such employees, consultants, and legal counsel as he considers necessary to carry out his duties hereunder, and may prescribe their duties, fix their compensation, and provide for reimbursement of their expenses.

38. ILL. CONST. art. V, § 16 (1970):

The Secretary of State shall maintain the official records of the

tional statute" as would invoke the exception to the powers of the Attorney General. But the *Stein* court held the provision unconstitutional, reasoning that the constitutional language of the Secretary of State provision was not "broad enough to overturn the provisions of section 15 and the time-honored decisions pertaining to the duties of the Attorney General."<sup>39</sup> The court did not disclose what criteria were necessary to establish a "constitutional statute" that would fit within the exception.

The *Briceland* court followed its brief examination of *Stein* with a cursory consideration of the language of article XI.<sup>40</sup> The court stated that the article was "too general to overcome the constitutional authority of the Attorney General,"<sup>41</sup> but not "broad enough to permit the legislature to diminish the Attorney General's power to represent the State in proceedings designed to enforce that policy."<sup>42</sup> Therefore, the court concluded, section 4(e) was not such a "constitutional statute" as would fit within the exception established in *Fergus*.<sup>43</sup>

The court's reasons for refusing to find that section 4(e) was a "constitutional statute" are both contradictory and vague. The court states that article XI is "too general" but not "broad enough"; yet an examination of the definitions of "broad" and "general"<sup>44</sup> shows that for something to be too general but not broad enough is contradictory. Such phrases illustrate that the court was employing generalities to obscure the fact that it had no guidelines or criteria to follow in determining whether a statute fit within the "constitutional statute" exception. The court refused to establish guidelines or criteria in this case.

The implication of the court's statement is that a constitutional article must explicitly state that it is authorizing the legis-

acts of the General Assembly and such official records of the Executive Branch as provided by law. Such official records shall be available for inspection by the public. He shall keep the Great Seal of the State of Illinois and perform other duties that may be prescribed by law. (emphasis added).

39. 52 Ill. 2d 570, 586-87, 289 N.E.2d 409, 418 (1972). See generally Scott, *The Role of the Attorney General's Opinions in Illinois*, 67 Nw. U.L. Rev. 643 (1972) (involving an examination of the origin of the Attorney General's opinion power, the weight to which those opinions are entitled, and the procedures involved in drafting and issuing advisory opinions).

40. ILL. CONST. art. XI, § 1 (1970); see note 35 *supra* for text of section.

41. 65 Ill. 2d 485, 501, 359 N.E.2d 149, 157 (1976).

42. *Id.*

43. *Id.*

44. Compare WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 280 (unabr. ed. 1961) (defining "broad" as "widely applicable; not limited or restricted: general") with *id.* at 944 (defining "general" as "marked by broad overall character without being limited, modified, or checked by narrow, precise considerations: concerned with main elements, major matters rather than limited details").



lature to diminish the powers of the Attorney General. Such a proposition is contrary to the long-established canon of statutory and constitutional construction which dictates that because constitutions are written in general language, they are to be construed liberally so that they may endure indefinitely; however, statutes are to be written specifically and construed strictly, as they are easily amended and their longevity is not paramount.<sup>45</sup> The decision in *Briceland* violates this canon. If a specific constitutional provision were required to diminish the Attorney General's power, that provision would be a "constitution" exception, as opposed to a "constitutional statute" exception. Such a requirement would make it impossible to create a "constitutional statute" exception. Since *Fergus* created two exceptions allowing diminution of the powers of the Attorney General, a rational interpretation demands that these two exceptions have exclusive and distinct criteria.<sup>46</sup>

Since no Illinois court has defined a "constitutional statute," an examination of the individual words is necessary to formulate a definition.<sup>47</sup> When read in conjunction, the words imply that a "constitutional statute" is an act of the legislature consistent with the constitution. It can be argued that the Environmental Protection Act<sup>48</sup> was the legislature's answer to the constitutional mandate of article XI.<sup>49</sup> As such, section 4(e) would be a statute consistent with the constitution, and therefore a "constitutional statute."

A plausible argument can also be made that article XI was intended to be a limitation on the Attorney General's powers. The Attorney General provision and article XI were enacted simultaneously in the 1970 constitution. Logically, they should be given equal weight and effect. That the interpretation of *Fer-*

45. *E.g.*, *Peabody v. Russel*, 301 Ill. 439, 134 N.E. 148 (1922) (courts should not construe a constitutional provision so strictly as to exclude its real object and intent). See generally *Wolfson v. Avery*, 6 Ill. 2d 78, 126 N.E.2d 701 (1955) (a constitutional guaranty should be interpreted in a broad and liberal spirit, and if there is any distinction between rules governing construction of constitutions and rules that apply to statutes, less technical ones are applied in construing constitutions).

46. *Fergus v. Russel*, 270 Ill. 304, 342, 110 N.E. 130, 145 (1915); see *People v. Vraniak*, 5 Ill. 2d 384, 125 N.E.2d 513 (1955) (use of "[t]he word 'or' marks an alternative indicating that the various members of the sentence which it connects are to be taken separately.")

47. See BLACK'S LAW DICTIONARY 385 (rev. 4th ed. 1968) (defining "constitutional" as "[c]onsistent with the constitution; authorized by the constitution. Dependent upon a constitution, or secured or regulated by a constitution"); *id.* at 1581 (defining "statute" as "[a]n act of the legislature declaring, commanding or prohibiting something; a particular law enacted and established by the will of the legislative department of government").

48. ILL. REV. STAT. ch. 111½, §§ 1001-1054 (1975).

49. ILL. CONST. art. XI, § 1 (1970). See note 35 *supra* for text of section.

gus had not, at the time of the adoption of the 1970 constitution, been expanded to include administrative actions<sup>50</sup> gives credence to this argument. Under this interpretation, article XI would allow the legislature to fulfill its mandate by creating an administrative agency empowered under section 4(e) to prosecute its own administrative proceedings.

