The Nation's Worst State Attorneys General 2015

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Executive Summary

State attorneys general (AGs) are among the most powerful office holders in the nation, yet there are few institutional checks on their power. This new survey of the nation's half-dozen worst attorneys general, like the 2007 and 2010 studies that preceded it, focuses on the most egregious abuses of power by some of the nation's most aggressive and overreaching state AGs.

Historically, the job of a state AG 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, AGs are also empowered by state legislatures to enforce specific laws and assist district attorneys in prosecuting serious crimes. But increasingly, state AGs are ignoring these basic obligations and meddling in areas traditionally outside their purview.

In evaluating candidates for the worst state AGs, this study sought to identify those AGs who have engaged in noteworthy ethical and legal breaches, including violating the Constitution, fabricating legal norms, usurping legislative powers, hiring outside counsel (often campaign contributors) on a contingency-fee basis, and suing businesses over conduct occurring outside their own states. Particular attention was paid to news coverage of state AGs who appeared, or came close to appearing, in CEI's previous AG ratings in 2007 and 2010, to see if their successors warranted inclusion this year, since a bad political culture and overreaching state AGs seem to go hand in hand.

Like other government officers, state AGs theoretically have limited powers, set forth by their respective state constitutions and statutes. These powers are also constrained by federal law. The U.S. Constitution's Due Process and Commerce clauses, for example, forbid one state from imposing its laws on another or from seeking to regulate interstate commerce.

However, over the past 20 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 process. This sort of activism may serve a state AG's political ambitions, but it imposes real costs on consumers, businesses, and the economy. These lawsuits foster corruption; circumvent legislative checks on regulation, taxes, and government spending; undermine government transparency; and divert attention from core AG responsibilities.

State AG misdeeds can be roughly categorized as follows:

1. **Ethical Breaches and Selective Applications of the Law.** Using campaign contributors to bring lawsuits. Using the AG's office to promote personal gain or enrich cronies or relatives. Favoritism towards campaign donors and other uneven or unpredictable application of the law.

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, regulations, or restrictions on private citizens' freedom to contract—or making up regulatory requirements out of thin air.

3. **Usurping Legislative Powers.** Bringing lawsuits that usurp regulatory powers granted to the federal government or other state entities, or that are not

tied to any specific statutory or constitutional grant of authority.

4. **Predatory Practices.** Seeking to regulate conduct occurring in other states—for example, preying on out-of-state businesses that have not violated state law and have no chance of remedy at the polls.

On the basis of these factors, and given the misdeeds highlighted below, the following have earned a spot on this year's list of the nation's worst state AGs:

1. **Kathleen Kane, Pennsylvania**—a long list of abuses, ranging from leaking confidential grand jury information to blocking corruption prosecutions to concealing contracts from public view;

2. **Jim Hood, Mississippi**—attempting to control Google's search methods despite the gravest of First Amendment and federalism concerns; hiring outside counsel for lucrative cases, who then collected payouts that rightfully belonged to the state; repeatedly defending a clearly incompetent state pathologist's ability to provide "expert" testimony in criminal trials;

3. **Tom Miller, Iowa**—chief negotiator of the $25 billion nationwide mortgage settlement, the costs of which were chiefly borne not by banks but by innocent third-party mortgage investors; key player in the Big Tobacco settlement, which put $85 million into the pocket of hand-picked trial lawyers, some of whom subsequently became donors to Miller's election campaigns.

4. **Kamala Harris, California**—disregarding repeated court warnings of prosecutorial misconduct; misleadingly rewriting the wording of ballot measures in order to sway voting outcomes; thwarting mergers that would have saved struggling hospitals in order to win favor with unions;

5. **William Sorrell, Vermont**—repeated flouting of state election laws; channeling contingency-fee lawsuits to campaign supporters; backing clearly illegal speech restrictions that were destined to be ultimately overturned; pioneering the imposition of retroactive Medicaid liability on tobacco companies;

6. **Eric Schneiderman, New York**—seeking campaign contributions from those who stood to gain or lose from his prosecutions; using payouts from his lawsuits as slush funds for his office; ignoring state corruption to the point where federal prosecutors had to step in.C

It should be noted that Pennsylvania AG Kane made the top of our list *before* she was indicted in early August for leaking grand jury materials.

Introduction

State attorneys general (AGs) are among the most powerful office holders in the nation, yet there are few institutional checks on their power. This discussion of the nation's half-dozen worst attorneys general, like its 2007 and 2010 precursors, seeks to focus much needed attention on the most egregious abuses of power by some of the nation's most aggressive and overreaching state AGs.[1]

The historic function of a state attorney general (AG) 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.[2] In some instances, state legislatures have entrusted attorneys general with enforcing specified laws and assisting district attorneys in prosecuting serious crimes. But increasingly, state attorneys general are ignoring even these basic obligations.

In evaluating candidates for the worst state attorneys general, this study relies on extensive legal research to identify those AGs who have engaged in noteworthy ethical and legal breaches, including violating the Constitution, fabricating legal norms, usurping legislative powers, hiring campaign contributors as outside counsel on a contingency-fee basis, and suing businesses over conduct occurring outside their own states. It also examines publications by organizations that have researched the issue of state attorney general misdeeds and abusive lawsuits. It surveys settlements of major cases brought by state AGs for signs of collusive shifting of costs on to third parties. Particular attention was paid to news coverage of state AGs rated badly in past years, or who had come close to appearing on CEI's previous AG ratings in 2007 and 2010, to see if their successors warranted inclusion this year, since a bad political culture and overreaching state attorneys general seem to go hand in hand.

A bad political culture and overreaching state attorneys general seem to go hand in hand.

Like other government agencies, state attorney general offices were designed to have limited powers, set forth by their respective state constitutions and statutes. Every state constitution empowers the legislature, not the attorney general, to make laws. If the legislature has not specifically given the attorney general the right to enforce a particular law, then he may exceed his authority by bringing a lawsuit under it.[3]

Federal law also limits an attorney general's power.[4] 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 from seeking to regulate interstate commerce.[5]

Many state attorneys general now ignore these constraints. Over the past

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20 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 process.[6] A classic example is the 1998 tobacco Master Settlement Agreement (MSA), which settled lawsuits against the big tobacco companies by creating what is effectively a perpetual national tax on cigarettes. That resulted in a $30 billion windfall for politically connected trial lawyers hired by some of the attorneys general.[7] The MSA's costs are borne by smokers, the very people the state attorneys general claim were victimized and defrauded by the tobacco companies.[8]

This sort of activism may serve a state attorney general's political ambitions, but it imposes real costs on consumers, businesses, and the economy.[9] Lawsuits brought by such attorneys general have fostered corruption, circumvented legislative checks on regulation, taxes, and government spending; undermined government transparency; and diverted attention away from core attorney general responsibilities of defending state agencies in court and providing legal advice to public officials. Overreaching state AGs have encroached on the powers of other branches of government, meddled in the affairs of other states or federal agencies, encouraged judicial activism and frivolous lawsuits, and shown favoritism towards campaign contributors.

Taking into account such abuses of power, and the criteria described below, the following attorneys general have earned a spot on this year's list of the nation's worst state attorneys general:

1. Kathleen Kane, Pennsylvania
2. Jim Hood, Mississippi
3. Tom Miller, Iowa
4. Kamala Harris, California
5. William Sorrell, Vermont
6. Eric Schneiderman, New York

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.
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—or making up regulatory requirements out of thin air.

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.

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Report Card

Subject:	*1.*	*2.*	*3.*	*4.*
Attorney General:				
Kathleen Kane, Pennsylvania	F	F	D	D
Jim Hood, Mississippi	F	D	D	F
Tom Miller, Iowa	D	F	D	F
Kamala Harris, California	D	D	F	D
William Sorrell, Vermont:	D	D	F	F
Eric Schneiderman, New York:	F	D	D	D+

While these six attorneys general share a lot of unpleasant traits, they vary considerably in the terms of the intensity of the ethics controversies they have provoked and in terms of the power they can potentially wield and misuse. Kane and Hood raise the most extreme ethical questions, for instance, while Schneiderman and Harris are probably the most powerful, in terms of the authority vested in their office by state law. [10]

1. Kathleen Kane, Pennsylvania

The worst attorney general in America is Pennsylvania's Kathleen Kane. The distinction is well earned. During her tenure, Kane has refused to defend state laws when they were challenged in court,[11] violated longstanding state laws, and thwarted corruption investigations launched by prosecutors.[12] Attorneys general are supposed to enforce the law and help prosecute crooks. But Pennsylvania attorney general Kathleen Kane has repeatedly violated these basic duties, to the point where most of the state's major newspapers have called for her resignation. Her scandalous behavior culminated in her indictment on August 6 for allegedly illegally leaking grand jury material and then trying to cover up her wrongdoing. The charges filed by Montgomery County District Attorney Risa Ferman, pursuant to a grand jury's recommendation in April, include perjury, official oppression, obstruction of justice, and contempt of court.[13]

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Her list of abuses of the power is long. In her short tenure as state attorney general, Kane has:

- Leaked confidential grand jury information to smear critics, resulting in her recent indictment.
- Illegally retaliated against a senior lawyer in her office, in defiance of a court order, by firing him after he testified before a grand jury investigating Kane's leak.
- Blocked state corruption prosecutions after a sting operation caught multiple Philadelphia politicians collecting bribes;
- Thwarted a criminal investigation of a former state official with ties to a tycoon associated with mob figures.
- Turned a blind eye to sexual harassment and assault by her current deputy, in violation of state law.
- Gave said deputy the authority to fire the victims, despite being notified of the harassment and advised to fire the harasser.
- Repeatedly refused to defend state laws challenged in court.
- Awarded lucrative no-bid contracts to her campaign contributors.
- Falsely accused state prosecutors of emailing child pornography.
- Falsely accused her predecessor and his staff of delaying an investigation into the Jerry Sandusky child molestation scandal.
- Falsely implied an African American lawyer had collaborated in racial profiling.
- Concealed no-bid contracts from the public in violation of the state's Right-to-Know Law, using taxpayer money to hire lawyers to invent rationalizations for doing so.

