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The Nation's Worst State Attorneys General

By Hans Bader

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Executive Summary

State attorneys general (AGs) are among the most powerful office holders in the country, with few institutional checks on their powers. A state attorney general, such as Oklahoma's Drew Edmondson, can bring a politically motivated prosecution in violation of the First Amendment, yet his victims may well have no legal redress. With the possible exception of former New York Attorney General Eliot Spitzer, the enormous power wielded by state attorneys general has received little scrutiny. This discussion of the nation's half-dozen worst attorneys general, like its 2007 precursor, seeks to focus much needed attention on their most egregious abuses of power.

The historic function of a state attorney general is to act as the state's chief legal advisor, charged with defending the state in court and giving legal opinions to officials on pending bills and policies. In some instances, attorneys general have been entrusted by state legislatures with enforcing specified laws, assisting district attorneys in prosecuting serious crimes, and disseminating legal information.

Like other government offices, state attorney general offices were designed to have limited powers, set forth by their respective state constitutions and statutes. Under all state constitutions, the legislature, not the attorney general, is given the power to make laws. If the legislature has not specifically given the attorney general the right to enforce a particular law, then he may be exceeding his authority by bringing a lawsuit under it.

Federal law also limits an attorney general's power. When a state attorney general attempts to regulate conduct in another state, that may violate not only state law, but also the Constitution's Due Process and Commerce clauses, which forbid any state from imposing its laws on another state or regulating interstate commerce.

Unfortunately, many state attorneys general now ignore these constraints. In recent years, many state AGs have increasingly usurped the roles of state legislatures and Congress by using lawsuits to impose interstate and national regulations and extract money from out-of-state defendants who have little voice in a state's political processes.

Although abuses are widespread, some attorneys general are worse than others. The greatest harms inflicted by overreaching state AGs include encroachment on the powers of other branches of government, meddling in the affairs of other states or federal agencies, encouragement of judicial activism and frivolous lawsuits, favoritism towards campaign contributors, ethical breaches, and failure to defend state laws or state agencies being sued.

Introduction

State attorneys general (AGs) are among the most powerful office holders in the country, with few institutional checks on their powers. A state attorney general, such as Oklahoma's Drew Edmondson, can bring a politically motivated prosecution in violation of the First Amendment, yet his victims may well have no legal redress. With the possible exception of former New York Attorney General Eliot Spitzer, the enormous power wielded by state attorneys general has received little scrutiny. This discussion of the nation's half-dozen worst attorneys general, like its 2007 precursor,¹ seeks to focus much needed attention on their most egregious abuses of power.

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Unfortunately, many state attorneys general now ignore these constraints. Over the past 15 years, many state AGs have increasingly usurped the roles of state legislatures and Congress by using lawsuits to impose interstate and national regulations and extract money from out-of-state defendants who have little voice in a state's political processes.⁸ A classic example is the 1998 tobacco Master Settlement Agreement (MSA). It settled lawsuits against the big tobacco companies by creating what is effectively a national tax on cigarettes, giving at least \$15 billion of the resulting revenue to politically connected trial lawyers hired

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by some of the state attorneys general. The MSA's costs are borne by smokers—the very people the state AGs claim were victimized and defrauded by the tobacco companies.⁹

The worst offenders flaunt their abuses of power. Eliot Spitzer once boasted that he had “redefined the role of Attorney General.”¹⁰ Similarly, California's Jerry Brown boasts: “I've got 1,100 lawyers standing by and they're looking for someone to sue.”¹¹

This sort of activism may serve a state attorney general's political ambitions, but it imposes real costs on consumers, businesses, the economy, and our democratic system.¹² The recent wave of lawsuits brought by state attorneys general has fostered corruption, circumvented legislative checks on regulation, taxes, and government spending, made government less transparent, and diverted attention away from their core responsibilities of defending state agencies in lawsuits and providing legal advice to public officials.

Although these abuses are widespread, some attorneys general are worse than others. The greatest harms inflicted by overreaching state AGs include encroachment on the powers of other branches of government, meddling in the affairs of other states or federal agencies, encouragement of judicial activism and frivolous lawsuits, favoritism towards campaign contributors, ethical breaches, and failure to defend state laws or state agencies being sued. Taking these criteria into account, the following state attorneys general have earned their spot on this year's list of the nation's worst attorneys general:

1. Jerry Brown, California
2. Richard Blumenthal, Connecticut
3. Drew Edmondson, Oklahoma
4. Patrick Lynch, Rhode Island
5. Darrell McGraw, West Virginia
6. William Sorrell, Vermont

Criteria for AG Ratings

1. **Ethical Breaches and Selective Applications of the Law.** Using campaign contributors to bring lawsuits. Using the attorney general's office to promote personal gain or enrich cronies or relatives. Favoritism towards campaign donors and other uneven or unpredictable application of the law (including refusal to defend state laws or state agencies being sued when plausible defenses exist).