### History of the Attorney General

The Attorney General claimed that section 4(e) was unconstitutional because he was the only state officer empowered by the constitution to prosecute actions before the Pollution Control Board. His claim rested upon the delineation of his constitutional powers in *Fergus v. Russel*,<sup>51</sup> and he argued that *Fergus* had been incorporated into the 1970 constitution. The court responded by comparing the provisions of the 1870 and 1970 constitutions regarding the powers of the Attorney General,<sup>52</sup> and then briefly reviewed the history of the Attorney General and his powers.

After reviewing the facts of *Fergus*, the court in *Briceland* found that *Fergus* had interpreted the 1870 constitution as granting to the Attorney General all the powers associated with that office at common law, and had held that while the legislature might add to these powers, it could not reduce them.<sup>53</sup> *Briceland* interpreted *Fergus* to mean that "the Attorney General is the sole officer who may conduct litigation in which the People of the State are the real party in interest."<sup>54</sup> The court conceded that *Fergus* had been subject to criticism,<sup>55</sup> but noted that it had

50. See text accompanying notes 101-07 *infra*.

51. 270 Ill. 304, 110 N.E. 130 (1915).

52. Compare ILL. CONST. art. V, § 15 (1970) ("The Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law.") with ILL. CONST. art. V, § 1 (1870) (see note 1 *supra* for text of section).

53. 65 Ill. 2d at 493, 359 N.E.2d at 153. But see text accompanying notes 86-89 *infra* (illustrating that Illinois is the only state to give this interpretation to the constitutional language of the Attorney General provision).

54. 65 Ill. 2d at 495, 359 N.E.2d at 154. But see notes 114-15 and accompanying text *infra* (dealing with the contention of *Fergus* that the Attorney General had the common law duty of being the Crown's sole representative in the courts); notes 60-68 and accompanying text *infra* (illustrating that the common law history of the Attorney General establishes that the Attorney General, in 1606, was not the sole representative of the Crown in the courts; nor did he have the duty to represent administrative agencies).

55. See DeLong, *Powers and Duties of the State Attorney-General in Criminal Prosecution*, 25 J. CRIM. L. 358, 368 (1935) ("The supreme court of Illinois appears to stand entirely alone in applying a weird construction to the constitutional provision which is found in so many states providing that the attorney-general shall have 'such duties as may be prescribed by law.'"); see also D. BRADEN & R. COHN, *THE ILLINOIS CON-*

never been overruled.<sup>56</sup> Rather, it had repeatedly been cited with approval,<sup>57</sup> and was valid law when the 1970 constitution was adopted.<sup>58</sup> The court then summarily refused to consider the EPA's contention that *Fergus* rested upon an erroneous interpretation of the common law.<sup>59</sup> However, the interpretation in *Fergus* that the Attorney General had all the powers of his predecessor at common law is the foundation upon which the decision in *Briceland* is built. This necessitates an examination of those common law powers to determine whether the decision in *Fergus*, and therefore *Briceland*, was based on an erroneous interpretation of the common law.

### Common Law

At early common law, the King was responsible for the protection of the rights and liberties of his subjects and the administration of laws on their behalf.<sup>60</sup> When required to appear in court, he frequently appointed a special attorney to represent the public interest, initially on a case-by-case basis.<sup>61</sup> In time, there

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STITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS 253-60 (1969) ("[T]he really strange thing about the case [*Fergus*] is that the court used the words 'such duties as may be prescribed by law' to back up its argument that the 1870 drafters meant to clothe the Attorney General with the powers of the English common law Attorney General . . . [I]t would seem appropriate, and, it is hoped, not too controversial, to do something about the *Fergus v. Russel* determination concerning the Attorney General.") See generally notes 84-100 and accompanying text *infra*.

56. See text accompanying notes 101-13 *infra*.

57. See, e.g., *Stein v. Howlett*, 52 Ill. 2d 570, 586, 289 N.E.2d 409, 418 (1972) (declaring that the proceedings of the Constitutional Convention of 1970 indicated a clear intent to preserve the *Fergus* principle which reserved to the Attorney General the sole authority to render advisory opinions); *Department of Mental Health v. Coty*, 38 Ill. 2d 602, 606, 232 N.E.2d 686, 689 (1967) (indicating that the Attorney General could file suit under the statute to recover for treatment of mentally retarded patients under his common law powers); *People ex rel. Barrett v. Finnegan*, 378 Ill. 387, 38 N.E.2d 715 (1941) (involving a mandamus action brought under the Attorney General's statutory power to compel a circuit court judge to expunge an order from the record). *But see* *People v. Illinois State Toll Highway Comm'n*; 3 Ill. 2d 218, 120 N.E.2d 35 (1954) (indicating that State commissions would be allowed to retain legal counsel, with the Attorney General controlling them—a retreat from the complete centralization of power dictated by *Fergus*); *People ex rel. Board of Trustees of Univ. of Ill. v. Barrett*, 382 Ill. 321, 46 N.E.2d 951 (1943) (establishing the public corporation exception to *Fergus*, reasoning that since the Attorney General did not have the duty to represent public corporations at common law, he did not have the power under *Fergus* to represent them in the present).

58. 65 Ill. 2d at 495, 359 N.E.2d at 154.

59. *Id.* at 500, 359 N.E.2d at 156.

60. See Comment, *The Illinois Attorney General: Exclusive Legal Counsel for the State?*, 1975 U. ILL. L.F. 470, 471 (the King was the supreme "Justiciar" in the 13th century, akin to the relationship existing between state or federal governments and their citizens) [hereinafter cited as *Illinois Attorney General*].