In April, the state's largest newspaper, *The Philadelphia Inquirer*, called Kane "Pennsylvania's self-destructing attorney general" and called for her to resign, withdrawing its support for a politician the newspaper had endorsed in 2012. The *Inquirer* reported that Kane had "disrupted" political corruption investigations and leaked confidential grand jury information, for which she was indicted on August 6. The paper cited her sabotaging of a 2013 corruption investigation of a former state gaming official with ties to a tycoon associated with mob figures by revoking their subpoenas a few months before receiving a $25,000 campaign contribution from the tycoon's business.[14] The *Inquirer* was not alone. The editorial boards of many news outlets across the state have called for Kane's resignation, including the *Harrisburg Patriot-News*,[15] *Easton Express-Times*,[16] *Scranton-Times Tribune*,[17] and *Lancaster Intelligencer-Journal*.[18] These publications had endorsed Kane prior to her being

elected attorney general, and were ideologically sympathetic to her.[19] Even her hometown newspaper, the Wilkes-Barre *Citizens' Voice*, has called on her to resign.[20]

Persecution of opponents. To date, Kane has responded to widespread bipartisan criticism by illegally retaliating against whistleblowers. On April 10, 2015, a Montgomery County judge ordered Kane to explain why the court should not hold her in contempt for firing a top prosecutor who testified before a grand jury investigating whether she had leaked secret documents to a newspaper. That prosecutor, Chief Deputy Attorney General James Barker, was protected from retaliation by a protective order issued by the judge who was supervising the grand jury.[21]

Kane contradicted herself about why she fired Barker, and had no good explanation for the illegal retaliation in contempt of the court's order.[22] Kane initially said she let Barker go due to a restructuring of the criminal division, a purported restructuring that Barker, a high-ranking aide, had not even heard about. The next day, Kane's office changed its tune, and said Barker was fired because he was responsible for unspecified grand jury leaks.[23]

The grand jury recommended charging Kane with perjury, obstruction of justice, official oppression, and criminal contempt of court.[24] For example, it found probable cause to believe that she engaged in an "abuse of power" that constituted "official oppression,"[25] when she used her political consultant to leak confidential documents about a 2009 grand jury investigation of former Philadelphia NAACP head J. Whyatt Mondesire.[26] Kane ostensibly orchestrated this leak—which smeared a man who was never charged with a crime—to embarrass former prosecutors who criticized her handling of cases she inherited but did not prosecute. After Mondesire said he found it "stunning to see the attorney general was completely oblivious to what impact her leak would have" on his reputation, her office disingenuously claimed it had never intended to embarrass him, even though the leaked documents suggested, without any evidence, that he was involved in stealing state grant money for a job training program.[27] The grand jury report sharply criticized Kane for dredging up the Mondesire case to attack her political rivals.[28]

Legal experts have questioned Kane's ability to continue running the attorney general's office given how much the allegations of misconduct by her have already eroded public trust. Legal ethics expert Sam Stretton described Kane's tenure as a "disaster." "She's a disgrace," he said. "She can't run the office" due to her misconduct, and the "best thing she can do and the only

Kane has responded to widespread bipartisan criticism by illegally retaliating against whistleblowers.

honorable thing she has left to do is resign." "She's prosecuting people for perjury, and here she's accused of it herself," said attorney Peter Vaira of Philadelphia, a former U.S. Attorney for the Eastern District of Pennsylvania. "It makes it difficult for her to administer her office and enforce the law, no question about that."[29]

Kane's spokesman argued that her troubles are the result of "angry Republican men" who "have plotted to bring her down."[30] But it is hard to chalk the criticism of Kane up to partisanship, especially given her recent indictment. In fact, some Democratic prosecutors have taken issue with Kane's decisions. In 2013, Kane secretly shut down an undercover sting operation that had captured 11 Democratic Philadelphia elected officials accepting cash or gifts. After the *Inquirer* reported Kane's decision, Democratic Philadelphia District Attorney Seth Williams revived the case, charging six people. At least four have already pled guilty.[31]

As the *Inquirer* reported, the district attorney was scathingly critical of Kane, saying she made repeated false statements to justify shutting down the undercover sting. In announcing bribery charges against two lawmakers in the corruption case he revived, Williams said Kane had claimed without evidence that the investigation had been marred by racial targeting, even though testimony and documents from within Kane's own office showed her own top aides rejected the idea that racial prejudice affected the case.[32]

This false allegation triggered a lawsuit against the attorney general's office—one that will likely prove costly for taxpayers—by the former law enforcement agent it indirectly besmirched. On April 16, 2015, Claude Thomas, former Senior Supervisory Special Agent with the Office of Attorney General, sued Kane in Philadelphia, claiming she falsely told the public that Thomas said an attorney general's sting operation targeted African Americans. Thomas, who is black, says that in the course of doing so, Kane portrayed him as a "greedy sellout" who collaborated in racial targeting.[33] Philadelphia's district attorney, who is African American, compared Kane's incendiary claim of racism to "pouring gasoline on the fire for no reason." Williams was especially angry about Kane's move to quietly end the sting without filing any charges and without notifying the state Ethics Commission. Williams concluded that Kane killed the case "out of pure incompetence, to gain political favor, or because of a grudge against other personalities."[34]

Kane also falsely suggested that under her Republican predecessor, state law enforcement officials had sent emails containing child pornography, a serious and inflammatory claim that proved unfounded. She also falsely accused

former attorney general Tom Corbett—who later served as Pennsylvania governor—of having slowed the Jerry Sandusky child-molestation prosecution for political purposes, but an investigation found no evidence to support her charge.[35] Then, even after her own review turned up no evidence of wrongdoing by state prosecutors, she suggested that their actions in the original Sandusky probe allowed for two more victims to be abused. Her office withdrew the claim the next day.[36]

Protecting bad actors. While casting unfounded aspersions on potential political rivals, she turned a blind eye to sexual misconduct in her own office. Kane promoted Jonathan Duecker, a former supervisor of the AG office's narcotics agents, to serve as her chief of staff after a report from her internal affairs unit informed her he had made unwanted sexual advances to two female colleagues, such as putting his hand underneath a colleague's blouse, under her skirt,[37] and on her thigh,[38] despite her repeated objections.[39] Even after this became front-page news in Philadelphia newspapers, Kane's office feigned ignorance of the investigation, with her spokesman claiming, "I have no idea whether there was an investigation or not," even though the Office of Professional Responsibility sent its report to Kane five days before she announced she was promoting him.[40]

Kane not only failed to fire Duecker after the personnel office recommended his firing, but gave him the power to hire and fire,[41] enabling him to make his victims live in fear through the omnipresent specter of retaliatory firings or disciplinary action.[42] Kane's office's indifference to sexual harassment allegations was at odds with state law governing sexual harassment that requires agencies to "take 'immediate and appropriate corrective action' when one employee harasses another."[43] It also invited potential lawsuits against the state that could be costly to taxpayers. One alleged victim said that when she heard Duecker had been promoted, "my stomach turned sick, and I just wanted to leave the office."[44]

Failure to perform basic duty of representing the state in court. Kane has repeatedly refused to defend state laws challenged in court—a basic duty of her office—while displaying a pattern of putting political activism ahead of her official duties.[45] Specifically, she has simply ignored her duty as the state's top lawyer to represent the state laws challenged in court, when laws being challenged were favored by Republicans.[46] This violated the Pennsylvania's Commonwealth Attorneys Act, which states: "It shall be the duty of the Attorney General to uphold and defend the constitutionality of all statutes."[47]

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For example, Kane refused to defend a gun-rights statute, Act 192, after it was challenged by liberal lawmakers after it easily passed the state legislature.[48] The challengers argued that the law violated the state constitution's single-subject rule, but even if this argument were correct—as it might well be—it is not her role, but that of the courts, to declare it unconstitutional.[49] If there was any plausible argument to be made in defense of the statute—and indeed there was[50] —she should not have refused to defend it.[51] In Pennsylvania, the attorney general is not entitled to refuse to defend a statute just because a court might strike it down. In fact, attorneys general routinely defend laws that will likely be held unconstitutional.[52]

Even opponents of the law believed that Kane acted improperly. Bruce Ledewitz, an expert on the Pennsylvania Constitution at the Duquesne University School of Law, who said he considered the firearms policy "a terrible law" and "a gift to the NRA," said, "It's almost like she's saying, 'I think this is a very bad law, I don't agree with it, and so I'm not defending it." Ledewitz added, "Nobody thinks she has that authority."[53] *The Reading Eagle*, which opposed the challenged law, noted, "Kane may well have good reasons to dislike the law or even believe that it is not a winnable case," but she still was duty-bound to "make her best attempt at defending it. Unlike other lawyers, she doesn't get to choose her clients," and the very nature of the attorney general's job requires her "to defend positions with which she does not personally agree."[54]

Cronyism. Kane awarded lucrative no-bid contracts to campaign contributors, and then concealed them from the public in violation of Pennsylvania's Right to Know law. Under these contracts, law firms could reap millions of dollars from lawsuits involving the Commonwealth of Pennsylvania. Those four law firms and their lawyers donated a combined $191,400 to Kane's campaign from 2011 to 2013, reported the *Pittsburgh Tribune-Review*. A total of nine outside firms hold contracts with Kane's office which, along with their employees, donated at least $362,199 to her campaign.[55]

For example, the Washington law firm Cohen, Milstein, Sellers & Toll, which had donated $10,000 to Kane's campaign, offered to act as a "bounty hunter" for the attorney general's office, investigating nursing homes to see if they employed enough staff. It would then report them to the AG's office, which could impose fines on those with insufficient staff. A nursing home attorney told the *Philadelphia Inquirer* that the firm has gone after seemingly wealthier nursing homes.[56]

Open records advocates have criticized Kane's secrecy about such contracts.