2. **Fabricating Law.** Advocating that courts, in effect, rewrite statutes or stretch constitutional norms in order to make new law—for example, seeking judicial imposition of new taxes or regulations, or restrictions on private citizens’ freedom to contract.
3. **Usurping Legislative Powers.** Bringing lawsuits that usurp regulatory powers granted to the federal government or other state entities, or that are untethered to any specific statutory or constitutional grant of authority.
4. **Predatory Practices.** Seeking to regulate conduct occurring wholly in other states—for example, preying on out-of-state businesses that have not violated state law and have no remedy at the polls.

Report Card

| Subject: | 1. | 2. | 3. | 4. |
|----------------------------------|----|----|----|----|
| <u>Attorney General:</u> | | | | |
| Jerry Brown, California | F | F | F | F |
| Richard Blumenthal, Connecticut: | F | F | F | F |
| Drew Edmondson, Oklahoma: | F | F | F | F |
| Patrick Lynch, Rhode Island: | D- | F | F | F |
| Darrell McGraw, West Virginia: | D- | F | F | F |
| William Sorrell, Vermont: | C- | D- | F | F |

1. Jerry Brown, California

The worst attorney general in America is California’s Jerry Brown. One of the most fundamental duties of a state attorney general is to defend all state laws against constitutional challenges. California Attorney General Jerry Brown has abdicated that duty by picking and choosing which laws to defend, and even seeking to undermine those he disagreed with (regardless of their constitutionality). For example, he refused to defend Proposition 8, an amendment to California’s constitution that prohibits gay marriage—but not civil unions—even after it was upheld by the state Supreme Court. Absurdly, Brown claimed that Proposition 8 somehow violated the state constitution—even though it is actually part of California’s constitution.¹³ Brown also claimed that Proposition 8 violates

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the federal Constitution,¹⁴ even though the Supreme Court and other courts have already rejected such challenges to state gay marriage bans.¹⁵ While the author of this paper publicly opposed Proposition 8,¹⁶ it plainly does not violate the state constitution.

In December 2008, Brown, after previously claiming he would defend the amendment against a state constitutional challenge, suddenly changed position shortly before the deadline for opposing the lawsuit, filing a brief supporting the lawsuit instead. As *The Los Angeles Times* noted, Brown's decision to switch course "at the last possible moment before the court's deadline, surprised many legal experts. The attorney general has a legal duty to uphold the state's laws as long as there are reasonable grounds to do so."¹⁷ And even critics of Proposition 8 admitted that it had plausible legal defenses.¹⁸ Indeed, courts have generally upheld bans on gay marriage against state constitutional challenges, even when such bans are merely statutory, and not written into the state constitution itself, the way California's is.¹⁹ As one civil libertarian put it, Brown "ripped up his job description" when he unilaterally decided not to defend Proposition 8 in court.²⁰

Even some liberal law professors criticized Brown's position. Santa Clara University law professor Gerald Uelmen said that Brown's argument "turns constitutional law on its head," and that he was unaware of any case law that supported it.²¹ Goodwin Liu, associate dean and professor of law at University of California, Berkeley's Boalt Hall School of Law, said it was "extraordinary for the chief law enforcement officer of the state to decline to enforce a law—even on the grounds that it is unconstitutional." He said, "The chief law enforcement officer of the state is charged with enforcing laws, even laws with which he disagrees."²² (After the state Supreme Court upheld Proposition 8, it was challenged yet again in federal court. Brown once again refused to defend it,²³ this time claiming it violated the federal Constitution—an argument the U.S. Supreme Court rejected in an earlier case,²⁴ and that has recently been rejected again by a federal appeals court.²⁵)

Brown also attacked another provision of the California Constitution, which had been upheld by the federal courts more than a decade earlier. Article 1, Section 31 of the California Constitution bars California's government from imposing racial or gender preferences, including race-based affirmative action. It was adopted by California voters in 1996 as Proposition 209, and upheld in 1997 by a federal appeals

court.²⁶ In 2009, Brown told the California Supreme Court to ignore this provision, because, he claimed, it was unconstitutional.²⁷

Brown has also been very aggressive in using lawsuits based on vague claims of environmental harm to block energy projects in California, and to regulate beyond the state's borders. The effect of any individual project or development on overall global warming, or greenhouse gas emissions, is microscopic, yet Brown brought so many lawsuits over global warming against businesses and local governments that the state legislature curbed his ability to sue local governments.²⁸

Brown has engaged in this kind of green activism without regard to the effects on the state's economy. In 2008, he threatened to sue to block a proposed water bottling plant in Northern California unless its effects on global warming were evaluated. Nestlé wanted to bottle water from three natural springs that supply McCloud, a depressed former lumber town about 280 miles north of San Francisco that badly needs jobs. The plant would produce enough water to fill 3.1 billion water bottles.²⁹ Shortly after Brown's threat, Nestlé cancelled the project and the 100 jobs the plant would have created evaporated along with it.³⁰

Modernization of America's refineries is critically needed to maintain a secure supply of fuel.³¹ The nation has a significant shortfall in refining capacity, which unnecessarily forces overreliance on uncertain foreign supplies.³² Despite this need, in 2008, Brown used the threat of litigation to delay modernization of a refinery by Chevron.³³ This represented a conflict of interest. Brown's personal fortune came from the "family oil business," which received a "fee for each barrel" of oil exported from Indonesia, in a concession granted by that country's former military dictatorship. Chevron's oil refineries in California are designed to process Alaskan crude, to compete against oil from Indonesia in California's power plant market.³⁴ Brown has also meddled beyond his own jurisdiction by pressuring other states to block new power plants within their own borders.³⁵