61. *Id.* See also Holdsworth, *The Early History of the Attorney and*

emerged a trend to appoint fewer attorneys with more responsibility, allowing them to appoint deputies.<sup>62</sup> By the beginning of the 16th century, this centralization of the Crown's legal talent resulted in the creation of the offices of the King's Attorney, later known as the Attorney General, and the King's Solicitor.<sup>63</sup> Though considered important officers, neither was the sole advisor of the Crown nor its only representative in the courts.<sup>64</sup>

Eventually, the role of the Attorney General was magnified until he did become the Crown's sole representative in the courts.<sup>65</sup> While there is some dispute as to when he achieved this preeminence,<sup>66</sup> the most credible authority points to his having attained this status by the middle of the 17th century.<sup>67</sup> This date is significant because Illinois does not bind itself to English decisions after 1606.<sup>68</sup> Therefore, while the Attorney General may have been one of the Crown's representatives in the courts in 1606, he was not its *only* representative.

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*Solicitor General*, 13 ILL. L. REV. 602, 612 (1919) (the attorney was also appointed for a particular court, a particular area, or a particular business) [hereinafter cited as Holdsworth].

62. See Holdsworth, *supra* note 61, at 606 (indicating that this process had been completed by the end of the 15th century); see also T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 205 (2d ed. 1936).

63. See Holdsworth, *supra* note 61, at 615 (the Solicitor General was envisaged as subordinate to the Attorney General, created to perform the same functions as the private solicitor performed for the private attorney, and thus became a stepping-stone to the position of Attorney General).

64. *Id.* (the advisory and representative duties were shared with the King's Serjeants); see *Illinois Attorney General*, *supra* note 60, at 471 (the Attorney General was not the King's only legal advisor at the beginning of the 16th century).

65. See Holdsworth, *supra* note 61, at 606.

66. *Id.* at 616 (indicating that Hudson, a noted English historian, stated that in 1604 the Attorney General was the only representative of the Crown who could proceed by information in the Court of Star Chamber, and was therefore the sole representative of the Crown at that time).

67. *Id.* at 602:

But the offices of the attorney and solicitor general only began to assume their modern shape in the course of the sixteenth century; and it was not till the end of the seventeenth century that they in substance attained it. By that date they had become legal advisors of the crown.

*Illinois Attorney General*, *supra* note 60, at 472: "Historians observe that the attorney general used his exclusive power of initiating litigation to become the King's chief litigator by the middle of the seventeenth century, thus ousting the serjeants from their former position of superiority." This article also cites Holdsworth and Roger North, English historian and author, as supporting the proposition that the Attorney General did not become the Crown's sole representative in the courts until the middle of the 17th century.

68. ILL. REV. STAT. ch. 28, § 1 (1975) provides in part:

That the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First . . . and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.

One fact not disputed by historians is that the Attorney General's powers did not extend to the representation of departments of the Crown.<sup>69</sup> The equivalent of the modern agency or department was not established in England until the 19th century.<sup>70</sup> There existed forerunners of the modern department in 1606, but they retained their own counsel independent of the Attorney General.<sup>71</sup> These legal representatives were responsible to their respective departments, not to the Attorney General, and they transacted their legal affairs without control, supervision, or representation by the office of the Attorney General.<sup>72</sup> This historical fact has been recognized in Illinois cases which have found that the special statutory proceedings under the Environmental Protection Act were unknown at common law.<sup>73</sup>

The colonial Attorney General's office began as an extension of the English Attorney General's office.<sup>74</sup> After the American Revolution, each state retained the Attorney General within its government, giving him many of the same powers held by his English counterpart.<sup>75</sup> As territories were created, the federal government appointed an Attorney General for each,<sup>76</sup> including Illinois.<sup>77</sup> Under the 1818 Illinois Constitution, the General Assembly was given the option of creating and appointing an Attor-

69. See 12 W. HOLDSWORTH, *HISTORY OF THE ENGLISH LAW* 10-13 (1938) (indicating that the Attorney General was not directly concerned with the departments' prosecution of cases); 1 CHALMERS, *OPINIONS OF EMINENT LAWYERS* xi-xii (indicating that the Attorney General's early representation of governmental departments was the result of government commission rather than common law duty).

70. See Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. LEGAL HISTORY 304, 307-08 (1958); *Illinois Attorney General*, *supra* note 60, at 476 n.48 (government by administrative agency was unknown at common law as the English form of modern bureaucracy, the cabinet, did not develop until the 19th century).

71. See *Illinois Attorney General*, *supra* note 60, at 472-73.

72. *Id.*

73. *Fry Roofing Co. v. Pollution Control Bd.*, 20 Ill. App. 3d 301, 310, 314 N.E.2d 350, 357 (1974), *cert. denied*, 420 U.S. 996 (1975) (petitioner was claiming right to jury trial in administrative proceedings before Pollution Control Board; the court declared that "[t]he constitutional guarantee of right to trial by jury was never intended to apply to administrative proceedings which were unknown at common law, and therefore, petitioner cannot argue that this right has been abridged"); *Ford v. Environmental Protection Agency*, 9 Ill. App. 3d 711, 719, 292 N.E.2d 540, 545 (1973) (commenting on proceedings under the Environmental Protection Act: "We have before us a special statutory proceeding unknown to the common law. . . .")

74. *Illinois Attorney General*, *supra* note 60, at 472-73. See generally H. CUMMINGS & C. MCFARLAND, *FEDERAL JUSTICE* 11 (1937); Key, *The Legal Work of the Federal Government*, 25 VA. L. REV. 169-73 (1938).