"The Right to Know Law does not authorize agencies to withhold financial records from the public," said Paula Knudsen, general counsel for the Pennsylvania NewsMedia Association. "The law is designed to allow accountability for the expenditure of public funds." Most state agencies are subject to an executive order banning no-bid legal contracts, but that order apparently does not apply to the attorney general's office, which is an independent agency. To end the secrecy, State Rep. Tim Krieger, R-Hempfield, has proposed legislation that would limit lawyers' contingency fees and require posting of contracts with outside law firms on state websites.[57]

Kane also wasted taxpayer money by hiring outside lawyers to handle and reject state freedom of information requests, even though state agencies have their own officers to handle such requests. Hiring outside lawyers is "very rare" for state officials, according the state's open records director. Yet Kane did so repeatedly at a substantial and unnecessary cost to taxpayers. For example, Kane paid Sarah Yerger, one of her former staffers, who now works for Kane's former law firm, Post & Schell, $3,245 just to handle the *Pittsburgh Tribune-Review*'s request for sexually explicit emails shared by attorney general staffers. Yerger denied the request, a denial later overturned on appeal as erroneous.

In an effort to defend her record and address accusations of wrongdoing, Kane launched a website, "The Truth about Kathleen Kane," that lists 10 "facts" about Kane, leading with the fact that she is Pennsylvania's first elected female Democratic attorney general. It also links to a May 2015 op-ed in the *Pittsburgh Post-Gazette* by Becky Berkebile, an employee in Kane's office, who describes Kane as "friendly and polite," praises her record on drugs, and denies that her office is "out of control."[58] The website fails to disclose that this employee received an $11,300 pay hike—a salary increase of more than 25 percent—after writing the article.[59] As for the accusations levied against her, however, neither Kane nor her personal attorney, Lanny Davis, offered defenses of her alleged misconduct beyond categorical denials. Davis, a major player in Democratic Party politics and former special counsel to President Bill Clinton, has since ceased representing Kane.[60]

2. Jim Hood, Mississippi

Mississippi Attorney General Jim Hood is famous for his ethically questionable conduct while in office, including prosecuting businesses to benefit campaign contributors, close ties to corrupt trial lawyers whom Hood has used the power of his office to enrich, and continued reliance on discredited forensic "expert" witnesses.

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Hood effectively attempted to censor Google's search results in violation of the First Amendment to the Constitution, at the urging of several of his campaign supporters.

Fleecing Google. Hood effectively attempted to censor Google's search results in violation of the First Amendment to the Constitution, at the urging of several of his campaign supporters. Beginning in 2013, Hood threatened to investigate, prosecute, and sue Google unless it blocked third-party ads he deemed objectionable from its search engine and YouTube video platform. When Google did not comply with his demands, Hood retaliated by issuing a 79-page subpoena that asked for reams of documents and threatened to pursue civil and criminal penalties against the company.[61] In response, Google sought a preliminary injunction against Hood to prevent the enforcement of his subpoena.[62] A federal court granted Google an injunction in March 2015.

As the court noted:

> Google has demonstrated a substantial likelihood that it will prevail on its claim that Attorney General Hood has violated Google's First Amendment rights by: regulating Google's speech based on its content; by retaliating against Google for its protected speech (i.e., issuing the subpoena); and by seeking to place unconstitutional limits on the public's access to information... Google's publishing of lawful content and editorial judgment as to its search results is constitutionally protected... The Attorney General's interference with Google's judgment, particularly in the form of threats of legal action and an unduly burdensome subpoena, then, would likely produce a chilling effect on Google's protected speech, thereby violating Google's First Amendment rights.[63]

Hood made these unconstitutional threats and demands even though he and 46 other state attorneys general acknowledged in a 2013 joint letter to congressional leaders that "federal law prevents State and local law enforcement agencies from prosecuting" Internet platforms.[64] As *The New York Times* noted, Hood did this after he was lobbied to investigate Google by companies that object to its business practices,[65] including the Motion Picture Association of America (MPAA).[66] The MPAA, like Google itself, has poured hundreds of thousands of dollars into the Democratic Attorneys General Association,[67] which in turn has pumped hundreds of thousands of dollars into Hood's election campaigns.[68] A team of lawyers employed by a firm that represents the MPAA helped prepare draft subpoenas and legal briefs for Hood and other state AGs to use against Google. Hood went so far as to base a warning he sent to Google on a letter drafted by a

corporate rival.[69] For several reasons, Hood had no legal basis for his investigation and subpoena, as a federal judge recently ruled[70]—a conclusion shared by experts on Internet regulation.[71]

First, as federal appeals courts have repeatedly held, Section 230 of the federal Communications Decency Act preempts states from holding online intermediaries such as Google liable for any third-party content available on its services—regardless of the manner in which Google moderates that content.[72] If a user posts illegal content to a website, any criminal or civil liability under state law rests solely with that user—not with the website to which the user posted unlawful content. Thus, even if the ads to which Hood objected were in fact illegal under Mississippi or federal law, he had no authority to threaten Google for hosting the ads, because they were posted to Google's site by third-party users.[73]

Second, courts have ruled that the First Amendment protects not only how Google organizes and displays third-party information, such as search results, but also bars *retaliation* against the company based on its editorial decisions.[74] In short, the state can no more tell a search engine what results to publish than it can tell a newspaper what editorials to run.[75] Nor can a state official encourage the suppression of speech in a manner that can reasonably be interpreted as suggesting some form of punishment or adverse legal action will follow the company's failure to accede to the official's request.[76]

Third, most of the subject matter addressed by the attorney general's subpoena was preempted by the Copyright Act or the Food, Drug and Cosmetics Act (FDCA). Many of Hood's inquiries concerned purported copyright infringement—even though copyright is exclusively the province of federal law.[77] Similarly, the subpoena demanded information about Google's practices a decade prior about ads related to imported prescription drugs. But the FDCA preempts such enforcement actions not brought "by and in the name of the United States."[78] In short, if there were questions about some Google activities, they were exclusively a matter for the federal government, not Jim Hood or any state AG.

Finally, the subpoena violated the Fourth Amendment by demanding that Google divulge private information about conduct that was clearly lawful.[79] As the court noted, little in the subpoena issued by Hood addressed proper subjects for regulation by the attorney general, as most of the requests for information involved conduct that was immunized or preempted by federal law.[80] Instead, the court concluded, Hood had waged "an unduly burdensome fishing expedition into Google's operations."[81]

The state can no more tell a search engine what results to publish than it can tell a newspaper what editorials to run.

The consequences of Hood getting away with this would have been dire for free speech and the public's freedom to access information.[82] Free-speech advocacy groups like the Electronic Frontier Foundation (EFF) and the Center for Democracy and Technology have warned about the precedent Hood's overly broad subpoena, if allowed to stand, could have a major detrimental effect on online speech. An amicus brief filed on August 3, 2015 by EFF and other groups noted:

> This use of law enforcement powers, if permitted, would set a dangerous precedent for other state officials, the service providers they may choose to target, and the users that depend on those services. Faced with similar pressure, smaller service providers—those without Google's resources and thus more vulnerable to such pressure tactics—would likely be forced to decide between censoring third-party content and going out of business.[83]

Hood said he was motivated to investigate Google out of a desire to protect Mississippi consumers. But regardless of his intentions—or the sincerity of his stated motive—he almost never availed himself of pre-existing, easy-to-use tools provided to him by Google to address illegal conduct by third parties. In addition to giving him over 100 pages of written answers, and 100,000 pages of supporting documents, Google created a custom reporting tool and trained the attorney general's office on how to use it so that they could report objectionable videos. Months later, Hood's office had reported only seven videos after using this tool, and he did not pursue any legal action against those videos' creators.[84] By contrast, Google had voluntarily spent over $250 million over the preceding three years on enforcement measures and systems to help remove illegal content from its search index.[85]

Instead of focusing his efforts on identifying illegal content, Hood demanded that Google promote certain websites and discriminate against others. He demanded that Google promote the search rankings of video sites that had been endorsed by Hollywood studios.[86] For content he disfavored, Hood asked that Google censor from its search results links to websites readily available on the Internet, regardless of whether any court had found them unlawful.[87] Yet, even if all of the websites Hood wanted Google to censor were hosting or linking to infringing copyrighted material, Section 512 of the federal Digital Millennium Copyright Act provides a specific procedure by which online service providers like Google are required to remove hyperlinks or files that infringe copyrights.[88] This law gives state attorneys general no

authority to insist that search engines or video platforms modify their policies or algorithms to restrict access to copyright-infringing content.

