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United States District Court, M.D. Louisiana.

Hayes WILLIAMS, et al.,
v.
John MCKEITHEN, et al.

Civ. A. No. 71–98–B. | July 20, 1990.

Opinion

MEMORANDUM ON THE ISSUE OF WHO REPRESENTS THE STATE

POLOZOLA, District Judge.

***1** The Court has instructed the parties to submit memoranda on the issue of whether the Governor of Louisiana or the Louisiana Attorney General represents the State of Louisiana (hereinafter sometimes "State") in the instant litigation. This memorandum on that issue is submitted by the State of Louisiana acting through its Governor, Charles E. "Buddy" Roemer, III.

I. ***The Court Should Resolve the Issue of Who Represents the State.***

Resolution of the issue of who represents the State in the instant action is important for at least two reasons.

First, on June 21, 1990, the Attorney General, after being absent from the case for some time, filed a Motion in Support of Sheriffs [*sic*] Motion to Vacate Preliminary Injunction and accompanying Memorandum of Law, in which the Attorney General, purportedly on behalf of the State, joined with certain Louisiana sheriffs in their Motion to Vacate Preliminary Injunction issued by the Court on May 25, 1990. The preliminary injunction opposed by the sheriffs and the Attorney General ordered those sheriffs holding prisoners from the District of Columbia to remove the prisoners from the respective parish jails on or before June 25, 1990. The preliminary injunction also ordered the sheriffs not to accept any additional prisoners from the United States Immigration and Naturalization Service.

The sheriffs suggested in their Motion to Vacate Preliminary Injunction that non-Louisiana prisoners are a vital source of revenue to the sheriffs and, further, that the State should be responsible for providing this additional revenue should the preliminary injunction not be vacated. *See* Sheriffs' Motion to Vacate Preliminary Injunction. The figure of $40 per Louisiana prisoner per day was mentioned. The State currently pays $18.25 per prisoner per day. *See id.* By joining in the sheriffs' motion, the Attorney General, according to the Court, may have conceded that the sheriffs are correct that the State is responsible for this additional funding. Such an admission could exist, however, only if the Attorney General speaks for the State of Louisiana in the lawsuit. For that reason resolution of the representation of the state issue is important.

The second reason it is important to determine who represents the State has to do with the swift, orderly and efficient resolution of the litigation. Undoubtedly, both the Governor and the Attorney General desire that end. It will be impossible to achieve, nonetheless, if the Governor and the Attorney General consistently take inconsistent positions, both purportedly on behalf of Louisiana. This may have already happened insofar as the $40 per prisoner per day from the State coffers issue is concerned. It also may happen again if past experience is any indication.

As the Court probably knows, Louisiana is currently embroiled in a number of other major pieces of litigation in Louisiana federal courts. One is *United States of America v. State of Louisiana, et al.,* Civil Action No. 80–3300 "A", United States District Court for the Eastern District of Louisiana (on appeal to the United States Court of Appeals for the Fifth Circuit), which is Louisiana's public higher education desegregation litigation. The other is *Clark, et al. v. Roemer, et al.,* Civil Action No. 86–435 "A", United States District Court for the Middle District of Louisiana, which is a challenge under Section 2 of the federal Voting Rights Act to the way Louisiana currently selects its state district court and court of appeal judges.

***2** In both of these cases the Attorney General has challenged the right of the Governor to speak for the State, suggesting instead that the Attorney General and the Attorney General alone is constitutionally empowered to represent Louisiana, to the exclusion of all other state officials, in those cases and in all cases to which Louisiana is a party or in which Louisiana has an interest. *See, e.g.,* Motion to Supersede Counsel for State of Louisiana and to Strike Response in Opposition to State's Motion for a Stay Addressed to Individual Justice, filed by the Louisiana Attorney General in *State of Louisiana, ex rel. William J. Guste, Jr., Attorney General of the State of Louisiana v. United States of America, et al.,* Case No. A–127, Supreme Court of the United States (Louisiana's public higher education desegregation case before the Supreme Court of the United States) ("Motion to

Supersede"); Defendant's Response to Pleading Entitled "Defendants' Proposed Remedial Plans", filed by the Louisiana Attorney General in *Clark, et al. v. Roemer, et al.,* Civil Action No. 86–435 "A", United States District Court for the Middle District of Louisiana. The Attorney General has even filed a motion before the Supreme Court of the United States in the higher education desegregation case to fire the Governor's and the State's counsel because of a position taken by the Governor and the State in the trial court, despite the fact that the Attorney General consented to that position at the trial below. *See* Motion to Supersede.