Brown's fundraising practices raise ethical concerns. He collected \$52,500 in campaign contributions from relatives and from a company his office had been investigating in a public pension fund corruption probe.³⁶ Using his leverage as state attorney general, Brown raised nearly \$10 million in contributions to favored charities from industries that he oversees as state attorney general, including utilities, casino operators, and health care organizations.³⁷ Brown also conducted an investigation

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of the scandal-prone leftist activist group Association of Community Organizations for Reform Now, better known by its acronym, ACORN, that has been criticized as a whitewash. ACORN faced a public relations disaster in September 2009, when the conservative commentary website BigGovernment.com released a series of highly embarrassing hidden-camera videos. In the videos, ACORN employees at several of the group's offices around the country are seen providing advice to the filmmakers, a man and woman posing as a pimp and prostitute, on how to conduct several illegal activities, including running a prostitution ring.³⁸ In his report, Brown said that while ACORN did nothing "criminal," his office found likely violations of state law.³⁹ Brown closed his investigation without taking any action against ACORN, despite admitting that it had committed "highly inappropriate acts," such as failure to file tax returns, illegally dumping 20,000 pages of documents, and four instances of possible voter registration fraud. Worse, Brown criticized the filmmakers who exposed ACORN's wrongdoing, claiming their videotape "violated" ACORN's privacy—even though the videos were all made at the ACORN offices' public reception areas.⁴⁰

2. Richard Blumenthal, Connecticut

The second worst state attorney general in the nation is Richard Blumenthal. A left-wing ideologue who has used the power of his office to spread largesse to cronies, Blumenthal was rated the nation's worst attorney general in our January 2007 ratings. Blumenthal has not gotten any better since then, but the competition for worst AG seems to have gotten fiercer.

The Tobacco Racket

Blumenthal, more than anybody else, is responsible for the multi-state act of corruption and cartelism known as the Master Settlement Agreement, which he negotiated along with Oklahoma state AG Drew Edmondson.⁴¹ Wealthy trial lawyers across the nation received \$14 billion nationally in attorneys' fees⁴² under a \$246 billion-plus settlement paid for primarily by smokers—the alleged victims of the supposed fraud that begat the settlement.⁴³

The settlement was structured to allow the major tobacco companies to maintain their market share and raise prices in unison in order to pass settlement costs on to smokers. Working together, state attorneys general and major tobacco companies were also able to force smaller tobacco companies that had never been accused of any

fraud to join the settlement or pay penalties for not doing so. In a word, the settlement created a cartel, undermining free competition. As the federal appeals court with jurisdiction over Connecticut observed, had the tobacco company executives entered into a similar settlement without the collusion of the attorneys general, “they would long ago have had depressing conversations with their attorneys about the United States Sentencing Guidelines.”⁴⁴ By getting a state official such as Blumenthal to sign their settlement, the tobacco companies were able to claim that the cartel was exempt from antitrust laws under a loophole known as “state action” immunity, which exempts many state-recognized cartels under the generous assumption that state officials would not sign off on a cartel unless it promoted the public interest.⁴⁵

The tobacco settlement was joined by 46 states—dubbed “Settling States”—but many of its provisions apply nationally, thus imposing a major encroachment on state autonomy. The MSA requires tobacco companies that join the settlement to make payments to the Settling States based on their national cigarette sales, *including sales in states that did not join the tobacco settlement*. Worse, it requires companies that never joined the settlement agreement to make payments, even though, under America’s legal system, court settlements are not supposed to affect the rights of non-parties.⁴⁶ Moreover, such companies must make payments on any of their cigarettes that end up in the Settling States, even cigarettes resold *without their knowledge* by third parties in a Settling State.⁴⁷

Amid all the sordidness of the tobacco deal, Blumenthal personally steered \$65 million in fees to his own allies and the associates of former Connecticut Governor John Rowland (who was later convicted of corruption in an unrelated matter). Blumenthal had gone through the motions of soliciting letters from firms seeking to represent the state in the lawsuit against major tobacco companies. He selected four of 16 firms that expressed interest. The three Connecticut-based firms included:

- (1) Blumenthal’s own former law firm, Silver, Golub & Teitell in Stamford, where he worked for six years prior to becoming Attorney General. Partner David S. Golub is a long-time friend and law school classmate of Blumenthal’s;

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(2) Emmet & Glander in Stamford, whose name partner, Kathryn Emmet, is married to partner David Golub of Silver, Golub & Teitell; and

(3) Carmody & Torrance of Waterbury, whose managing partner, James K. Robertson, served as personal counsel and counselor to the later convicted Governor John Rowland.⁴⁸

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Other firms that bid for the litigation publicly complained that they did not have a fair chance at the contract. For example, Robert Reardon of New London, a former president of the Connecticut Trial Lawyers Association, reportedly could not even get in the door for a meeting, despite repeated efforts.⁴⁹