75. See *Illinois Attorney General*, *supra* note 60, at 473.

76. *Id.*

77. *Id.* See *Fairlie & Simpson, Law Officers in Illinois*, 8 J. MAR. L.Q. 65 (1942).

ney General.<sup>78</sup> In 1819, the General Assembly required the Attorney General to perform such duties "as are or may be defined by law."<sup>79</sup> The 1848 constitution abolished the appointive office of the Attorney General and failed to establish an elective replacement.<sup>80</sup> In 1867, the General Assembly created the elective office of the Attorney General,<sup>81</sup> but it was not until the 1870 constitution that the Attorney General was established as an elective constitutional officer.<sup>82</sup>

### *Fergus v. Russel*

The first case<sup>83</sup> extensively to discuss the duties of the Attorney General under the 1870 constitution was *Fergus v. Russel*,<sup>84</sup> a court action by the Attorney General which challenged appropriations to government departments for legal expenses incurred in prosecuting violations of the law. In finding one of the appropriations unconstitutional, the court examined the Attorney General's duties to determine whether they had been invaded by the department. The court reasoned that since the constitution conferred no express duties on the Attorney General, he was to have those duties held by the English Attorney General at common law.<sup>85</sup> This reasoning is contrary to the decisions of many other states.<sup>86</sup> Illustrative is *State v. Davidson*,<sup>87</sup> where the New Mexico court held that since the Attorney General was of statutory origin and his powers and duties were enumerated in the statute creating the Territory, the fact that he subsequently was made a constitutional officer did not confer upon him the com-

78. ILL. CONST. SCHEDULE § 10 (1818): "An auditor of public accounts, an attorney general, and such other officers for the state as may be necessary, may be appointed by the general assembly; whose duties may be regulated by law."

79. 1819 Ill. Laws 204-06. See also *Fergus v. Russel*, 270 Ill. 304, 357, 110 N.E. 130, 150 (1915) (Craig, J., dissenting).

80. See *Fergus v. Russel*, 270 Ill. 304, 357, 110 N.E. 130, 150 (1915) (Craig, J., dissenting).

81. PUBLIC LAWS OF 1867 at 46. For a discussion of the duties given the Attorney General under this statute see Freels, *Powers of the Attorney General of Illinois*, 53 CHI. B. REC. 119, 121-22 (1971).

82. ILL. CONST. art. V, § 1 (1870). See note 1 *supra* for text of section.

83. One case was decided prior to *Fergus v. Russel*, but it did not extensively discuss the powers of the Attorney General. *Hunt v. Chicago Horse & Dummy Ry. Co.*, 20 Ill. App. 282 (1886), *rev'd on other grounds*, 121 Ill. 638, 13 N.E. 176 (1887) (holding that the Attorney General could bring an action to abate a public nuisance because the constitution authorized abatement actions as part of the Attorney General's duties prescribed by common law).

84. 270 Ill. 304, 110 N.E. 130 (1915).

85. *Id.* at 342, 110 N.E. at 145 ("By our Constitution we created this office by the common law designation of Attorney General and thus impressed it with all its common law powers and duties.")

86. See, e.g., cases cited in note 6 *supra*.

87. 33 N. Mex. 664, 275 P. 373 (1929).

mon law duties and powers of his English counterpart.<sup>88</sup> *Davidson* is analogous to *Fergus* because the Illinois Attorney General was a "creature of statute" prior to the 1870 constitution.<sup>89</sup> Under the rationale of *Davidson* and the corresponding cases in other states, the Attorney General should not have the powers of his common law predecessor.

After determining that the Attorney General did have those powers, *Fergus* attempted to define them. The court came to the conclusion that "at common law the Attorney General was the law officer of the crown and its chief representative in the courts."<sup>90</sup> The four English cases cited to support this proposition were decided long after 1606,<sup>91</sup> and upon examination it is evident that not one of them stands for the proposition for which the court cites it. The holdings vary from determinations that the Attorney General was the Crown's sole representative in criminal actions<sup>92</sup> to his being the only legal representative in the Court of King's Bench.<sup>93</sup> The one common denominator is that none of the cases stands for the proposition that the Attorney General was the Crown's sole representative in all of the courts.

On the basis of its research, the court in *Fergus* decided that the Attorney General "becomes the law officer of the people, as represented in the state government, and its only legal representative in the courts, unless by the Constitution itself or by some constitutional statute he has been divested of some of these powers and duties."<sup>94</sup> As should be evident, the Attorney General should not have been held to have this power. However, the court concluded its analysis with the following passage:

As the office of the Attorney General is the only office at common law which is thus created by our Constitution the Attorney General is the chief law officer of the state, and the only officer empowered to represent the people in any suit or proceeding in which the state is the real party in interest, except where the Constitution or a constitutional statute may provide otherwise. With this exception, only, he is the sole official advisor of the

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88. *Id.* at 667, 275 P. at 375.

89. See text accompanying notes 78-82 *supra*.

90. 270 Ill. 304, 336, 110 N.E. 130, 143 (1915).

91. *King v. Austen*, 147 Eng. Rep. 48 (Ex. 1821); *Attorney General v. Brown*, 36 Eng. Rep. 384 (Ch. 1818); *Rex v. Wilkes*, 98 Eng. Rep. 327 (K.B. 1770); *Wilkes v. Rex*, 2 Eng. Rep. 244 (H.L. 1769).

92. *Attorney General v. Brown* held that criminal prosecutions, with few exceptions, were within the control of the Attorney General; *Wilkes v. Rex* held that the Attorney General was the only officer of the Crown to present a criminal indictment; *Rex v. Wilkes* stood for the same proposition as *Wilkes v. Rex*.

93. An editor's footnote accompanying *Attorney General v. Brown* attributes to the Attorney General the status of being the only legal representative of the crown recognized before the Court of King's Bench.