The point is that the Governor and the Attorney General have disagreed before, both in the instant litigation and in other cases important to the State. While one can hope it will not happen again in this case, and that this litigation will proceed in swift, orderly and efficient manner, the only way to insure the absence of conflicting State positions is for this Court, for once and for all, to resolve the issue of who represents Louisiana.

II. *The Governor of Louisiana Represents the State of Louisiana in this Lawsuit.*

Louisiana case law, the Louisiana Constitution and federal case law each indicates that the Governor of Louisiana, not its Attorney General, represents the State of Louisiana in this lawsuit. These authorities will be examined below. Additionally, attached to this Memorandum is a copy of Motion to Dismiss Appeal of William J. Guste, Jr., filed by the attorneys for the State and the Governor in *State of Louisiana, ex rel. William J. Guste, Jr., Attorney General of the State of Louisiana v. United States of America,* et al., Case No. 89–556, Supreme Court of the United States, in which these and other authorities are discussed further.

A. *Louisiana Case Law*

Based on pleadings filed by the Attorney General in other cases, including the cases mentioned above, it is anticipated that the Attorney General will argue that he and he alone is entitled to speak for the State in all matters of litigation to which the State is a party or in which the State has an interest, to the exclusion of all other state officials including the Governor. The Attorney General contends that he has this extraordinary authority because Article IV, Section 8 of the Louisiana Constitution of 1974 designates him the "chief legal officer" of the State.[1]

***3** The Attorney General's position is without merit. The Attorney General contends, in effect, that once he enters a case to which the State is a party or in which the State has an interest, he assumes the role of both counsel and client and becomes the sole repository of the executive power of the State. This position is patently incorrect. It also represents a fundamental misunderstanding of the attorney-client role and relationship and has no support whatsoever under Louisiana law, including Louisiana case law.

The recent case of *State of Louisiana ex rel. Guste v. Texaco, Inc.,* 433 So.2d 756 (La.App. 1st Cir.1983), demonstrates that the Attorney General's title as the state's "chief legal officer" does not mean that he replaces the Governor as the spokesman for the State whenever the Attorney General enters or attempts to enter a legal proceeding. In *Texaco,* a special counsel for the State sought direct payment of his attorneys' fees by the trial court. The Governor (then Governor Edwin Edwards) opposed the payment. *Id.* at 757. The Attorney General (who then was and now is William J. Guste, Jr.) responded by challenging the Governor's position, declaring that the fees "should be paid immediately to Special Counsel". *Id.* at 758.

The Louisiana trial and appellate courts in *Texaco* refused to treat the Attorney General's challenge to the Governor's position as mooting the controversy. Instead of accepting the Attorney General as the definitive spokesman for the State, both the *Texaco* trial and appellate courts ruled in favor of "the State's position" as articulated by the Governor. *Id.* at 759 (rejecting the special counsel's argument that the Governor had no standing to prevent the direct payment of attorneys' fees and agreeing with "the State's position" as articulated by the Governor).[2]

The affirmance of the Governor's position in *Texaco* is consistent with Louisiana case law under predecessor state constitutions. As one court has observed, "the Louisiana Supreme Court on frequent occasions has construed Article VII, Section 56 [the Attorney General Clause under the Louisiana Constitution of 1921] as not conferring an exclusive charge and control of all legal matters in which the state has an interest in favor of the Attorney General." *State, ex rel. Guste v. Louisiana Board of Highways,* 275 So.2d 207, 213 (La.App. 1st Cir.1973), *aff'd,* 289 So.2d 82 (La.1974). The *Louisiana Board of Highways* court cited two twentieth-century Louisiana Supreme Court cases in support of its position: *Kemp v. Stanley,* 204 La. 110, 15 So.2d 1, 9 (La.1943), and *Ricks v. Department of State Civil Service,* 200 La. 341, 8 So.2d 49, 60 (La.1942). It also cited a nineteenth-century Louisiana Supreme Court case denying claims of legal supremacy by the Louisiana Attorney General. *State v. Dubuclet,* 25 La.Ann. 161 (La.1873). Thus, the Louisiana case law tradition from *Dubuclet* in 1873 to *Texaco* in 1983 has consistently rejected claims by any Louisiana Attorney General that he possesses the sole and absolute power to speak for the State in legal proceedings.[3]