The contingency fees these lawyers received probably violated the Connecticut state constitution and state law.⁵⁰ First, the contingency fee was not authorized by the legislature, which has the exclusive power to appropriate funds. Connecticut courts have consistently held that the power to spend or receive state funds rests solely with the legislature.⁵¹ Second, the fees at issue were paid with money that was the property of the State of Connecticut.⁵² Connecticut law treats all funds recovered in a legal case as the property of the client, not his lawyer.⁵³ Thus, the state Supreme Court held that the costs awarded in a lawsuit belong to the party in whose favor they are taxed, and not to his attorney.⁵⁴ Moreover, the contingency fee arrangement endorsed by Blumenthal was patently unethical because it gave lawyers for the state a mercenary motive for maximizing the state's monetary recovery, regardless of the public interest.⁵⁵

As attorney general, Blumenthal has also supported other meritless, politically motivated lawsuits. For example, he filed an amicus brief in favor of a lawsuit against gun makers—most from out of state—for crimes committed by third parties. The lawsuit, rejected by the state Supreme Court, would have circumvented limits on tort law by dramatically expanding nuisance law and undermining individual responsibility.⁵⁶ Moreover, the suit targeted out-of-state businesses that are not properly subject to Connecticut law. It should be noted that the gun sales were lawful.

Similarly, Blumenthal backed former New York Attorney General Spitzer's lawsuit against Western Union. Western Union was sued after foreign swindlers used it to send telegrams (*i.e.*, "Millions are Trapped in Nigeria; we'll give you some of the millions, but we need \$15,000 first").

The AGs forced Western Union to settle and pay more than \$8 million for “national peer-counseling programs” run by their political ally, AARP.⁵⁷ Victims of fraud received nothing,⁵⁸ and the settlement applies nationally even outside the states that joined it.⁵⁹ Under the logic of the lawsuit against Western Union, one could sue the phone company for fraud committed using the telephone.

Blumenthal has frequently supported racial quotas and unconstitutional restrictions on speech.⁶⁰ He has also attacked private property rights, including advocating that private homes be subject to government seizure for use by private developers.⁶¹

Blumenthal also used the power of his office to bully small businesses. An egregious example is his abusive treatment of computer store owner Gina Malapanis, which led to an \$18-million judgment against the State of Connecticut. In 2003, he sued Malapanis’s store, Computers Plus Center, for \$1.75 million for allegedly selling machines to the state government that had missing parts. In a press release, Blumenthal accused Malapanis of fraud. Malapanis was arrested in her home and charged with seven first-degree larceny charges. The charges against Malapanis were dismissed in 2008. She then countersued the state for abuse of power and for violating her constitutional rights. As Fergus Cullen of the Yankee Institute for Public Policy noted, the jury, “recoiling at the overly aggressive action that ruined her business, awarded her a whopping \$18 million in January. In a handwritten note on court documents, the jury foreman said the state had engaged in a ‘pattern of conduct’ that harmed Ms. Malapanis’s reputation, and cited the state’s press releases impugning her integrity, some of which came from Mr. Blumenthal.”⁶² Blumenthal appealed the decision.

3. Drew Edmondson, Oklahoma

The third worst attorney general is Oklahoma’s Drew Edmondson, whose tenure has been marked by a pattern of political bullying and hypocrisy. Edmondson appears to have had no problem with accepting money from out-of-state lawyers,⁶³ wealthy special interests,⁶⁴ and even felons.⁶⁵ He has violated state ethics rules and campaign laws.⁶⁶ And he has steered lucrative government contracts to lawyers who give him donations (such as generous contingency fees for lawyers that give them up to \$250 million simply for bringing copycat lawsuits that mimic pending lawsuits brought by other trial lawyers, and give the lawyers up to 50 percent of what the state recovers).⁶⁷

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Edmondson has abused the power of his office in order to intimidate political opponents.

Edmondson has also abused the power of his office in order to intimidate political opponents. In 2007, he repeatedly indicted taxpayer activists Paul Jacob, Susan Johnson, and Rick Carpenter for seeking to place on the ballot a Taxpayer Bill of Rights that would have limited the rate of growth of state government spending.⁶⁸ These activists, dubbed the “Oklahoma Three,”⁶⁹ were led out of the courtroom in handcuffs for their role in hiring petition circulators from across the country to help them gather the hundreds of thousands of signatures needed to put the initiative on the ballot.⁷⁰ If convicted, they faced up to 10 years in prison.⁷¹