94. 270 Ill. 304, 337, 110 N.E. 130, 143 (1915) (emphasis added).

executive officers, and of all boards, commissions, and departments of the state government, and it is his duty to conduct the law business of the state, both in and out of the courts.<sup>95</sup>

When *Fergus* spoke of the Attorney General's representation in suits or proceedings, the court must have been using the term "proceeding" to describe actions in the courts, as administrative proceedings were neither involved nor discussed in *Fergus*. The term "proceeding" was first used in describing insurance actions, which were prosecuted in the courts, and was intended to explain the earlier quote that the Attorney General was the "chief representative . . . in the courts."<sup>96</sup> To give the words any other meaning would extend them beyond what was intended and well beyond the facts of the case.

In stating that the Attorney General was to conduct the law business "both in and out of the courts,"<sup>97</sup> the most logical interpretation would equate law business in the courts with court actions, and law business out of the courts with the rendering of official advisory opinions. To contend that the court meant to include administrative proceedings within the out-of-court category would extend the decision well beyond the facts confronted by the court, giving an unintended meaning to the words.

In his dissent in *Fergus*, Justice Craig declared that the Attorney General was not the Crown's sole representative in the common law courts.<sup>98</sup> He disagreed with the majority statement that creation of the post with the common law name "Attorney General" meant that the voters intended to clothe him with all of his common law powers and duties.<sup>99</sup> Since the legislature had the right to create the office, he argued, the office was wholly within the control of the legislature, and the legislature could diminish the Attorney General's powers and duties by statute.<sup>100</sup>

95. *Id.* at 342, 110 N.E. at 145.

96. *Id.* at 337, 110 N.E. at 143.

97. *Id.* at 342, 110 N.E. at 145.

98. *Id.* at 356, 110 N.E. at 150 (Craig, J., dissenting):

To hold that it is the duty of the Attorney General to conduct the entire law business of the State, and that he is the sole official adviser of all boards, commissions and departments of State government, in my opinion is unwarranted, and such holding is not supported by the common law authorities. . . .

99. *Id.* at 357, 110 N.E. at 150:

It is reasonable to suppose that, in adopting the constitution of 1870 the people had in mind by the term 'Attorney General' the officer that was known to the law of the State before that time and not the office existing in England centuries before that time, whose duties and powers could only be ascertained by an examination of the early English Reports, if at all.

See, e.g., text accompanying notes 86-89 *supra*.

100. *Id.* at 359, 110 N.E. at 150:

We have held repeatedly that, when an office which the Legislature has the right to create has been created by statute, such office is wholly within the control of the Legislature creating it. . . . And



*Decisions Subsequent to Fergus*

Cases subsequent to *Fergus* have eroded its conception of the Attorney General's powers and duties. An exception to *Fergus* was clearly created in *People ex rel. Board of Trustees of University of Illinois v. Barrett*,<sup>101</sup> where the supreme court recognized that the Attorney General did not have the duty to represent public corporations at common law. The court held, therefore, that he did not have the power or duty to represent them under the Illinois constitution.<sup>102</sup> By excluding a group of public officers from *Fergus*, the case intimated that officers and agencies unknown at common law would fare similarly.<sup>103</sup> Under this rationale, administrative agencies would be excluded from *Fergus*, because they were unknown at common law.<sup>104</sup>

*Fergus* was eroded further in *People v. Illinois State Toll Highway Commission*,<sup>105</sup> where the supreme court upheld a statute allowing the Toll Highway Commission to hire its own attorneys. The court reasoned that the Act gave sufficient recognition to the Attorney General's position as the attorney and legal adviser of the commission because the assistant attorneys or special prosecutors, though hired by the commission, were subordinate to him and served at his pleasure.<sup>106</sup> *Toll Highway* suggested a slight deviation from the trend toward complete centralization of the state's legal talent.<sup>107</sup>

The first decision concerning the scope of the Attorney General's powers subsequent to the adoption of the 1970 constitution was *Stein v. Howlett*,<sup>108</sup> which involved legislation authorizing the Secretary of State to render advisory opinions interpreting the Illinois Governmental Ethics Act.<sup>109</sup> In striking down this delegation of power, the supreme court held that *Fergus* reserved to the Attorney General power to render advisory opinions, and cited the proceedings of the Constitutional Convention as indicating an intent to preserve this policy.<sup>110</sup>

The supreme court reaffirmed the public corporation excep-

it necessarily follows that the Legislature has the full power to prescribe the duties pertaining to that office and declare what officers shall manage its affairs and what appropriations are necessary therefore.

101. 382 Ill. 321, 46 N.E.2d 951 (1943).

102. *Id.* at 346-47, 46 N.E.2d at 964.

103. See *Illinois Attorney General*, *supra* note 60, at 476.

104. See text accompanying notes 69-73 *supra*.

105. 3 Ill. 2d 218, 120 N.E.2d 35 (1954).

106. *Id.* at 237-38, 120 N.E.2d at 46.

107. See *Illinois Attorney General*, *supra* note 60, at 476.

108. 52 Ill. 2d 570, 289 N.E.2d 409 (1972). See text accompanying notes 36-39 *supra* (discussion of *Stein* on other grounds).