B. ***The Louisiana Constitution***

1. ***Chief Legal Officer***

***4** The Attorney General, in asserting his legal supremacy, will undoubtedly rely heavily and by necessity almost exclusively upon the language of Article IV, Section 8 of the Louisiana Constitution of 1974, which designates him the state's "chief legal officer". However, the official records of the constitutional convention that drafted the 1974 state constitution demonstrate that the reference in Section 8 to the Attorney General as "the chief legal officer of the state" is merely an introductory truism. It is not a technical term indicating some substantive or overall supervisory power.

The phrase is an innovation not found in the prior Louisiana Constitution of 1921. *See* Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974,* 37 La.L.Rev. 765, 834 (1977) (hereinafter "Hargrave").[4] It appeared in the proposal submitted to the convention by the Committee on the Executive Branch ("Executive Committee"), which was charged with the responsibility of drafting the 1974 constitution's provisions on the executive branch of Louisiana state government. Committee Report With Respect to Committee Proposal No. 4, § 8, in Records of the Louisiana Constitutional Convention of 1973: Journal of Proceedings (hereinafter "Records–Journal"), vol. I, at 95. *See* Hargrave, *supra,* at 834. The comments provided by the Executive Committee to its proposal simply stated that "[t]he attorney general is made the state's 'chief legal officer,' " without further explanation. Committee Report With Respect to Committee Proposal No. 4, § 8, in Records–Journal, *supra,* vol. I, at 95. *See* Hargrave, *supra,* at 834 n. 306. The convention's Judiciary Committee also proposed a section to govern the Attorney General, but it did not contain the "chief legal officer" language. The Judiciary Committee's proposal simply used the language of the prior constitution. Committee Report With Respect to Committee Proposal No. 6, §§ 28, 29, in Records–Journal, *supra,* vol. I, at 100. *See* Hargrave, *supra,* at 834 n. 306.

The proposal concerning the Attorney General submitted by the Executive Committee reached the convention floor before the proposal of the Judiciary Committee, since the Executive Committee's proposal was part of the overall provisions on the executive branch. The powers of the Attorney General were not considered at that time, however. Instead, to avoid a heated and protracted debate, part of which involved the proper jurisdiction of the committees, the convention voted to delay consideration of the powers of the Attorney General. Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts (hereinafter "Records–Transcripts"), vol. VI, at 624–26. *See* Hargrave, *supra,* at 831. Delegate Camille Gravel, a member of the Executive Committee, proposed an amendment that deleted the Executive Committee proposal's reference to the Attorney General's powers and, instead, simply provided that "[t]here shall be a department of justice headed by the attorney general who shall be the state's chief legal officer." Explaining his proposal, Mr. Gravel said:

***5** [A]ll that this does is to create the Department of Justice within the executive branch and to constitutionally declare that the attorney general shall be the head of that department and the state's chief legal officer. *All of the matters relating to the functions, powers and duties of the department and of the office of attorney general will be relegated to future consideration when we consider the judiciary article.*

Records–Transcripts, *supra,* vol. VI, at 625 (emphasis added). *See* Hargrave, *supra,* at 821 n. 292.

The reference to "chief legal officer" thus remained, but, as the comment from Mr. Gravel indicates, only as an introductory expression without substative meaning with regard to powers, functions or duties. The "chief legal officer" language, which is now the first paragraph of Article IV, Section 8 of the 1974 constitution, merely establishes the Department of Justice and the fact that its head, i.e., "the chief legal officer of the state," is the Attorney General. The specifics of the Attorney General's powers were to be (and were in fact) handled later when the Judiciary Committee's proposal was considered.

Once the consideration of the powers of the Attorney General was completed upon debate of the Judiciary Committee's proposal, the introductory paragraph in Article IV, Section 8 containing the "chief legal officer language" was followed by two specific categories of powers in two specific paragraphs. The second paragraph specifies the constitutional powers granted to the Attorney General and also limits those specified powers. The third paragraph leaves to the legislature (and to other constitutional provisions) the determination of the "other powers" and "other duties" of the office. Records–Transcripts, *supra,* vol. IX, at 3377–81. *See* La.Const. of 1974 art. IV, § 8; Hargrave, *supra,* at 831.