Edmondson previously had stated that there was nothing wrong with using people coming from out-of-state to circulate petitions, as long as they resided in Oklahoma for the duration of their work.⁷² Oklahoma’s Secretary of State had given the same advice.⁷³ But Edmondson suddenly changed his position and indicted Jacob, Johnson, and Carpenter for violating a previously unenforced, patently unconstitutional Oklahoma statute banning non-resident petition circulators—a statute interpreted by the state Supreme Court to ban all but “permanent” state residents from gathering petition signatures.⁷⁴ While Edmondson’s prosecution may seem lawful by following the letter of the law, rulings on similar laws—and the resulting long odds against his prosecution succeeding—make clear that it was purely political. Essentially, Edmondson prosecuted the Oklahoma Three under a law that had already had several legs kicked out from under it. Several federal appeals courts had struck down such residency requirements, and less restrictive ones requiring only brief residency, as violating the First Amendment.⁷⁵ That includes the federal appeals court with jurisdiction over Oklahoma, which struck down restrictions on non-resident petition circulators contained in a municipal ordinance in 2002,⁷⁶ and struck down the very statute under which Edmondson charged the Oklahoma Three in 2008.⁷⁷ But Edmondson persisted in his politically motivated prosecution until 2009,⁷⁸ when he finally bowed to the inevitability that he would be found in violation of the First Amendment. Moreover, his hanging on to such a thin reed to persecute his political opponents does not speak well of his judgment.

Edmondson’s office and his supporters defended the prosecutions as a way of keeping people from outside the state from participating in Oklahoma state politics.⁷⁹ Such a purpose is flatly at odds with the First Amendment, which protects non-residents and residents alike,⁸⁰ and fully applies to petition circulators.⁸¹ As one citizen noted in *The Oklahoman*, “The prosecution of Paul Jacob and others for the alleged crime of using

out-of-state petition circulators, and the law on which that prosecution is based, are dangerous attacks on our constitutional right to petition for redress of grievances. The tradition of coming to the political assistance of others is well established in American history, law and practice. Should Virginians have stayed home during the Revolution and not assisted the other colonies? Should people not have gone to Alabama in the 1960s to fight injustice?"⁸² Out-of-state activists played critical roles in the fight to end segregation in states like Mississippi and Alabama.⁸³ Even today, they continue to play a critical role in movements for political change, such as the push for term limits, whose leading exponent is Paul Jacob, the most prominent of the Oklahoma Three.⁸⁴

It is worth nothing how ironic it is for Edmondson to complain about outsiders meddling in Oklahoma politics, when out-of-state opponents of the initiative routinely harassed the petition gatherers, without Edmondson or anyone else questioning their right to come into the state to do so.⁸⁵ It is also ironic in light of his willingness to ignore federalism safeguards when it has been convenient for him to do so.⁸⁶

The law banning non-resident petition circulators was challenged in federal court by supporters of voter initiatives, who often prefer hiring experienced professional petitioners from out of state to gather signatures, because they produce better results,⁸⁷ and, in the case of Oklahoma, because of a dearth of experienced petition circulators.⁸⁸ The challenge was obviously well-founded, since it was based on a 2002 decision by the same court that struck down a Colorado city's ban on petitioning by non-residents.⁸⁹

Edmondson hypocritically claimed that he had no choice but to prosecute the Oklahoma Three, saying, "[W]e're charged with enforcing the laws that are on the books."⁹⁰ But as *The Wall Street Journal* noted, [E]very prosecutor has to make judgment calls about how to deploy limited manpower. And in other areas, Mr. Edmondson has opted not to act while legal challenges are pending. Upon learning that the Supreme Court had agreed to review a challenge to the death penalty, for example, he recently requested that all executions be halted until the High Court speaks.⁹¹

4. Patrick Lynch, Rhode Island

The fourth worst state attorney general in America is Patrick Lynch, attorney general of Rhode Island since January 2003. Lynch continued a nuisance suit against paint companies (filed by his predecessor in 1999) that was later thrown out as meritless by the Rhode Island Supreme

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Court.⁹² As that Court recently observed, Lynch sought to redefine the concept of a nuisance so broadly that “nuisance law would become a monster that would devour in one gulp the entire law or tort” and eviscerate rational boundaries on product liability.⁹³ Lynch’s lawsuit sought to circumvent legislation that placed the burden on property owners, not paint companies, to make their properties lead-safe.⁹⁴

By prosecuting the multibillion-dollar suit, Lynch empowered trial lawyers who donated to his campaign to seek hundreds of millions of dollars in contingency fees. The suit, launched by his predecessor, now-Senator Sheldon Whitehouse, sought to hold out-of-state paint companies liable based on their lawful sales of lead paint decades earlier. To maximize their potential legal fees, he allowed them to seek the most extravagant remedy possible, even though cheaper remedies would do more to protect public health. He then pocketed more campaign contributions from those lawyers, as well as from lawyers for paint companies seeking special settlement terms.