Such demands to favor certain speech or speakers over others strike at the heart of the First Amendment.[89] Moreover, Hood's subpoena essentially would have required Google to search through someone else's haystack in search of a needle. Enforcement actions targeting unprotected speech can violate free speech if they also restrict access to constitutionally protected material. The Supreme Court has ruled that the government cannot penalize a bookseller for unknowingly offering obscene material, because that would result in booksellers limiting the books they sell to those they have time to inspect.[90] Similarly, a state may not sanction a magazine for unknowingly publishing unlawful advertisements because, as the Supreme Court has explained, " publishers cannot practicably be expected to investigate each of their advertisers," and the risk of sanction could lead a publisher to reject advertisements that "could conceivably be deemed objectionable by the [government]," thus depriving the public of access to protected speech."[91] In the context of copyright infringement, although an online service provider may be liable if it makes a deliberate effort to avoid learning of specific infringing actions, a provider cannot be liable *unless* it gains knowledge of a specific infringing activity yet fails to remove the infringing content. Hood's subpoena would have turned this principle of federal copyright law on its head, imposing on Google "an amorphous obligation to take commercially reasonable steps in response to a generalized awareness of infringement."[92]

Usurping federal regulation of interstate commerce. By trying to regulate the Internet and an online search engine based in another state, Hood's actions violated constitutional principles of federalism and state sovereignty. State attempts to regulate Internet content typically violate the Constitution's Interstate Commerce and Due Process Clauses. Those constitutional provisions constrain the ability of states to enforce laws that have the practical effect of regulating commerce outside a state's borders, because such regulation can have the effect of imposing one state's legislation on other states[93] and unduly interfering with interstate commerce.[94]

Thus, courts have repeatedly struck down state attempts to regulate Internet content, such as regulation of online speech under state laws banning the dissemination of material "harmful to minors."[95] Even when such laws can be validly applied to newspapers and magazines in a state, they are invalid for online speech,[96] because, as federal judges have explained, such content is

The government cannot penalize a bookseller for unknowingly offering obscene material, because that would result in book-sellers limiting the books they sell to those they have time to inspect.

Some lawyers hired by Hood have ended up in federal prison after being convicted in judicial bribery scandals.

"uniquely suited to national, as opposed to state, regulation."[97] A state that tries to impose its regulatory regime on the rest of the nation by regulating Internet content posted outside its borders thus violates the Constitution.[98]

Cronyism. Hood has a history of hiring outside attorneys for assistance in major lawsuits that have led to big payouts—for the lawyers bringing them.[99] In at least two such cases, he violated state law by allowing trial lawyers to collect fees that belonged not to them, but to the state treasury—that is, the taxpayers. The Mississippi Supreme Court ruled against Hood in two outside counsel fees cases involving MCI and Microsoft. In both cases, the court found that state law requires that any outside counsel hired by the attorney general must be paid from funds appropriated by the legislature for the AG's office.[100]

Some of the lawyers hired by Hood, including Dickie Scruggs and Joey Langston, have since ended up in federal prison after being convicted in judicial bribery scandals.[101] Scruggs pleaded guilty to 2009 for bribing two judges, and was sentenced to seven years in federal prison, of which he served five.[102] Hood has claimed to have formed strong friendships with several trial lawyers—including the now-disgraced Scruggs.[103] And astoundingly, he has used his very closeness to these figures as an excuse not to prosecute them after their wrongdoing being apparent, claiming his prosecuting them would create an "appearance of impropriety … like prosecuting relatives."[104] This rationale for doing nothing was questioned by legal experts, such as a Mississippi College law professor Matt Steffey, who noted that "there are ways to handle these situations at the attorney general's office" without leaving the case unprosecuted or personally embroiling the attorney general.[105]

Hood used the threat of criminal charges to pressure a company, State Farm, to enter into a settlement that paid $26.5 million to his trial lawyer friend Dickie Scruggs.[106] As Harvard Law School professor J. Mark Ramseyer and Indiana University economics professor Eric Rasmusen noted:

> How Scruggs induced State Farm to pay illustrates the tie between litigation and politics. In this case, the method was to buy an attorney general, use him to threaten criminal charges against the civil defendant, and get the charge dropped if the defendant paid up.[107]

Scruggs had played a key role in bankrolling Hood's campaign. In the 40 days before one election, Scruggs, a close associate, and two other lawyers gave $472,000 to the Democratic Attorneys General Association, which turned around and gave $550,000 to

Hood shortly thereafter. Hood repaid the favor, opening a criminal investigation of State Farm, which was facing a civil suit from Scruggs, to pressure State Farm into settling the lawsuit. As Ramseyer and Rasmusen noted, "Hood's deputy insurance commissioner recalled Hood saying, '[If] they don't settle with us, I'm going to indict them all, from [State Farm CEO] Ed Rust down.'" In response to this grave threat, State Farm settled, and Hood then closed the criminal investigation.[108]

Hood also helped Scruggs evade a judge's order to return stolen insurance company documents,[109] ileading federal prosecutors to express concern about the "remarkably close relationship" between Hood and the indicted Scruggs.[110]

Despite past scandals involving contingency-fee lawyers he hired, Hood has continued to hire campaign contributors to sue on behalf of the State of Mississippi. A recent example is the law firm Cohen Milstein Sellers & Toll, which he hired to sue Abbott Laboratories (for which it received a $250,000 payout), Standard & Poor's (for which it received nearly $5.5 million), Bank of America (for which it received $858,480.80),[111] and many other financial firms.[112] He also hired campaign contributors to sue many other companies, such as LCD manufacturers[113] and the pharmaceutical company Merck.[114]

Protecting bad actors. Hood increased the risk that innocent people will be falsely convicted, and guilty people will have their convictions overturned on appeal, by defending the use in criminal cases of the discredited former state pathologist Steven Hayne. Hood claimed that Hayne, a campaign donor,[115] was a credible expert witness even though he had lied about his qualifications and presented unreliable testimony in past cases.[116] Hayne had repeatedly made things up in his autopsies, as *The Washington Post*'s Radley Balko noted: "In one murder case, Hayne documented removing and examining the victim's ovaries and uterus even though the victim was male." Hayne "included in his autopsy report the weight of a man's spleen, and made comments about its appearance, even though the man's spleen had been removed four years prior to his death. In an autopsy on a drowned infant, Hayne wrote down the weight of each of the child's kidneys, even though one of them had previously been removed."[117]

Hood defended Hayne even though a Mississippi Supreme Court Justice had criticized him as unqualified in 2007 a case that reversed a defendant's murder conviction.[118] In one case, noted Balko, "Hayne supported his testimony by citing a study that doesn't exist and by citing a textbook that actually says the precise opposite of what he claimed on the witness stand."[119]

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Iowa's Tom Miller specializes in using lawsuits to harm the very people who have been victimized.

With Hood's blessing, Hayne was able to get away with continuing to testify as an expert witness long after some of his malfeasance came to light.[120] Despite Hayne's declining credibility, judges were reluctant to bar his testimony in the absence of prosecutorial action, as such a review would probably need to come from the state attorney general.[121] Defending Hayne's credibility also could endanger some prosecutions, since Hayne sometimes testifies for the defense. Although Hayne has effectively been barred from testifying for the state in new cases by a state law requiring such experts to be board-certified in forensic pathology, he can still testify in retrials of old cases.[122]

3. Tom Miller, Iowa

The third worst attorney general in the nation is Iowa's Tom Miller. Miller specializes in using lawsuits to harm the very people who have been victimized, and in using legal settlements with a defendant to harm innocent third parties across the country. He has played a key role in negotiating many such legal settlements, including the 1998 multi-state tobacco settlement, and he was the architect of the 2012 multistate foreclosure settlement.

Robbing Peter to pay Paul. Miller orchestrated a mortgage settlement with banks that ripped off innocent mortgage investors. In February 2012, the nation's biggest banks reached a $25 billion deal to resolve lawsuits brought against them by the federal government and 49 states over alleged foreclosure abuses. The agreement included billions of dollars in "financial relief"—such as reducing how much borrowers owed and helping borrowers refinance their loans—and billions more in cash for the federal government and the states. Although the big banks had earlier argued that the states' lawsuits were meritless, they happily agreed to this deal, because it allowed them to shift much of the $25 billion settlement to innocent third parties—chiefly, mortgage investors who had suffered major losses during the housing crisis. Miller was the chief negotiator for the states in that settlement.[123]

The states' deal with banks over their foreclosure practices, after 16 months of investigations, was relatively cheap for loan-servicing banks, but very costly for pension funds and other entities that hold mortgage-backed securities issued by those banks. "This was a relatively cheap resolution for the banks," because they passed the costs on to mortgage investors, noted Scott Simon, head of Pacific Investment Management Co.'s mortgage division and operator of the world's largest bond fund. "A lot of the principal reductions would have happened on their loans anyway, and they're using other people's money to pay for a ton of this. Pension funds, 401(k)s and

mutual funds are going to pick up a lot of the load."[124]

Asset managers were frustrated with the deal because, in addition to applying to debt the banks own, it also gave them credit for writing down loans in which they held no interest in but merely oversaw for investors. That provision "treats people's 401(k)s and pensions," which hold mortgage securities, "like perpetrators as opposed to victims," said Simon, who compared the deal to telling "your kid, 'You did something bad, I'm going to fine you $10, but if you can steal $22 from your mom, you can pay me with that.'"[125] By writing down the mortgages (first liens) they serviced for mortgage investors but did not hold on their own books, the banks received credit under the mortgage settlement—thus making their own loans (a second lien on the same property, such as a home equity loan, subordinate to the first lien) more valuable. This deal effectively made bondholders—including pension funds, individuals with 401(k) accounts, and insurers—pay for banks' liabilities, resulting in a huge transfer wealth from those investors to banks.[126]