2. ***Executive Branch Officer***

The placement of Section 8, pertaining to the Attorney General, in Article IV of the 1974 Louisiana constitution, pertaining to the executive branch of state government, rather than in Article V, pertaining to the judicial branch, indicates that the Attorney General is an executive officer functioning under the Governor. The Governor, in Article IV, Section 5(A), is designated "the *chief* executive officer of the state." La. Const.1974 art. IV, § 5(A) (emphasis added).[5]

During the convention debate on the executive branch article, it was suggested that even the introductory reference in Article IV, Section 8 to the Department of Justice and the Attorney General should be deleted and that all matters concerning both should be handled in the article on the judicial branch of the state government. Records–Transcripts, *supra,* vol. VI, at 625–26. The failure to do that, plus the later transfer of the provisions on the powers of the Attorney General to executive branch Article IV, clearly points to the conclusion that the Attorney General is and was meant to be a part of the executive branch, which is headed by the Governor. Most certainly, the Attorney General could have been but was not made a part of the judiciary, which is independent of the executive branch. Delegate Camille Gravel, a former executive counsel to the Governor and a top advisor to the Governor at that time, who dealt with the Office of the Attorney General, said quite clearly in response to that suggestion:

***6** No sir. I think that most of us agree that the attorney general should be in the executive branch of government. In the previous discussion on that ..., I believe the desire of this convention was to consider the functions of the attorney general's office under the judiciary article but generally with an understanding that probably those functions would then be placed back in the executive article where we will have created, if this amendment passes, the department of justice within the executive branch.

Records–Transcripts, *supra,* vol. VI, at 626.[6]

Another member of the Executive Committeee, delegate (now federal judge) Tom Stagg, was even more candid. In alluding to the powers of the Attorney General, Mr. Stagg said that the Executive Committee

debated what ought to be the powers that would adhere to that office for him effectively to be able to be the state's chief legal officer, to guard the rights of all of the people of the state, *without giving him so much authority that he might become more than the state's chief legal officer.*

Records–Transcripts, *supra,* vol. VI, at 880 (emphasis added).

One need not be clairvoyant, therefore, to realize that any argument of purported supremacy that rests on the state constitution's designation of the Attorney General as "the chief legal officer of the state" must also deal with the incontrovertible fact that the same document designates the Governor "the chief executive officer of the state" with authority over all other executive officers, including the Attorney General. Here, the issue is who establishes policy for the state in this litigation, and in this case the Attorney General appears to demanding to be the client, rather than the attorney. The Louisiana Constitution of 1974 gives him no such authority.

C. ***Federal Case Law***

Federal case law provides the same answer to the representation of the State question as state case and constitutional law. In *Graddick v. Newman,* 453 U.S. 928 (1981), for instance, the Supreme Court of the United States ruled that the Governor of Alabama and not that state's Attorney General had authority to establish and articulate the position of Alabama in a case involving the stay of a federal district court order pertaining to state prisons. The Alabama Attorney General sought to stay a district court order requiring the release of approximately 400 state prison inmates prior to the expiration of their sentences, as a part of the remedy for the state's long-litigated failure to operate its prison system in compliance with constitutional standards. The Alabama Attorney General had participated infrequently in the litigation. 453 U.S. at 929, 931. Instead, Alabama's primary representative in the lawsuit had been Governor Fob James. *Id.* The Governor, arguing that he, not the Attorney General, properly represented Alabama's interests, opposed the Attorney General's application for a stay. *Id.* at 934.

***7** The Supreme Court of the United States ruled in favor of the Governor. The Court found that the Alabama Attorney General, much like the Louisiana Attorney General in the instant case, entered the case with "unexplained tardiness" and, in any event, that the "views of the Governor ... remain entitled to great weight in assessing the compelling risks of irreparable injury" for purposes of the stay. *Id.* at 934–36. The Court reached that conclusion despite the fact the Alabama Attorney General is also the state's chief legal officer under Alabama law.[7]

A federal district court has also addressed the issue of whether the Governor of Louisiana or Louisiana's Attorney General represents the State. This ruling occurred in *United States of America v. State of Louisiana, et al.,* Civil Action No. 80–3300 "A", United States District Court for the Eastern District of Louisiana, which, as previously indicated, is Louisiana's public higher education desegregation litigation. Some background is necessary in order to understand the ruling.