A 2006 jury verdict, subsequently reversed by the Rhode Island Supreme Court, held three lead paint companies liable for a public nuisance, ordering them to remove lead paint from more than 300,000 homes, and opening the door to them being “forced to pay out billions of dollars in damages.”⁹⁵ The judge allowed the companies to be sued for vast sums even though they had removed the lead from their paint long before the government banned it.⁹⁶ Moreover, the lead paint companies, which were from out of state, were held liable to Rhode Island without any proof that the lead paint they sold ended up on any buildings currently standing in Rhode Island.⁹⁷ As *The Providence Journal* noted in an editorial:

The resulting Rhode Island verdict makes a mockery of the basic principles of tort law. Typically, to win a lawsuit, there needs to be an injured party. Not here, where not a single injured party—or a single house constituting a “nuisance”—made it into the evidence. Typically, for liability, a plaintiff needs to show that the defendant caused its harm. Not here, where the judge instructed the jury that it could find the defendants guilty without even finding that any of the paint companies had manufactured any paint actually used in the state.⁹⁸

Ratifying a decision made by his predecessor, Sheldon Whitehouse, Lynch contracted out the state’s litigation work to the Motley law firm, whose members and their relatives gave Lynch thousands of dollars in

campaign contributions,⁹⁹ and had become the largest donor in Rhode Island politics.¹⁰⁰ Their donors included, among others, John J. “Jack” McConnell, the lead lawyer in the lead paint lawsuit, who gave at least \$3,000 to Lynch, and his wife, Sara Shea McConnell, who also gave \$3,000 to Lynch, on exactly the same dates as her husband.¹⁰¹ McConnell is also a major donor to the Rhode Island Democratic Party, which backs Lynch.¹⁰²

Lynch also received money for his own political benefit from those he sued. He accepted campaign contributions from a lawyer for DuPont while he was negotiating to drop the company from the state’s lead paint lawsuit, including \$2,500 from the attorney and a total of \$4,250 from others tied to DuPont.¹⁰³ After receiving their donations, Lynch entered into a deal with DuPont that allowed the company to escape liability in exchange for a donation to a charity that the company itself set up, even as he continued to seek billions of dollars from the other lead paint companies.¹⁰⁴ A non-partisan ethics watchdog observed that Lynch’s conduct “does not pass the smell test.”¹⁰⁵

The contingency fee arrangement between Lynch’s office and the Motley law firm handling the suit against the lead paint makers was criticized by legal commentators, who argued that it violated laws requiring that attorneys’ fees recovered by the attorney general be paid back into the state treasury, that the legislature authorize any payments to attorneys acting on behalf of the state through the appropriations process, and that attorneys working on behalf of the state not financially profit from a lawsuit.¹⁰⁶ (The Rhode Island Supreme Court later ruled that the attorney general is not prohibited by state law from entering into contingency-fee agreements, although it cautioned that such provisions must be carefully reviewed and approved by the courts before any payments are made to guard against excessiveness or ethical breaches.¹⁰⁷)

The contingency fee also created a serious conflict of interest. It was in the interest of the lawyers handling the case for Rhode Island to maximize any damage award paid by the defendant—the larger the award, the larger the fee they will receive. A damage award based on the cost of removing all lead paint would be vastly larger than an award based on the cost of ensuring that painted surfaces on older buildings are kept intact. As Rhode Island political commentator Carroll Andrew Morse notes, “The decision of the Motley law firm to seek the former remedy—despite the views of virtually all scientists that the latter remedy is far better from a public health standpoint—can only be explained by the attorneys’ financial interest in maximizing their own fees. In other words, since contingency

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fee lawyers are compensated based on damages awarded, they have an incentive to advocate (in the name of the state) for whatever is most expensive, not for what is most effective.”¹⁰⁸

Engaging in grandstanding, Lynch made intemperate remarks in the lead paint litigation, and was repeatedly sanctioned for contempt of court by the trial court, which imposed \$15,000 in sanctions.¹⁰⁹ (The Rhode Island Supreme Court later ruled that regardless of whether Lynch’s remarks were inappropriate or constitutionally protected, they did not violate the clear terms of any pre-existing court order, and thus could not be punished as contempt of court.¹¹⁰)

At the end of the day, Lynch’s lead paint lawsuit achieved nothing, other than waste thousands of hours of attorney time, and give Rhode Island a reputation for having a bad legal climate—a big disincentive for businesses to move there and create jobs.¹¹¹ Lynch has also been a major participant in multistate lawsuits that seek to regulate conduct occurring wholly outside Rhode Island.

5. Darrell McGraw, West Virginia

Darrell McGraw, attorney general of West Virginia since January 1993, has violated the most basic duty of his office, to defend the state in court. In 1996, he brought a lawsuit against state agencies that was settled at a cost to taxpayers of more than \$2 million, all of which was pocketed by the trial lawyer whom McGraw hired to bring the suit.

McGraw also has regularly diverted money recovered by the state from legal settlements to friends and allies,¹¹² endangering West Virginia’s Medicaid funding in the process.¹¹³ As *The West Virginia Record* notes, he regularly hires “lawyers who are also his faithful campaign contributors. These appointments, most often made without an open and public process, have helped earn outside legal firms huge sums of money in partnership with the powerful office of Attorney General.”¹¹⁴ This cronyism and his diversion of lawsuits settlements are key reasons why West Virginia has been rated as the nation’s worst “judicial hellhole” by the American Tort Reform Association.¹¹⁵

McGraw appointed trial lawyer Thomas Galloway as special assistant attorney general to bring a contingency fee lawsuit against West Virginia’s Bureau of Employment Programs, which ended when the state paid Galloway a \$2-million fee in exchange for dismissing the suit.¹¹⁶ The state attorney general is supposed to defend state agencies from suit, not sue them for the benefit of his trial lawyer allies. The West Virginia