109. ILL. REV. STAT. ch. 127, §§ 601-101 to 608-101 (1975).

110. 52 Ill. 2d 570, 586, 289 N.E.2d 409, 418 (1972).

tion under the 1970 constitution in *Board of Education v. Bakalis*.<sup>111</sup> This action involved legislation authorizing the Superintendent of Public Instruction to render official advisory opinions interpreting the School Code.<sup>112</sup> In upholding this provision, the court indicated that the opinions sent to local school boards were within the public corporation exception created in *Trustees of University of Illinois*.<sup>113</sup>

*Briceland* was faced with this historical panorama when it attempted to ascertain the powers of the Attorney General. By its analysis and interpretation of *Fergus*, *Briceland* expanded *Fergus*' holding beyond that which it had covered. *Fergus*, a case involving only court actions, held that the Attorney General was "the only officer empowered to represent the people in any suit or proceeding in which the state is the real party in interest,"<sup>114</sup> arguably intending only to cover court actions. *Briceland* expanded the statement to include "litigation in which the People of the State are the real party in interest."<sup>115</sup> Although *Fergus* had not covered administrative actions, *Briceland* interpreted it to include them. The court refused to place administrative agencies within the public corporation exception created in *Trustees of University of Illinois* and upheld in *Board of Education v. Bakalis*, even though the same analogy applied. After thus extending *Fergus*, *Briceland* turned to the contention that *Fergus* was incorporated into the Attorney General provision of the 1970 constitution.

On this issue, the court in *Briceland* based its decision on three factors. First, the court stated that in construing a constitutional provision, an important object of inquiry is the understanding of the voters who adopted the document.<sup>116</sup> After examining the official explanation that accompanied the proposed 1970 constitution distributed to the voters,<sup>117</sup> *Briceland* decided that there was no indication of departure from prior decisions defining the Attorney General's duties.<sup>118</sup> The second factor considered was that the Constitutional Convention was provided

111. 54 Ill. 2d 448, 299 N.E.2d 737 (1973).

112. ILL. REV. STAT. ch. 122, §§ 1-1 to 36-1 (1975).

113. 54 Ill. 2d 448, 470-71, 299 N.E.2d 737, 748 (1973).

114. 270 Ill. 304, 342, 110 N.E. 130, 145 (1915) (emphasis added).

115. 65 Ill. 2d 485, 495, 359 N.E.2d 149, 154 (1976).

116. *Id.* at 496, 359 N.E.2d at 154; see, e.g., *Coalition for Political Honesty v. State Bd. of Elections*, 65 Ill. 2d 453, 467, 359 N.E.2d 138, 144-45 (1976); *Board of Educ. v. Bakalis*, 54 Ill. 2d 448, 476-77, 299 N.E.2d 737, 751-52 (1973) (concurring opinion); *Wolfson v. Avery*, 6 Ill. 2d 77, 88, 126 N.E.2d 701, 707 (1955).

117. 7 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION at 2711 (1969-70) [hereinafter cited as PROCEEDINGS]: "This section means that the Attorney General is the legal officer of the State. It makes no change in his current position."

118. 65 Ill. 2d 485, 496, 359 N.E.2d 149, 154 (1976).

with a means to abrogate *Fergus* in the 1970 constitution,<sup>119</sup> but the convention failed to use the means.<sup>120</sup> The final factor concerned the debates of the delegates to the Constitutional Convention regarding the Attorney General article.<sup>121</sup> The court decided that the debates indicated that *Fergus* was to have continued vitality under the 1970 constitution.<sup>122</sup>

*Briceland* stated that its analysis of the three factors led to the conclusion that *Fergus v. Russel*<sup>123</sup> was incorporated into, and became the essence of, article V, section 15 of the 1970 constitution.<sup>124</sup> Even though *Fergus* inaccurately interpreted the powers and duties of the Attorney General and gave him powers and duties he did not have, those powers were entrenched in the 1970 constitution.

In light of the constitutional proceedings, *Briceland* held that the Attorney General is the sole officer authorized to represent the People of Illinois in any litigation in which the State is the real party in interest, absent a contrary constitutional directive.<sup>125</sup> This is not what the 1970 constitution provided. It was intended to maintain *Fergus* as it was, not to expand or contract it.<sup>126</sup> *Fergus* held that the Attorney General was the sole repre-

119. D. BRADEN & R. COHN, *THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS* 260 (1969):

[I]t would seem appropriate, and, it is hoped, not too controversial, to do something about the *Fergus v. Russel* determination concerning the Attorney General. There is a simple drafting change that will introduce adequate flexibility in allocating legal work within the Executive Department. The change is to use the words of the 1818 Schedule—"whose duties may be regulated by law"—in place of "perform such duties as may be prescribed by law."

120. 65 Ill. 2d 485, 496-97, 359 N.E.2d 149, 155 (1976).

121. 3 PROCEEDINGS, *supra* note 117, at 1312-15. See generally Lousin, *Constitutional Intent: The Illinois Supreme Court's Use of the Record in Interpreting the 1970 Constitution*, 8 J. MAR. J. 189 (1974).

122. 65 Ill. 2d 485, 499, 359 N.E.2d 149, 156 (1976).

123. 270 Ill. 304, 110 N.E. 130 (1915).

124. 65 Ill. 2d 485, 500, 359 N.E.2d 149, 156 (1976).

125. *Id.*

126. 3 PROCEEDINGS, *supra* note 117, at 1312-13 (1969):

MR. YOUNG: Now, we do not intend by this section to either reduce or expand the powers of the attorney general, but to simply keep them as they are at the present time. . . . However, the attorney general is the legal officer for the state, and under our article we hope to keep it just exactly as it is.

*Id.* at 1313:

MR. YOUNG: Our wording in this section is simply to maintain the status quo and whatever the *Fergus v. Russel* means is to be applied to this section.

*Id.* at 1314:

MR. TOMEI: I take it that the committee is willing at this point to leave the law wherever it is in terms of whether the *Fergus* holding is—or the dicta rather—is dicta or holding or just what it's [sic] significance is. But the committee's intention is to leave that problem—vague or ambiguous as it might be—where it is now?

MR. YOUNG: That is correct. We have no intention to change it. . . . We are not attempting to broaden or narrow. All we want

sentative in the courts;<sup>127</sup> any arguably broader statements in the case were mere dicta. *Briceland* refused to limit *Fergus* to prosecution of court cases, citing two legal articles<sup>128</sup> as its only support for its extension of *Fergus*.