The United States filed the desegregation lawsuit in 1974, alleging that Louisiana and other defendants violated Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment to the Constitution of the United States. On September 8, 1981, without any admission of liability, the parties entered into a consent decree that was approved by a three-judge United States District Court and was implemented by the parties for a period of approximately

six years. Shortly before the expiration of the consent decree, the United States and defendant Board of Supervisors of Southern University and Agricultural and Mechanical College ("Southern University") filed separate motions for a hearing to determine whether a unitary system of higher education in Louisiana had been achieved.

The trial court never conducted the hearing. Instead, the court requested motions for summary judgment and, on August 2, 1988, granted the United State's motion for partial summary judgment on the issue of liability. The court then instructed the parties to submit proposed plans to desegregate public higher education in Louisiana and the case moved into its remedy phase.

Throughout the liability phase of the case, Louisiana was represented by Louisiana Attorney General William J. Guste, Jr., and his staff attorneys, and John N. Kennedy, Special Counsel to Governor Roemer. In December 1988, after the case entered its remedy phase, Joseph J. Levin, Jr. was retained by the State and, on January 20, 1989, an Assistant Attorney General on Mr. Guste's staff filed a motion formally requesting the trial court to admit Messrs. Kennedy and Levin as additional counsel to represent the State. Mr. Guste and his staff, while remaining a co-counsel, took a much less active role during the remedy phase in the litigation. Mr. Kennedy and Mr. Levin took the lead in the state's representation, drafting documents, filing motions, conducting discovery, attending hearings and presenting evidence.

***8** While maintaining separate legal counsel, defendant Board of Regents for the State of Louisiana ("Regents"), defendant Board of Trustees for Louisiana State Colleges and Universities ("Trustees") and defendant Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU") consistently supported the State's and the Governor's position during the liability and remedy phases of the trial. The United States and Southern University maintained positions generally consistent with each other and always in opposition to the State and the other defendants.

On August 3, 1989, after the trial court had entered its remedial order setting forth a desegregation plan for Louisiana higher education, *see United States v. Louisiana,* 718 F.Supp. 499 (E.D.La.1989), and while Governor Roemer was out of the country, Attorney General Guste suddenly re-entered the case and filed a post-trial motion, entitling it Notice to Join in Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment ("Notice to Join"). This filing by the Attorney General surprised as well as puzzled the trial court and most of the parties with the exception of Southern University.[8]

It was a surprise because Mr. Guste had not made any previous objection to the State's proposed remedy, which was supported by the State, Regents, Trustees and LSU, and had been adopted by the trial court almost in its entirety. Ironically, Mr. Guste's fundamental objection to the remedial order and desegregation plan was, and remains, the creation of a single governing board for public higher education in Louisiana to replace the current four boards, which was the principle remedy unceasingly and publicly promoted by the State, the Governor and all the other defendants (except Southern University) for more than nine months with Mr. Guste's knowledge and consent.

Mr. Guste's challenge to the trial court's remedial order and desegregation plan also was puzzling because in his motion the Attorney General designated Senator William J. Jefferson, counsel for Southern University, as counsel to represent the "particular interests of the Attorney General." *See* Notice to Join. As previously noted, throughout this litigation Southern University had been an opponent of the State and the remaining defendants and had closely aligned itself with the plaintiff United States. The Attorney General, realizing the conflict created by this designation, the next day filed a Motion to Withdraw "Notice to Join Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment" and Motion to Enroll Counsel of Record, in which Mr. Guste withdrew his appointment of Senator Jefferson and, instead, renamed himself and certain members of his staff as counsel. These filings began an attempt by the Attorney General to alter the State's position and marked the first activity in the case by the Attorney General since he and Mr. Kennedy represented the State on the issue of liability.

***9** Thus, the issue of whether the Governor of Louisiana or its Attorney General represented the State in the lawsuit was placed squarely before the district court by the Attorney General. The court resolved the issue in its August 4, 1989 Order and Reasons and its August 4, 1989 Reasons for Ruling issued in response to the post-trial motions filed by the Attorney General, Southern University and another party to alter or amend the judgment. While denying these post-trial motions, the district court also wrote that "[t]he State Attorney General joined in Southern's motion [to stay and/or to alter or amend judgment] but *the State acting through the Governor* opposes it." *United States v. Louisiana,* 718 F.Supp. 521, 523 (E.D.La.1989) (August 4, 1989 Order and Reasons) (emphasis added). The district court said further in its accompanying August 4, 1989 Reasons for Ruling:

The State Attorney General, Grambling and Southern have requested a stay of the [three-judge] Panel's Order of July 19, 1989 [the remedial order setting forth the desegregation plan], pending a determination of the merits

of the motions for new trial and anticipated appeals by Southern and the State Attorney General. *The State, acting through the Governor,* opposes the stay.