Supreme Court noted that there has been “an order of this court directing the attorney general to explain why he has not represented West Virginia” in that very case, but that he filed a non-responsive, evasive answer.¹¹⁷ It is interesting to note that the plaintiff’s counsel in this case donated to McGraw’s 1996 and 2004 campaigns.¹¹⁸ The contingency fees McGraw authorized were themselves probably illegal under West Virginia law.¹¹⁹

In similar fashion, McGraw hired lawyers on a contingency fee to sue tobacco companies in 1995. In response, he was specifically told by the state judge handling the state’s tobacco lawsuit that paying contingency fees to lawyers hired to represent the state was illegal.¹²⁰ But he went ahead and did it anyway, paying the trial lawyers he hired \$33.5 million, including \$3.85 million to an attorney who barely did any work, and even though the Legislative Auditor’s office specifically questioned the payments, doubting McGraw’s “authority to enter into the settlement.”¹²¹ McGraw authorized these millions in payments without even telling the state legislature, even though state law specifically limits any compensation for lawyers hired by the state to “amounts appropriated by the Legislature.”¹²² Later, McGraw allowed lawyers who had contributed to his campaign to reap almost \$4 million in fees after they helped the state obtain a \$12-million settlement from two credit card companies.¹²³ And he hired a campaign contributor as a special assistant attorney general to bring a contingency fee lawsuit against two drug companies.¹²⁴

McGraw has used other court settlements as his own political slush fund, so often that *The Charleston Daily Mail* summed him up as “a lawyer who sues on behalf of a client, settles out of court, and keeps the money.”¹²⁵ For example, in 2004, he took a \$10-million settlement from Purdue Pharma, decided that he did not need to turn it over to the state treasury, and has been doling out the dollars himself ever since.¹²⁶ Federal Medicaid officials were unhappy that the money did not go back into West Virginia’s Medicaid program, and threatened to withhold federal funds from the state.¹²⁷ And his doling out money to his trial lawyer friends may also violate rules against paying contingency fees to lawyers hired by the state.

McGraw sued Purdue Pharma on behalf of state Medicaid and workers compensation programs, alleging that the company had failed to warn about the addictive qualities of Oxycontin. But the state agencies in whose name McGraw sued received virtually none of the settlement.¹²⁸ Indeed, in violation of state ethics rules, they were not even informed in advance of the settlement by their lawyer, the state attorney general.¹²⁹ Out of the settlement, \$3.3 million went to attorneys’ fees for McGraw’s

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trial lawyer friends,¹³⁰ even though that was contrary to a state court ruling which upheld a West Virginia law that bars contingency fees to lawyers hired by the state attorney general.¹³¹ The balance of the settlement went, according to *The Charleston Gazette*, “mostly to help build a pharmacy school and to fund community corrections programs.”¹³² One hundred eighty thousand dollars went to a nursing program run by the wife of the State Senate president,¹³³ while \$500,000 went to a private, unaccredited pharmacy school.¹³⁴ Moreover, McGraw has apparently paid no heed to provisions in the settlement requiring that he consult with Purdue Pharma before disbursing funds from the settlement.¹³⁵

Lawmakers have criticized McGraw’s failure to return the settlement money to the state treasury as a violation of the state constitution and an improper use of taxpayer money.¹³⁶ McGraw’s critics include fellow Democrat and House Finance Committee Chairman Harold Michael, Delegate Eustace Frederick (D-Mercer), and Senator Andy McKenzie (R-Ohio), as well as legal commentators.¹³⁷ Had the settlement been paid back into the state treasury rather than doled out to McGraw’s friends, it might have resulted in the state receiving as much as \$30 million in federal matching funds.¹³⁸

Critics also have raised questions about whether McGraw’s diversion of the settlement money away from Medicaid violates federal laws against Medicaid fraud.¹³⁹ That resulted in a federal probe of McGraw’s handling of the Purdue Pharma settlement,¹⁴⁰ a ruling by a Department of Health and Human Services appeal board that the federal government is entitled to recover money from the State of West Virginia,¹⁴¹ demands for money by federal officials from several McGraw settlements,¹⁴² and threats by the federal government to withhold future payments to West Virginia’s Medicaid program.¹⁴³

McGraw took West Virginia into the multi-state Master Settlement Agreement, which resulted in wealthy trial lawyers receiving \$14 billion in attorneys’ fees¹⁴⁴ under a \$246 billion-plus settlement paid for primarily by smokers, who were the alleged victims of the very fraud that supposedly led to the settlement.¹⁴⁵

McGraw has helped his trial lawyer allies in other ways, such as by persuading the West Virginia Supreme Court to circumvent the exclusivity provisions of state workers’ compensation laws so as to allow duplicative recoveries by employees. He filed an amicus brief in a case filed by a campaign donor in which a divided West Virginia Supreme Court ruled that an employee could recover under both Workers’ Compensation Law and

state handicap discrimination law based on injuries flowing from the very same accident for which the employee has already been compensated, even though Workers' Compensation awards are supposed to be exclusive.¹⁴⁶