It is not even clear whether many individuals who benefited from the settlement even deserved it. Writing in the *New York Post*, Fox Business correspondent Charles Gasparino, a critic of bailouts and mortgage write-offs, argued that the lawsuits that led to this settlement were based on the false pretext that foreclosures victimized delinquent borrowers, even though "the government officials who were part of the deal have privately conceded that, with few exceptions, more than 95 percent of the so-called victims weren't victims at all; they faced imminent foreclosure because they were delinquent on their mortgage payments—often for a year or more."[127]

As Gasparino noted, given how little money many foreclosed borrowers put into their homes, many of them suffered only mildly due to foreclosure, since "many, in fact, barely plunked down a down payment for a mortgage. By borrowing far more heavily than what they could afford, they were also gambling that housing would keep rising in value, defying basic rules of economics." But despite that fact, he said, delinquent borrowers covered by the settlement ended up "being rewarded for their mistakes."[128] Moreover, foreclosed borrowers typically live for over a year in the home without paying a penny on the mortgage.[129]

Regardless of whether foreclosure relief was a good idea, the settlement provided little relief to people who were foreclosed upon, as most of them received checks of $2,000 or less.[130] Meanwhile, state governments used much of the money they received to temporarily mask structural budget

Under the logic of the lawsuit against Western Union, one could sue the phone company for fraud committed by scam artists using a telephone.

deficits or funnel it to groups favored by state attorney generals—some of them serving purposes completely unrelated to foreclosures or mortgage fraud.[131] Moreover, by ripping off mortgage investors, the multistate settlement increased the risk of investing in mortgages, which in turn will drive up the mortgage interest rates that homeowners face in the future.[132]

While the settlement harmed mortgage investors and mortgage markets, Miller's role in negotiating it enormously enriched his own political campaign, especially after October 13, 2010, when he assumed the lead role of negotiator on behalf of the states. Between then and Election Day, the money poured in—with $338,223 in campaign contributions arriving in just three weeks. From September 30 through the election, Miller received over $170,000 from out-of-state law firms—more than twice his support from out-of-state lawyers during the rest of the fundraising cycle. That included contributions from securities law firms Kirby McInerney ($25,000), Kaplan Fox ($11,000), and Milberg LLP ($7,500), all of which were bringing mortgage-related lawsuits.[133] Out-of-state law firms and donors from mortgage-related sectors gave Miller $261,445, which amounted to 88 times more than they had given him over the previous decade.[134]

This is part of a pattern. Miller backed former New York Attorney General Spitzer's 2005 lawsuit against Western Union after foreign swindlers used it to send telegrams ("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 pay more than $8 million for "national peer-counseling programs" run by their political ally, AARP.[135] Victims of fraud received nothing. Under the logic of the lawsuit against Western Union, one could sue the phone company for fraud committed by scam artists using a telephone. The settlement's requirements—such as the content of forms used to wire money, and about worker training—apply nationally even outside the states that joined the settlement, usurping Congress's authority to regulate interstate commerce.[136]

The Tobacco Racket. Miller played a key role in negotiating the 1998 tobacco Master Settlement Agreement.[137] Wealthy trial lawyers across the nation have already received more than $15 billion in attorneys' fees under this 46-state settlement with the big tobacco companies,[138] and will likely receive $30 billion by 2028.[139] That settlement was paid for primarily by smokers—even though it was the result of lawsuits brought by state attorneys general, including Miller, who argued that the big tobacco

companies had defrauded smokers about the dangers of smoking.[140]

The settlement Miller helped orchestrate was deliberately structured to allow the major tobacco companies to maintain their market share and raise prices in unison with their competitors in order to pass settlement costs on to smokers.[141] It resulted in record profits for the nation's largest tobacco company, Philip Morris.[142] As the states that entered into the settlement later admitted in court, the cost of the settlement was passed on to consumers via higher prices.[143] The biggest tobacco companies actually managed to raise prices by more than the cost of the settlement.[144]

The settlement also created a de facto cartel, undermining market forces and flouting basic principles of U.S. competition law. As a federal appeals court observed, had the tobacco company executives entered into a similar settlement without the collusion of attorneys general like Miller, "they would long ago have had depressing conversations with their attorneys about the United States Sentencing Guidelines."[145] By getting a state official such as Miller 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 promotes the public interest.[146] It was like a get out of jail free card for tobacco CEOs.

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 even join the tobacco settlement. Worse, it requires companies that never joined the settlement agreement to make payments.[147] Moreover, such companies must make payments on any of their cigarettes that end up in the settling states, even cigarettes resold by third parties *without their knowledge*.[148]

As a result of the settlement, $85 million flowed to trial lawyers chosen by Tom Miller, some of whom have helped to bankroll Miller's campaigns.[149] This money was never appropriated by the legislature, which has the exclusive power to appropriate funds.[150] Rather, it was doled out pursuant to the agreement Miller helped negotiate, arguably constituting an unconstitutional appropriation of public funds outside the legislative process.[151]

Usurping Congress' authority. Miller has aided and abetted attempts to usurp legislative powers and circumvent congressional authority. A nuisance lawsuit filed by eight states—California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont and

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Wisconsin—sought to regulate out-of-state utilities' emissions of carbon dioxide, even though any such regulation is the province of the Environmental Protection Agency (EPA). The attorney general who spearheaded this nuisance lawsuit admitted that his goal was to "shake up and reshape the way an industry does business" across the nation, although it is Congress, not a state attorney general, that has the right to regulate interstate commerce and set industrial policy.[152]

That lawsuit sought to apply the plaintiff states' nuisance laws against utilities located in totally different states. This clashed with federal court rulings that have held that the Clean Air Act bars states from suing under federal common law, and confers jurisdiction to handle such matters to the EPA.[153] It also clashed with court rulings barring states from imposing their own state nuisance laws on utilities on other states, either as preempted by the Clean Air Act[154] or due to territorial limits on states' jurisdiction imposed by the Constitution's Commerce and Due Process Clauses.[155] As the Supreme Court has emphasized, preemption of state laws in interstate pollution disputes minimizes the risks of regulatory chaos, unpredictability, and innumerable interstate conflicts that can result when one state asserts jurisdiction over an out-of-state source.[156]

Criminalizing Private Family Matters. A prosecution by Miller's office drew national criticism for its overreaching. Criminal prosecution is typically the responsibility of county attorneys, not the state attorney general. Yet Miller's office prosecuted a long-time Republican legislator for having sex with his wife, Donna, who suffered from Alzheimer's disease and who Miller's office argued had lost the mental capability of consenting to sex.

The defendant, Henry Rayhons, had been a state legislator for 18 years and was running for reelection at the time. Rayhons was a longtime community leader with a clean record,[157] but nevertheless had to withdraw from the race in 2014 because of the charges.[158] The prosecution failed to produce any evidence that the couple's love had faded, that Donna failed to recognize her husband, or that she asked for him not touch her, said Rayhons's son Dale Rayhons, who acted the family's unofficial spokesman.[159]

The notion that a nursing home resident cannot consent to sex—with her spouse, no less—because of mental disabilities is troubling. Does this mean she can consent to nothing? "If the law criminalizes sex among lovers altogether once one of them has become mentally incapacitated, however warm their relationship was beforehand, that's a lifetime constraint," noted UCLA law professor Eugene

Volokh. "It's a burden even on people who are not yet incapacitated but who know they are getting there, and who are upset that for many years to come they would be unable to give this sort of pleasure to their life partners—or to get this pleasure from them."[160]

Such prosecutions reinforce the puritanical norms often inflicted on the elderly by nursing homes, without any legal justification. "In practice, nursing homes tend to err on the side of prudish caution," notes Slate writer Daniel Engber described. "So, administrators crack down with de facto statutory rape rules that treat elderly patients as if they were teenagers: If they can't be trusted to provide consent, they're automatically treated as the victims of any sexual encounter."[161]

Legally, Miller's prosecution was a failure, leading to an acquittal.[162] A cynic might call it a success in naked political terms, however, since it humiliated a political opponent and got him to retire from office.[163]

4. Kamala Harris, California

The fourth worst state attorney general in America is California's Kamala Harris, who has turned a blind eye to misconduct by state lawyers, violated the First Amendment, and meddled in the state's ballot initiative process.