United States v. Louisiana, 718 F.Supp. 525, 527 n. 2 (E.D.La.1989) (August 4, 1989 Reasons for Ruling) (emphasis added). *See also id.* at 527 (emphasis added) ("This matter is before the Court on motions of the United States of America, the Southern University Board of Supervisors joined by the State Attorney General, and Grambling University Alumni Association to alter or amend judgment or for new tiral. *The State, acting through the Governor,* opposes the motions in most respects.").

It is respectfully submitted that the district court's holding in *United States v. Louisiana* that the State of Louisiana was represented, properly, in that case by its Governor and not by its Attorney General is correct.

III. ***Conclusion***

For these reasons, therefore, the State of Louisiana is represented in the instant litigation by its Governor, not its Attorney General. Undersigned counsel intends no disrespect whatsoever to the Attorney General or the Office of the Attorney General, but the simple fact of the matter is that there is not a single state case, a single federal case or any provision of Louisiana's current constitution or predecessor constitutions that support the Attorney General's contention that he alone speaks for Louisiana and possesses all State power to the exclusion of Louisiana's Governor in a legal proceeding. The swift, orderly and efficient administration of this litigation demands recognition of that fact, and the sooner this Honorable Court enters an order with written reasons to that effect, the sooner this case can proceed in a swift, orderly and efficient manner.

Consequently, the undersigned counsel, on behalf of the State of Louisiana acting through its Governor, Charles E. "Buddy" Roemer, III, respectively requests this Court to enter an order with written reasons holding that the Governor, not the Attorney General, represents the State of Louisiana in this ligigation and, further, that the Attorney General's Motion in Support of Sheriffs [*sic*] Motion to Vacate Preliminary Injunction, previously filed by the Attorney General in this case, does not constitute an admission in any respect by the State of Louisiana in the litigation.

***10** Respectfully submitted,

/s/ John N. Kennedy

Bar Roll No. 7782

Special Counsel to the Governor and Secretary to the Governor's Cabinet

Office of the Governor

4th Floor, State Capitol

Post Office Box 94004

Baton Rouge, Louisiana 70804

Telephone: (504)342–7015

/s/ Annette M. Viator

Bar Roll No. 1683

Chief Legal Counsel

Department of Public Safety and Corrections

State of Louisiana

Post Office Box 94304, Capitol Station

Baton Rouge, Louisiana 70804–9304

Telephone: (504)342–6743

Counsel for the State of Louisiana acting through, and, Governor Charles E. "Buddy" Roemer, III

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 1990, copies of the foregoing Memorandum on the Issue of Who Represents the State were sent by United States Mail, postage pre-paid, to all counsel of record.

Annette M. Viator

ORDER

Considering the foregoing Motion, IT IS ORDERED that the Governor of Louisiana, Charles E. "Buddy" Roemer, III, and not the Attorney General of Louisiana, William J. Guste, Jr., is recognized as the sole representative of the State of Louisiana in the above-captioned matter.

SIGNED this 20 day of July, 1990, at Baton Rouge, Louisiana.

"ATTACHMENT"

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

HAYES WILLIAMS, ET AL.

VERSUS

JOHN McKEITHEN, ET AL.

CIVIL ACTION NO. 71–98–B

MOTION TO RECOGNIZE THE GOVERNOR OF LOUISIANA

AS THE REPRESENTATIVE OF THE STATE OF LOUISIANA

Now into Court, through undersigned counsel, comes the State of Louisiana acting through its Governor, Charles E. "Buddy" Roemer, III, who respectfully moves this Court to recognize the Governor of Louisiana, Charles E. "Buddy" Roemer, III, and not the Attorney General of Louisiana, William J. Guste, Jr., as the sole representative of the State of Louisiana in the above-captioned matter.