The state Supreme Court's pro-plaintiff rulings in that period gave the state a lasting reputation as a "tort hell" that is hostile to business,¹⁴⁷ although the state judiciary itself has improved slightly since then.¹⁴⁸

6. William Sorrell, Vermont

Few state attorneys general have done more damage to the fabric of the law than William Sorrell of Vermont, appointed by then-Governor Howard Dean in 1997. Shortly after taking office, Sorrell dangled the prospect of money for state coffers in front of the state legislature, which then changed the law to make tobacco companies retroactively liable for the state's Medicaid bills, irrespective of their individual guilt or innocence of fraud towards smokers.¹⁴⁹ With the playing field suddenly tilted against them, the tobacco companies settled soon after Sorrell sued them under the revised law. Wealthy trial lawyers got a big cut of the loot from that lawsuit, and smokers ended up paying the tab.

Almost a decade later, Sorrell's law remains an extremely dangerous precedent for other businesses whose products can be alleged to have an ill effect on public health. Under the logic of Sorrell's law, Vermont businesses could easily be targeted by lawyers in other states.

Under Sorrell's law, the state could sue the tobacco companies based not on individual injuries or losses to the state's Medicaid program, but on national statistics that may or may not be characteristic of Vermont's own Medicaid expenses.¹⁵⁰ As John McClaughry of Vermont's Ethan Allen Institute notes, "[I]f national studies show that, say, 12 percent of all Medicaid expenditures are smoking-related, then Vermont could demand that the tobacco industry pay 12 percent of Vermont's Medicaid costs, year after year,"¹⁵¹ even though fewer people smoke in Vermont than in most states.¹⁵²

More importantly, Sorrell's bill severely undermined the principle of individual responsibility, by holding a tobacco company liable for a smoker's injuries even if the smoker knew the risk of smoking and chose to smoke anyway. Notes McClaughry:

In hundreds of tort cases brought by individual smokers around the country, Big Tobacco has argued that the plaintiff knowingly assumed the risks of smoking and should be responsible for the health consequences. Juries almost always

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reject the plaintiff's argument that he was brainwashed into damaging his health by that rascal Joe Camel. Sorrell want[ed] a case he c[ould] win, so his legislation simply strip[ped] away these defenses and declare[d] the state the victor.¹⁵³

McLaughry further notes that Sorrell had been approached by a group of trial lawyers experienced in tobacco litigation, "headed by Steve Berman of Seattle, Richard Scruggs of Mississippi, and Ron Motley of South Carolina, who have gone from state to state to sell their services on a contingency basis to attorneys general eager to pocket big bucks from the much-despised tobacco industry." Indeed, Sorrell's tobacco suits named these three and others as "special assistant attorneys general for the state of Vermont."¹⁵⁴

Sorrell also made sure that the lawyers he hired collected lots of money. They got at least \$10.5 million for their low-risk representation of Vermont in state court, under a contingency fee, even though contingency fees are supposed to compensate lawyers for taking risky cases.¹⁵⁵

In addition, the lawyers received a much larger amount of money for their role in the multi-state Master Settlement Agreement, which Sorrell helped negotiate.¹⁵⁶ Under it, the big tobacco companies agreed to pay more than \$14 billion to lawyers hired by state attorneys general like Sorrell, in annual installments over a period of years.¹⁵⁷

After the settlement went into effect, Sorrell then reshaped it to squelch competition from smaller tobacco companies that refused to join the tobacco settlement because they had never been accused of wrongdoing, in order to protect the market share of the big tobacco companies that had joined the settlement and were making big payments under it to trial lawyers.¹⁵⁸ As a result, one small company's payments increased by *1,000 percent*.¹⁵⁹

While Sorrell's bill targeted only on Big Tobacco specifically, it set a bad precedent for similar legislation that could give the state what the Ethan Allen Institute's McLaughry calls "a sure-fire legal hunting license, aimed at one industry after another wherever a lucrative recovery appears possible. The state could sue liquor companies for the costs of alcoholism." Similarly, it could sue Vermont-based "Ben and Jerry's for peddling artery clogging 15 percent butterfat ice cream, purposely made as tasty as possible to encourage addiction from childhood on."¹⁶⁰

Like Blumenthal, Sorrell is an ideologue who has frequently

supported unconstitutional restrictions on speech and racial quotas.¹⁶¹ He has also attacked private property rights, including advocating that private homes be subject to government seizure for use by developers.¹⁶²

Conclusion

Many state attorneys general across the nation conscientiously fulfill their duties every day. However, others, like those discussed above, have failed to heed the limits on their own power. Instead of focusing on their historical function of defending state agencies in court and providing legal advice, they have chosen to use lawsuits as a weapon by which to undemocratically impose new regulations on the public. In the process, they have usurped the lawmaking authority of state legislatures and Congress. To satisfy their ambitions, and enrich political allies, they have imposed great costs on our nation's economy and system of government, while fostering corruption, and undermining constitutional checks and balances. The power of state AGs needs to be brought back under control.

Many state attorneys general across the nation conscientiously fulfill their duties every day. However, others have failed to heed the limits on their own power.

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