Protecting bad actors. When judges warn you that something is wrong, you should listen, especially when you are the attorney general, and the judges are on a court that hears many of your cases. But Harris has been slow to heed to such warnings, even after the former Chief Judge of the Ninth Circuit Court of Appeals, Alex Kozinski, warned that constitutional violations by prosecutors had "reached epidemic proportions in recent years," and cited repeated instances of this occurring in cases involving her office.[164]

Harris has failed to take meaningful action against lawyers in her office even after they were cited for misconduct by judges in high-profile cases. After a state superior court judge found "pervasive" misconduct in the state's handling of a lawsuit over the Moonlight fire, a massive forest fire that burned in two California counties for 22 days, Harris continued to employ two lawyers the judge criticized by name,[165] even though their misconduct led to an order that the state pay $32 million in damages and expenses.[166] In his opinion, Judge Leslie Nichols wrote:

> The sense of disappointment and distress conveyed by the court is so palpable, because it recalls no instance in experience over 47 years as an advocate and a judge, in which the conduct of the Attorney General so thoroughly departed from the high standard it

California's Kamala Harris has turned a blind eye to misconduct by state lawyers, violated the First Amendment, and meddled in the state's ballot initiative process.

represents and, in every other instance, has exemplified.[167]

On February 4, 2014, Judge Nichols issued a 28-page order excoriating the California Department of Forestry and Fire Protection [Cal Fire] and two lawyers from the attorney general's office, which represented Cal Fire. "The court finds that Cal Fire's actions initiating, maintaining, and prosecuting this action, to the present time, is corrupt and tainted," wrote Judge Nichols in his ruling. "Cal Fire failed to comply with discovery obligations, and its repeated failure was willful." He condemned the "exaggeration and hyperbole in the papers submitted by Cal Fire." He also noted that the agency wrongly withheld exculpatory documents for months, "destroyed evidence critical (to the case) and engaged in a systematic campaign of misdirection with the purpose of recovering money from (Sierra Pacific)."[168] The lawyers cited by the judge for wrongdoing have remained employed in Harris's office.[169]

Abuse of power: People v. Velasco-Palacios. In 2013, Judge Kozinski had warned of an "epidemic of *Brady* violations," in which a prosecutor unconstitutional conceals evidence of a defendant's innocence, citing a growing and "unsettling trend" in both "federal and state" court."[170] But Attorney General Harris paid no attention, filing a brief effectively condoning even worse conduct: a California prosecutor's falsifying a transcript to make it appear that a defendant had confessed to committing a heinous crime when he in fact had not,[171] even after a state trial judge had made clear in 2013 that resulted "in the deprivation of basic fundamental constitutional rights."[172]

Former Justice Department attorney Sidney Powell notes one egregious case, in *People v. Velasco-Palacios*: "Ms. Harris and her staff defended the indefensible—California State prosecutor Murray flat out falsified a transcript of a defendant's confession." As Powell notes, by perjuriously adding two sentences to the transcript, Murray was able to threaten charges that carried a term of life in prison. As a result, defense counsel encouraged his client to plead guilty based on this fabricated evidence. Not until after the defense lawyer requested the original tape recording from which the transcript was made did Murray admit that he had added the most incriminating statements to the transcript.[173]

Harris failed to heed the earlier ruling of California Judge Harry Staley, who had ruled that Murray's fabrication of evidence —falsifying the transcript of a confession during discovery and plea negotiations—was "egregious, outrageous, and ... shocked the conscience." He dismissed the indictment, and in a scathing opinion quoted by the appeals court, wrote that

the prosecutor's actions "ran the risk of fraudulently inducing defendant to enter a plea and forfeit his right to a jury trial."[174] But as Powell notes, "Undaunted by the criminal conduct of a state prosecutor, or the district court's opinion, Ms. Harris appealed the decision dismissing the indictment."[175]

Abuse of power: Baca v. Adams. This is part of a disturbing pattern for Harris. In February 2015, all three Ninth Circuit judges hearing an appeal from a criminal defendant were so disturbed by prosecutorial misconduct in the case that Judge Kozinski, the senior judge on the panel, raised the possibility of a perjury charge against the prosecutor. In *Baca v. Adams*, Harris's office long defended convictions obtained through prosecutorial deceit, acquiescing to a new trial for the defendant in January 2015 only after being shamed in open court by the federal appeals court, which made clear that it would reverse their convictions if she did not.[176]

As Sidney Powell observes, Harris was forced to reverse course in that case and accept an order summarily overturning the defendant's conviction due to its obviously tainted nature, "but she did so only after the Ninth Circuit judges made clear that she would not like the opinion that would be forthcoming" if she objected. Judge Kozinski asked Deputy Attorney General Kevin Vienne if Harris, his boss, wanted to defend a conviction "obtained by lying prosecutors."[177]

Even before the Ninth Circuit raised questions, a state court of appeal had previously cited "evidence that the prosecutor himself had committed perjury." Yet Harris persisted in defending the conviction until it became politically untenable: "If Ms. Harris' office had its way," says Powell, "it all would have been swept under the rug."[178]

The January 2015 oral argument before the Ninth Circuit Court of Appeals aired how prosecutors presented false evidence but were never investigated or disciplined. Prosecutors "got caught this time but they are going to keep doing it" because there are seldom any consequences for their misdeeds, noted Judge Kozinski. "It is a cumulative type thing," said Santa Clara University law professor Gerald Uelmen. "The 9th Circuit keeps seeing this misconduct over and over again. This is one way they can really call attention to it." As the *Los Angeles Times* noted, a 2010 report by the Northern California Innocence Project cited 707 cases in which state courts found prosecutorial misconduct over 11 years. Only six of the prosecutors involved were disciplined.[179]

In the *Baca* case, the prosecutor both perjured himself and relied on an inmate's false testimony to finger the defendant. A jailhouse informant testified that Baca had confided that his son planned the killing. The defendant was twice tried and convicted, even

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Harris has demanded confidential, federally protected private financial information from non-profit organizations, even when doing so could lead to threats against the organization's donors.

though a state court had found that both the
informant and the prosecutor had given false testimony. As a result, Baca was sentenced to 70 years to life.[180]

Persecuting political opponents. Harris has also flouted the First Amendment. She has demanded confidential, federally protected private financial information from non-profit organizations, even when doing so could lead to threats against the organization's donors.[181] In response, a federal judge issued an injunction against her on February 17, 2015, barring her from obtaining the confidential information of a non-profit whose donors had been subjected to threats in the past.[182] Even though she has no statutory authority to do so under state law, Harris demanded that organizations that register with her office under California's charitable solicitation law disclose their biggest donors. She did this to get around federal law that protects donor confidentiality by barring the IRS from releasing such information to state attorneys general. Harris has threatened fines against charities unless they comply with her demands, which are unusual for state officials.[183]

The federal district court's injunction against Harris noted that she threatened to suspend the solicitation license of plaintiff Americans for Prosperity (AFP) unless it disclosed its largest donors. The district court found that she could not assure that donor records would be kept confidential under her policies, which are not explicitly authorized by any state law, and that they would have a chilling effect on First Amendment rights. Harris made these demands even though AFP presented uncontroverted evidence that its donors had received threats.[184] The Supreme Court has made clear that even generally valid disclosure requirements cannot be enforced against donors to groups whose donors have received threats in the past.[185]

Judge Manuel Real, a Democratic appointee, noted in his ruling issuing a preliminary injunction against the Attorney General that AFP had sufficiently called into question Harris's excuse for demanding the donor information, noting that she sought information on national donors, not California donors, and that Harris "lacks express statutory authority to access such information." The judge noted that even if Harris's demands were actually related to a valid government interest, there were "numerous, less intrusive alternatives" to her attempted invasion of donor privacy that would meet California law's oversight and law enforcement goals. Harris's claims that the information was truly needed was belied by the fact that California had not suffered any harm from not having AFP's Schedule B for the past decade.[186] Harris has appealed this ruling to the U.S. Court of Appeals for the Ninth

Circuit.

Playing politics with ballot measures. Harris has also worked to thwart the people's exercise of their initiative power under the California Constitution, by slanting and rewriting the language of proposed initiatives in a misleading way, thereby essentially overriding the voters' legislative role. When San Jose Mayor Chuck Reed tried to introduce a ballot initiative to amend the state constitution to allow prospective changes to worker retirement benefits that had not yet accrued, he was forced to give up after Harris blocked a neutral ballot summary for the initiative. Instead, she insisted on mischaracterizing even pension reform initiatives that scale back only future unaccrued benefits as eliminating "constitutional protections for current and future public employees' vested pension benefits." As *The Wall Street Journal* observed, Harris dictated a "tendentious summary" for the initiative that "prejudiced voters" and their ability to make an informed decision on it.[187]

In taking this position, Harris ignored a 1947 California Supreme Court ruling that a pension "right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the implied qualification that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension." She also ignored a 2010 state Supreme Court ruling that workers' future salaries could be cut, and language in a 1983 state Supreme Court ruling declaring: "Not every change in a retirement law constitutes an impairment of the obligations of contracts. ... Nor does every impairment run afoul of the contract clause." As *The Wall Street Journal* noted, in doing this, "politicians like Ms. Harris have usurped California's initiative process, which was intended to help citizens check unaccountable government."[188]

While giving ballot initiatives she dislikes a negative slant, Harris has condoned unduly rosy ballot language about legislation backed by her political allies. One example is the glowing ballot summary that resulted in California voters approving by a narrow margin a bond measure borrowing billions for high-speed rail.[189] Harris defended that project in court long after it was clear it was not affordable, efficient, or even consistently "high-speed."[190]

Union favoritism. Harris has also twisted the law at patients' expense to help organized labor. As *The Wall Street Journal* notes, "she blew up a deal by Prime Healthcare Services to rescue a group of struggling Catholic hospitals so she could curry favor with

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Harris obstinately blocked efforts to rescue students stranded by the demise of Corinthian Colleges, a for-profit higher education firm offering mostly technical degrees.

the Service Employees International Union (SEIU)."[191] In 2014, the Daughters of Charity Health System sought to sell its six insolvent hospitals in California to Prime Health Care Services. But state law required the AG to approve such nonprofit hospital acquisitions. At the urging of SEIU, Harris attached several poison pills as conditions, which forced Prime to withdraw its offer in March 2015.[192]

Harris had previously abused her veto power to thwart a merger with Prime for purely political motives. In 2011 she vetoed Prime's acquisition of the bankrupt Victor Valley Community Hospital as "not in the public interest" though a report produced for her own office concluded that Prime's "capital investment over the next five years should lead to substantial improvement to facilities, infrastructure, and certain services at the Hospital."[193]

