No. 84483-6

SANDERS, J.* (concurring) — I agree with the majority that the attorney general's powers include initiation of the suit at issue. I write separately, however, to note this result, which was based solely on the constitution and statute, not the common law, requires we overrule our previous decisions in *State v. Taylor*, 58 Wn.2d 252, 362 P.2d 247 (1961), and *Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 209, 588 P.2d 195 (1978) (hereinafter *YAF*).

The *Taylor* court held the attorney general was authorized to enforce a charitable trust *without* express statutory authorization. *Taylor*, 58 Wn.2d at 255; *YAF*, 91 Wn.2d at 209. In *Taylor* we stated, "It has long been recognized that at common law the Attorney General has the duty of representing the public interest in securing the enforcement of charitable trusts." *Id.* We also acknowledged that the Washington Constitution and former RCW 43.10.030 (1951) "certainly d[id] not embody a clear command to the Attorney General to enforce charitable trusts."[1] *Id.*

[1] I need not address the misprinted version of former RCW 43.10.030 quoted in *Taylor*, 58

* Justice Richard Sanders is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

at 256. Nevertheless because "the proper management of charitable trusts is a matter of public concern," we determined that the attorney general was authorized to represent the public interest. *Id.* We further asserted, "RCW 43.10.030(1) does not, of course, authorize the Attorney General to bring an action in the courts if no cognizable common law or statutory cause of action can be stated." *Id.* at 257. The *Taylor* court explicitly stated the attorney general is not deriving his power from the Washington Constitution or applicable statutes; thus, the only authority which remains is the common law. Because the attorney general's authority is not a divine right, I interpret our holding in *Taylor* as recognizing common-law powers in the attorney general.

Thereafter in 1978 the *YAF* court adopted *Taylor*'s rejection of "the requirement of express statutory authorization." *YAF*, 91 Wn.2d at 209. In *YAF* we held the attorney general was authorized to file an amicus brief on behalf of the State of Washington even though *not* "specifically authorized by the pertinent constitutional and statutory provisions." *Id.* This court cannot create authority out of thin air; we must rely on some source. Again the only remaining power is common law. Because *Taylor* and *YAF* necessarily rely on a mistaken common-law authority in the office of the attorney general, they must be overruled.

Wn.2d 252, because we found, in the context of charitable trusts, former RCW 43.10.030 did not grant authority to the attorney general to enforce such trusts.

I concur.

AUTHOR:
Richard B. Sanders, Justice Pro Tem.

WE CONCUR:

Justice Debra L. Stephens