The court concluded that the Attorney General is the sole officer entitled to represent the interests of the state in litigation before the Pollution Control Board.<sup>129</sup> Therefore, section 4(e) of the Environmental Protection Act was unconstitutional, but only to the extent that it authorized the institution and prosecution of administrative proceedings before the Pollution Control Board by any state officer other than the Attorney General.<sup>130</sup>

At the same time as the decision in *Briceland*, the supreme court decided *Fuchs v. Bidwill*,<sup>131</sup> a taxpayer suit seeking to create a constructive public trust over money illegally gained by certain state legislators. The court decided that the Attorney General was the only person, whether state officer or private individual, who could bring such an action, thus denying taxpayers access to the courts.<sup>132</sup> The court's stated reason was the desire to avoid a multiplicity of suits.<sup>133</sup> *Fuchs* avoided the important decision—the legality of the conduct and the retention of illegal profits—by conferring upon the Attorney General the exclusive right to bring these actions, a right he neither claimed nor wanted.<sup>134</sup>

The most recent case to deal with the powers of the Attorney General is *Environmental Protection Agency v. Pollution Control Board*,<sup>135</sup> in which the Illinois Supreme Court was faced with

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to do is leave it as is; and if the courts change the *Fergus v. Russel*, why they can change it.

See also *id.* at 1312-13.

127. 270 Ill. 304, 337, 110 N.E. 130, 145 (1915); see notes 94-97 and accompanying text *supra*.

128. See Cohn, *Attorney General and Governor Fight over Control of Lawyers Employed by Executive Agencies*, 1 ILL. ISSUES 9 (1975) ("There can be little quarrel with his claim of right to 'appear as an advocate before administrative tribunals, as well as in court.'"); *Illinois Attorney General*, *supra* note 60, at 477-78 ("House counsel would also be restricted by the Attorney General's power to control litigation and to prosecute statutory violations. Although house counsel could investigate violations and draft proposed complaints, they would have to turn actual prosecutions over to the attorney general's office.")

129. 65 Ill. 2d 485, 501-02, 359 N.E.2d 149, 157 (1976).

130. *Id.*

131. 65 Ill. 2d 503, 359 N.E.2d 158 (1976).

132. *Id.* at 510, 359 N.E.2d at 162.

133. *Id.*

134. *Id.* at 511, 359 N.E.2d at 162 (Schaefer, J., dissenting).

135. 69 Ill. 2d 394, 372 N.E.2d 50 (1977). See McGreevey, *The Illinois Attorney General's Representation of Opposing State Agencies—Conflicts of Interest, Policy and Practice*, 66 ILL. B.J. 308 (1978) (explores the cases leading up to the EPA case, examines the decision and its rationale, and makes predictions as to its possible effect on the powers of the Attorney General).

the inevitable result of its decision in *Briceland*. In this case, the Illinois Pollution Control Board sought representation by private counsel in the appellate court in all cases in which the EPA appealed from Board orders, because of a potential conflict of interest.<sup>136</sup> The court held that the Attorney General could represent competing state agencies, as he has the duty of "serving or representing the broader interests of the State."<sup>137</sup> The court's rationale for this further expansion of the powers of the Attorney General was that the Attorney General-State agency relationship is not akin to the traditional role of private counsel-client.<sup>138</sup>

### *Personal Liability and Right to Independent Counsel*

*Briceland* also considered the issue of defendants *Briceland* and *Diver's* personal liability for litigation costs expended by the EPA in prosecutions before the Pollution Control Board. Before disposing of the issue, the court reiterated the well-established rule that a public officer is immune from individual liability for the performance of discretionary duties undertaken in good faith.<sup>139</sup> *Briceland* reasoned that the action taken by the defendants in instituting enforcement actions was pursuant to a statute requiring the EPA to prosecute enforcement actions at the administrative level. As such, though in opposition to the Attorney General's advice, their action was a good faith exercise of discretion for which they would not be held liable.<sup>140</sup>

The final issue of the case involved a determination of whether the EPA was entitled to counsel other than the Attorney General in the present action. The court held that since the Attorney General filed suit against the EPA, he was "interested" in the cause which it was his duty to defend; hence the situation fit within the statutory provision that allows the court to appoint special counsel in place of the Attorney General.<sup>141</sup> The court therefore affirmed the decision of the trial court on this point.

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136. 69 Ill. 2d at 397, 372 N.E.2d at 50. See *McGreevey, supra* note 135, at 310 (outlines the procedures in the lower courts by which the cases came to the supreme court).

137. 69 Ill. 2d at 401, 372 N.E.2d at 53.

138. *Id.* at 401, 372 N.E.2d at 52-53.

139. See, e.g., *People ex rel. Munson v. Bartels*, 138 Ill. 322, 328, 27 N.E. 1091, 1092 (1891); *Lusietto v. Kingan*, 107 Ill. App. 2d 239, 244, 246 N.E.2d 24, 27 (1969); *Fustin v. Board of Educ.*, 101 Ill. App. 2d 113, 121, 242 N.E.2d 308, 312 (1968).

140. 65 Ill. 2d 485, 502-03, 359 N.E.2d 149, 158 (1976).