Only four of Prime's 15 California hospitals are unionized, and SEIU opposed the merger because of the company's refusal to enter into a so-called neutrality agreement, which would facilitate unionization at its hospitals. The practical consequence was to increase the likelihood of loss of badly needed local hospitals. Daughters was in danger of going bankrupt, which could result in cuts to pensions, hospital closures, and job losses in the thousands. Since 2010 operating losses at Daughters had tripled to $146 million, resulting in losses of $10 million per month and the likelihood that it would soon run out of cash. Of six bidders, only Prime had agreed to assume the $300 million liability for worker pensions.[194] Harris blocked the merger even though Prime pledged to fully fund the pensions of 17,000 current and former employees, maintain or increase charity care, and invest $150 million in capital improvements.[195]

Vendetta against Corinthian Colleges. Harris obstinately blocked efforts to rescue students stranded by the demise of Corinthian Colleges, a for-profit higher education firm offering mostly technical degrees, which was under federal investigation and state scrutiny for apparently exaggerating its graduates' job prospects. Most of Corinthian's schools were sold last year to a nonprofit student-loan servicer after the U.S. Department of Education restricted its students' ability to obtain federal loans, a key source of revenue for Corinthian.[196] But thanks to Harris, Corinthian could not find a buyer for its California colleges.[197] To prevent thousands of students and employees from being displaced, Harris had the option of releasing any buyers from future liability for past "predatory practices" by Corinthian. But she refused to do so, which scared off any potential buyers.[198] As a result, Corinthian's California schools, such as Heald College in Roseville,

closed abruptly in April 2015, leaving thousands of students suddenly with no college to attend.[199] This closure displaced around 16,000 students, many only months from graduation, and 2,500 employees.[200]

Even if the predominantly working-class students at these colleges could afford to transfer to some distant college, it might do them little good. Many colleges do not offer the vocational programs many of them were pursuing or the flexible schedules they need, while others do not accept their credits, meaning they would have to start their studies all over again.[201]

Effectively, Harris punished innocent students and instructors for the alleged sins of Corinthian Colleges' leaders. In doing so, she thwarted a sale of the schools that the federal Education Department recognized as being in the public interest, because it would enable needy students to continue their studies. Corinthian had agreed to sell all its schools as part of a deal with the Department of Education. But that potential purchaser decided not to buy Corinthian's schools in California because of concerns about being sued by Harris.[202]

Harris's obstinacy also cost California taxpayers. By thwarting the sale of Corinthian's California colleges, she not only forced them to shut down and leave students stranded—and teachers unemployed and thus not paying any payroll taxes—but also blocked a deal that involved Corinthian making additional payments to cover student or taxpayer losses.[203] Instead, Corinthian filed for bankruptcy, making it much harder to recover any money from it. In its bankruptcy filing, Corinthian noted that it had $143 million in debt, but less than $20 million in assets.[204]

Harris was on plenty of notice that her actions thwarting potential buyers would shut down the colleges. Heald College President and CEO Eeva Deshon had written to Harris warning that Corinthian would close within weeks absent a sale, and describing how the school had attracted several interested buyers that were turned off by the attorney general's onerous financial and other conditions, and threats of litigation. "All we ask is that potential buyers not be threatened with devastating lawsuits for alleged conduct of prior ownership so that Heald College can survive under new ownership and continue to serve its students," wrote Deshon. Her pleas fell on deaf ears, and the college closed.[205]

Although it is hardly improper for a state attorney general to take legal action against an educational institution based on credible allegations that it materially deceived its students, Harris's refusal to let Corinthian's properties be purchased by independent entities unencumbered by liability for Corinthian's past misdeeds has caused

Effectively, Harris punished innocent students and instructors for the alleged sins of Corinthian Colleges' leaders.

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many students to suffer avoidable injury.

Other abuses of power. Harris also has used legal settlements to rip off investors, including through the national multistate mortgage settlement discussed earlier, which created an enormous conflict of interest and financial losses for third parties, by giving banks credit for writing down mortgages owned by innocent mortgage investors rather than the banks.[206]

5. William Sorrell, Vermont

Few state attorneys general have done more damage to the rule of law than Vermont's William Sorrell.

One election law for me, another for thee. Sorrell has also run into his share of ethics controversies. The state's governor, a member of Sorrell's own party, recently appointed an independent counsel to investigate ethics charges against him. The charges include allegations that Sorrell:

- Accepted campaign contributions from private lawyers and then joined them in litigation;
- Violated campaign finance laws by improperly coordinating activities with a super PAC; and
- Misreported campaign expenditures.[207]

In April, Sorrell himself conceded that an investigation was warranted.[208]

The charges grew out of an official complaint filed by attorney Brady Toensing alleging that Sorrell had engaged in long-term and chronic flouting of Vermont's campaign finance laws.[209] The allegations included that Sorrell:

- Improperly coordinated with the political action group Committee for Justice and Fairness to receive $200,000 during the 2012 attorney general race;
- Changed campaign finance rules in the midst of the 2012 campaign in a way that directly benefited him;
- Accepted campaign contributions from law firms he later hired as outside counsel; and
- (4) Repeatedly reimbursed himself from his campaign funds without proper reporting, starting in 2009, including $18,524 that went into his pocket.[210]

Sorrell has prosecuted political adversaries for campaign violations much more trivial than those he has been accused of engaging in. As a Vermont newspaper, *The St. Johnsbury Caledonian-Record*, asked: "[D]oes our highest law-enforcement get a free pass for flaunting campaign rules he so frenziedly enforces against others?"[211]

For example, Sorrell went after Republican gubernatorial candidate Brian Dubie over the innocuous fact

that his campaign had shared polling data with the Republican Governors Association (RGA), even though there is nothing obviously corrupting about members of a political party cooperating in a campaign—which is, after all, the whole purpose of a political party. To settle Sorrell's lawsuit, the RGA agreed to pay a $30,000 fine, while Dubie agreed to pay a $10,000 fine and make a $10,000 donation to the Vermont Foodbank, without admitting to breaking any laws.[212]

Cronyism. Sorrell has also hired campaign contributors to bring contingency fee lawsuits on behalf of the state.[213] For example, he outsourced a groundwater contamination lawsuit against oil companies to the Texas law firm Baron & Budd, which donated $10,000 to Sorrell's campaign. The deal was brokered by a former state attorney general turned lobbyist who specializes in hooking up state attorneys general with law firms seeking to bring lawsuits on behalf of states. Those law firms return the favor by funneling huge campaign contributions to the AGs who give them big cases.[214] *The New York Times* noted that the lobbyist will "earn a fee for helping to sell the job" to Vermont, and that Sorrell had acknowledged that the lobbyist had "played a role" in Vermont's hiring of the firm. The *Times* cited this as an example of "a flourishing industry that pairs plaintiffs' lawyers with state attorneys general to sue companies, a collaboration that has set off a furious competition between trial lawyers and corporate lobbyists to influence these officials."[215]

Trying to squelch political speech. Sorrell has supported unconstitutional restrictions on the free speech rights of non-profits and voluntary associations.[216] In *Randall v. Sorrell*, 548 U.S. 230 (2006), the Supreme Court, in a 6-3 vote, struck down Vermont Act 64, which imposed very restrictive expenditure and contribution limits. Much of the Supreme Court's ruling was inevitable, and it predictably cost Vermont taxpayers millions in legal bills. As the Barre-Montpelier *Times-Argus* noted: "The new law clearly ran contrary to a 1976 U.S. Supreme Court ruling, *Buckley v. Valeo*, which declared that limits on congressional campaign spending were unconstitutional." This basic reality seemed to escape Sorrell, who told legislators before the law was enacted that it "was legally sound."[217] Ultimately, Vermont had to pay nearly $1.4 million in legal fees to the challengers' attorneys after it predictably lost the case in which the Supreme Court declared key parts of the state's campaign finance law unconstitutional.[218]

The Supreme Court also struck down Vermont's campaign contribution

limits—which had effectively magnified the advantages of incumbency,[219] and made it harder to fund challengers in competitive elections.[220] Sorrell cannot be faulted for defending these contribution limits once they were challenged in court, because attorney generals are supposed to defend state laws if there is a straight-face argument for them, but it was irresponsible of him not to warn legislators about this likely result when they drafted the bill. And even if he believed the contribution limits might somehow be upheld, he failed to advise legislators to remove the plainly unconstitutional expenditure limits, since if the state were to lose even part of the case, it would still have to pay attorneys' fees to the challengers.[221]

The expenditure limits were clearly unconstitutional under its prior First Amendment ruling in *Buckley v. Valeo*, 424 U.S. 1 (1976), and as Justice Stephen Breyer noted in his opinion for the Court, Sorrell presented no meaningful argument for a different result: "Act 64's expenditure limits are not substantially different from those at issue in *Buckley*. In both instances the limits consist of a dollar cap imposed upon a candidate's expenditures. Nor is Vermont's primary justification for imposing its expenditure limits significantly different from" the rationale debunked in the *Buckley* decision.[222]

The tobacco racket. Shortly after taking office in 1997, Sorrell dangled the prospect of increased revenue 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 regarding fraud toward smokers.[223] All of 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.