Respectfully submitted,

/s/ John N. Kennedy

Bar Roll No. 7782

Special Counsel to the Governor and Secretary to the Governor's Cabinet

Office of the Governor

4th Floor, State Capitol

Post Office Box 94004

Baton Rouge, Louisiana 70804

Telephone: (504)342–7015

/s/ Annette M. Viator

Bar Roll No. 1683

Chief Legal Counsel

Department of Public Safety and Corrections

State of Louisiana

Post Office Box 94304, Capitol Station

Baton Rouge, Louisiana 70804–9304

Telephone: (504)342–6743

Counsel for the State of Louisiana acting through, and, Governor Charles E. "Buddy" Roemer, III

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 1990, copies of the foregoing Motion were sent by United States Mail, postage pre-paid, to all counsel of record.

Annette M. Viator

Footnotes

1 Article IV, Section 8 provides:

> There shall be a Department of Justice, headed by the attorney general, who shall be the chief legal officer of the state. The attorney general shall be elected for a term of four years at the state general election. The assistant attorneys general shall be appointed by the attorney general to serve at his pleasure.
>
> As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supersede any attorney representing the state in any civil or criminal action.
>
> The attorney general shall exercise other powers and perform other duties authorized by this constitution or by law.

2 The dispute in *Texaco* was eventually settled and compromised and, on a joint motion and order for dismissal and release of the

funds deposited in the registry of the court, the Louisiana Supreme Court dismissed the appeal and intervention. *State of Louisiana ex rel. Guste v. Texaco, Inc.,* 453 So.2d 557 (La.1984).

3 La.Rev.Stat. § 49:21 (West 1987) is also instructive in this regard. It provides:

> Special counsel shall be employed to preserve and protect the powers reserved to the State of Louisiana by the tenth amendment to the Constitution of the United States, by means of the institution of suits in the name of the State of Louisiana to prevent any governmental agency, including corporations with corporate authority only as approved by the President of the United States, established by the Congress or by the President of the United States under the provisions of any law or resolution of the Congress of the United States, and any officer, agent, or employee thereof, from exercising in this State any power not delegated to the United States by the Constitution of the United States, but reserved by the Constitution of the United States to the State of Louisiana, or expending any public funds, appropriated or made available by the Congress, in the exercise or attempted exercise of that power.

La.Rev.Stat. § 49:22 (West 1987) provides further:

> The governor and the attorney general, or either of them, in his discretion, may select the special counsel provided for in R.S. 49:21 and fix compensation.

These statutes clearly and explicitly authorize the Governor to retain counsel other than the Attorney General to represent the State in this and other litigation.

4 Professor Hargrave is a professor of law at the Paul M. Hebert Law Center at Louisiana State University in Baton Rouge and was Coordinator of Legal Research for the Louisiana Constitutional Convention of 1973.

5 Article IV, Section 5(A) provides:

> The governor shall be the chief executive officer of the state. He shall faithfully support the constitution and laws of the state and of the United States and shall see that the laws are faithfully executed.

6 Article IV, Section 1(A) of the Louisiana Constitution of 1974 was also amended to list the Attorney General as a member of the executive branch, although the Attorney General had been omitted at one point. Article IV, Section 1(A) provides that "[t]he executive branch shall consist of the governor, lieutenant governor, secretary of state, attorney general, treasurer, commissioner of agriculture, commissioner of insurance, and all other executive officers, agencies, and instrumentalities of the state." La.Const.1974 art. IV, § 1(A).

7 Ala.Code § 36–15–21 (1975) provides:

> All litigation concerning the interest of the state, or any department thereof, shall be under the direction and control of the attorney general, and the employment of any attorneys for the purpose of representing the state or any department thereof shall be by the attorney general with the approval of the governor, but nothing in this section shall prevent the governor from employing personal counsel, whose compensation shall be payable out of the governor's contingent fund.

This statute is substantially similar to Louisiana law on the same subject. *Compare id. with* La.Const.1974 art. IV, Section 8 *and* La.Rev.Stat. § 49:21 & 22 (West 1987).

8 Southern University not only knew Mr. Guste was joining its motion but Mr. Guste admitted that State Senator William J. Jefferson, counsel for Southern University, prepared Mr. Guste's pleadings and that Senator Jefferson actually filed them for Mr. Guste. *SU Wrote Guste's Motion,* The Shreveport Times, September 2, 1989, 1A, col. ——; *Jefferson Was Convenient for College Case, Guste Says,* The Times Picayune, September 3, 1989, A–35, col. ——.