141. ILL. REV. STAT. ch. 14, § 6 (1975) reads in pertinent part:

Whenever the attorney general or state's attorney is sick or absent, or unable to attend, or is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause

It is interesting to note that one of the delegates to the Constitutional Convention foresaw that this situation would arise. She brought up the question of what would occur when the Attorney General was faced with the problem of representing competing state agencies or departments.<sup>142</sup> While *Briceland* was faced with this dilemma, it refused to provide long-range guidelines. Guidelines have since been established in *Environmental Protection Agency v. Pollution Control Board*.<sup>143</sup> Here the Illinois Pollution Control Board sought a determination that it was entitled to representation by private counsel in any action in which the EPA, as represented by the Attorney General, appealed from a Board order. The Board contended that the Attorney General represented the EPA before the Board and upon appeal, and would be unable to represent both the EPA and the Board upon appeal, as this would create a serious conflict of interest. The supreme court held that, with two exceptions, the Attorney General could represent competing state agencies, the two exceptional situations being when he is interested as a private individual and when he is an actual party to the litigation.<sup>144</sup> With these two exceptions, only, the Attorney General is able to represent competing state agencies in a dispute.

#### CONCLUSION

*People ex rel. Scott v. Briceland*<sup>145</sup> stands at the vanguard of a movement toward complete centralization of the State's legal talent. The supreme court has found a case that misinterpreted the common law powers of the Attorney General,<sup>146</sup> and has misconstrued this case to formulate a rule of law never contemplated at common law. Illinois has previously held that litigants are not entitled to jury trials in actions under the Environmental Protection Act because these special statutory proceedings were unknown at common law,<sup>147</sup> yet *Briceland* states that the Attor-

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or proceeding, and the attorney so appointed shall have the same power and authority in relation to such cause or proceeding as the attorney general or state's attorney would have had if present and attending to the same. . . . (emphasis added).

142. 3 PROCEEDINGS, *supra* note 117, at 1313 (Delegate Leahy sought a solution to what she considered the "schizophrenic role" of the attorney general, the possibility of conflict inherent in the fact that he has the power to bring suit in the name of the people of Illinois, and is also charged with representing the officers of the state. The response of Delegate Young was that the committee did not consider these problems to be of such a nature that something should be done in the constitution).

143. 69 Ill. 2d 394, 372 N.E.2d 50 (1977). See text accompanying notes 135-39 *supra*.

144. 69 Ill. 2d at 400-01, 372 N.E.2d at 52. See McGreevey, *supra* note 135, at 311-14.

145. 65 Ill. 2d 485, 359 N.E.2d 149 (1976).

146. *Fergus v. Russel*, 270 Ill. 304, 110 N.E. 130 (1915).

147. See note 73 and accompanying text *supra*.

ney General has the power to prosecute actions under the Environmental Protection Act because of his common law powers.<sup>148</sup> By means of such inconsistencies, it has been irrefutably established that henceforth no legal action will be taken by or for the State except with the approval of and by the solitary direction of the Attorney General. Because of its constitutional stature, this "impregnable bastion" is now open to modification only by a constitutional amendment, as the court refuses to recognize the "constitutional statute" exception.<sup>149</sup>

In its interpretation of the Environmental Protection Act,<sup>150</sup> the supreme court correctly determined that the General Assembly directed the EPA to prosecute all administrative actions, but failed to comprehend the legislature's reason for doing so. Administrative agencies, by their very nature, need to have one directing head if they are to function at their optimum ability. This decision "substitute[s] the Attorney General as the directing head of all such boards and commissions, instead of the chief executive, who is by law entrusted with such matters,"<sup>151</sup> and raises questions as to the ability of the EPA to function effectively under two masters.

Those cases decided subsequent to *Briceland* highlight the trend in Illinois to create a unified and centralized Attorney General with awesome power to control litigation in Illinois. *Fuchs*<sup>152</sup> establishes that the Attorney General is the only person who is able to bring suit against state legislators who have received illegal bribes.<sup>153</sup> *Environmental Protection Agency v. Pollution Control Board*<sup>154</sup> establishes that the Attorney General will be able to represent both sides in a dispute between agencies.<sup>155</sup> This endowment of power carries the implication that the Attorney General will be able to influence court decisions, as he will direct the appeals and legal documents of both sides of the dispute. Finally, the tone of the supreme court indicates that even more power may be given to the Attorney General. The supreme court has stated:

The Attorney General's responsibility is not limited to serving or representing the particular interests of State agencies, including opposing State agencies, but embraces serving or rep-

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148. 65 Ill. 2d 485, 501, 359 N.E.2d 149, 157 (1976).

149. See notes 33-50 and accompanying text *supra*.

150. ILL. REV. STAT. ch. 111½, §§ 1001-1051 (1975).

151. 270 Ill. 304, 358, 110 N.E. 130, 150 (1915) (Craig, J., dissenting).

152. 65 Ill. 2d 503, 359 N.E.2d 158 (1976).

153. *Id.* at 510, 359 N.E.2d at 162.

154. 69 Ill. 2d 394, 372 N.E.2d 50 (1977).

155. *Id.* at 401, 372 N.E.2d at 53. See McGreevey, *supra* note 135, at 312-19 (discusses the effects, both practical and theoretical, of this decision and attempts to reconcile the case with other Illinois law).

resenting the broader interests of the State. . . . It seems to us that if the Attorney General is to have the unqualified role of the chief legal officer of the State, he or she must be able to direct the legal affairs of the State and its agencies. Only in this way will the Attorney General properly serve the State and the public interest.<sup>156</sup>

In support of a centralized legal advisory system, the Illinois Supreme Court has reasoned that private counsel for state agencies is expensive, and centralization is more efficient.<sup>157</sup> What the supreme court fails to realize is that entrusting too much power to one official presents greater opportunity for abuses, as fewer people are able to supervise and restrain the activities of this official. This finding was supported by the actions of the drafters of the United States Constitution, who well understood that an efficient and orderly government requires a system of checks and balances, as well as the distribution of power among many officials.

*Thomas E. Grace*

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156. 69 Ill. 2d at 401-02, 372 N.F.2d at 53.

157. *Id.* at 399, 372 N.E.2d at 52.