Sorrell's law set a dangerous precedent for legislation targeting other products alleged to have an ill effect on public health. Such legislation, notes John McLaughry of the Ethan Allen Institute, would give the state "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."[224]

Under Sorrell's radical change in the law, the state could sue the tobacco companies for Medicaid costs in the absence of any fraud, based only on national statistics that might or might not even reflect Vermont's own Medicaid expenses, under a "market share" theory.[225] As the Ethan Allen Institute's John McClaughry notes: "[I]f national studies show that, say, 12 percent of all Medicaid expenditures are smoking-related, then Vermont could demand that the tobacco indus-

try pay 12 percent of Vermont's Medicaid costs, year after year,"[226] even though Vermonters smoke less than residents of most other states.[227] Sorrell's bill also severely undermined the principle of individual responsibility, by holding a company liable for a smoker's injuries even if the smoker knew the risk of smoking and chose to smoke anyway.[228]

As McLaughry noted, Sorrell was approached by a group of trial lawyers, "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."[229] Sorrell also made sure 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.[230] 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.[231]

6. Eric Schneiderman, New York

Eric Schneiderman is the nation's sixth worst state attorney general. He has pressured people being investigated by his office for campaign donations, while suing a firm that competed with a big campaign donor; kept money that belongs to state taxpayers in slush funds to be doled out by his own office; turned a blind eye to corruption in Albany and theft and fraud on Wall Street by a political ally; and kept communications with his cronies secret in violation of New York's Freedom of Information Law.

Cronyism. Schneiderman accepted $50,000 in campaign contributions from Jules Kroll, the CEO of a credit ratings company that bears his name, while he prosecuted a high-profile case against one of its major competitors, Standard & Poor's. He later dropped the case in exchange for a settlement restricting Standard & Poor's from competing with Kroll's company. Under the settlement, S&P was banned for a full year from operating in the lucrative commercial mortgage-backed securities market—a $100 billion market where S&P and Kroll compete against each other.

Campaign watchdog groups criticized Schneiderman's actions. "Just because money is handed to you doesn't mean you have to accept it," Scott Amey, the general counsel of the Project on Government Oversight, told the Daily Caller in April. "[Schneiderman]

Sorrell made sure the lawyers he hired collected lots of money.

For an attorney general or prosecutor to solicit donations from individuals or businesses while investigating them verges on extortion and smells like the sale of justice. Schneiderman has done just that.

could have easily returned that money due to the fact that the attorney general didn't want to be tangled in an appearance of a conflict with a major investigation."[232]

The New York Observer, which had endorsed Schneiderman in the past, has turned harsh critic.[233] "A pattern of political opportunism in which enemies pay while friends skate, a questionable nine-figure slush fund and an inability to play nicely in his own party's sandbox have begun to make influential New Yorkers wonder if the attorney general has hit his political ceiling," noted the *Observer*'s Michael Graig. "In numerous cases, Mr. Schneiderman has shown vindictiveness toward political foes and been uncharacteristically lenient or ignorant of activities of political friends."[234]

For an attorney general or prosecutor to solicit donations from individuals or businesses while investigating them verges on extortion and smells like the sale of justice. Schneiderman has done just that. For example, Schneiderman is accused of repeatedly pestering the Trump family for campaign contributions while investigating Donald Trump for allegedly operating a school without a license, even though the "school" was just a three-day seminar about selling real estate. For this technicality, according to sworn declarations reported by the *The New York Observer* (whose publisher is married to Donald Trump's daughter), Schneiderman requested that Trump:

- Make a $5,000 campaign contribution (which Trump donated under pressure);
- Attend and contribute to a Schneiderman fundraiser;
- Appear at a fundraiser for a Schneiderman political ally; and
- Attend and contribute to a fundraiser in honor of Schneiderman's birthday.[235]

While his investigation of the Trump family was fruitless—as most of his claims were barred by the applicable statute of limitations—Schneiderman turned a blind eye to massive wrong-doing committed by political allies, such as former New Jersey Senator and Governor Jon Corzine, who had given more than $3 million to liberal politicians. Schneiderman refused to prosecute Corzine for massive financial fraud against investors, even though that fraud involved actions directly related to the attorney general's duty to protect investors and should have been a strong case for a prosecutor to pursue. Corzine, who was head of the commodities trading firm MF Global when it careened into bankruptcy, allegedly diverted money from customer accounts, which are supposedly sacrosanct, to company coffers, resulting in a shortfall in customers' accounts totaling $1.5 billion by the time MF Global filed for bankruptcy on October 31,

2011. Schneiderman did nothing to hold Corzine accountable.[236]

Overreach. Schneiderman also used settlements with companies sued by his office as slush funds for his own office, with millions of dollars paid out either to private parties or into a fund to be managed by the AG—not the state legislature. For example, a settlement with JPMorgan Chase gave the attorney general sole discretion over the allocation of the money. This was a flagrant violation of New York law, and the state legislature's rights. Under New York law, money received by or on behalf of the state must be deposited into the state treasury, under State Finance Law § 121(1). New York law also requires that money be paid out of the treasury only pursuant to the legislative appropriation process. Moreover, as the statute states, the attorney general must "pay into the treasury all moneys received by him for debts due or penalties forfeited to the people of the state."[237]

The incident reportedly outraged the administration of Governor Andrew Cuomo. In January 2014, noted *The New York Observer*, "the governor and attorney general agreed to split the money 50-50, but the governor's people remain apoplectic that an attorney general, the man tasked with enforcing transparency, would set up a fund that he can do with as he wishes."[238]

Carol Kellermann, the president of nonpartisan fiscal watchdog Citizens Budget Commission, was likewise outraged, saying:

> Funds paid in settlement of litigation with the state, unless intended to compensate for specific losses, should be used as determined through the normal budget and appropriation process. The attorney general should not be able to unilaterally allocate public funds without the executive and legislative review that the budget process is intended to provide.[239]

Schneiderman also joined the multistate mortgage settlement negotiated by Iowa Attorney General Tom Miller, which ripped off mortgage investors—including New York-based funds and investors—to shift the costs of the settlement away from large banks like Bank of America and Wells Fargo.

Thwarting transparency. Schneiderman has attacked transparency in state government, including withholding records covered by New York's Freedom of Information Law (FOIL). He drew criticism from New York's top transparency official, Bob Freeman, executive director of the state Committee on Open Government, for rejecting a request for communications between Schneiderman's office and a

There is a vast difference between a consultant to an agency and a political consultant to a politician who heads the agency.

powerful political consultant, taking a position that Freeman called "a stretch that would do damage to the Freedom of Information Law."

In Spring 2014, Schneiderman's office rejected a FOIL request from *Crain's New York Business* reporter Chris Bragg for records of communications between the AG's office and Jennifer Cunningham, a partner in the SKD Knickerbocker firm, claiming they were "intra-agency records" covered by the "deliberative process" privilege, even though Cunningham is not an agency employee and only serves as an informal and unpaid "political consultant" to the attorney general's office. Cunningham is Schneiderman's ex-wife and was a political adviser to his 2010 and 2014 campaigns. After Bragg appealed the denial, the attorney general's office admitted it had erred by not releasing 72 pages of communications between Cunningham and AG office personnel in her capacity as a consultant for other clients, but it continued to withhold other communications with Cunningham.[240] In an editorial *endorsing* Schneiderman, *The New York Daily News* strongly criticized him, saying he "showed poor judgment in allowing his political consultant and former wife, Jennifer Cunningham, to represent private clients in dealings with his office—and in then withholding email correspondence with her that ought to be public information."[241]

Freeman noted the Committee on Open Government's opinions have consistently made clear that "in order to be a consultant, one has to be retained—meaning paid."[242] Communications with outside parties can hardly be treated as privileged "intra-agency" communication, especially when they are exchanged with a consultant who represents interests other than the agency's own.

There is a vast difference between a consultant to an agency and a political consultant to a politician who heads the agency. Even under federal Freedom of Information Act,[243] which has been read to exempt certain communications with agency "consultants," it is universally recognized that such communications cannot be withheld if the consultant represents competing or conflicting interests. As the Supreme Court has emphasized, if a document is shared with a consultant, it loses its privileged status as an "intra-agency" communication, unless "the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it."[244]

Despite this, Schneiderman's office has repeatedly argued to the contrary, treating powerful lobbyists for special interests as if they were neutral agency consultants. In fact, the attorney general's office made this same baseless argument in its March 2014 rejection of a FOIL request from Justin Elliott of ProPublica, who

sought 2007-2010 communications between former attorney general Andrew Cuomo's office and mortgage industry lobbyist Howard Glaser.[245]

The Supreme Court has ruled that to qualify for the privilege, the government must show that such consultants have "not been communicating with the Government in their own interest or on behalf of any person or group whose interests might be affected by the Government action addressed by the consultant."[246] Even under the narrower federal law governing freedom of information requests, if the consultant's own "interests might be affected by the Government action addressed by the consultant," then she will not qualify for the privilege, even if the consultant's own interests were " entirely legitimate."[247]

Ignoring corruption. Schneiderman has also been criticized for being soft on corruption in Albany, such as remaining mute as Governor Cuomo shut down the Moreland anti-corruption commission after it sought to subpoena a major Cuomo campaign donor who had also contributed to Schneiderman,[248] and reportedly was on the verge of sending subpoenas to Democratic Party officials and other large Cuomo campaign contributors."[249]

It was federal rather than state prosecutors that ended up prosecuting the leaders of New York's legislature for corruption, such as Assembly Speaker Sheldon Silver,[250] and the Majority Leader and deputy leader of the state Senate.[251] Silver exploited his position as one of New York State's most powerful politicians to collect millions of dollars in bribes and kick-backs, according to federal authorities.[252] Senate Majority Leader Dean Skelos was charged with extortion, conspiring to commit fraud, and soliciting bribes. Skelos's deputy was also indicted for corruption.[253]

Schneiderman has been criticized for being soft on corruption in Albany.

It was dangerous for Schneiderman to leave corruption prosecutions to the federal government, which has much narrower jurisdiction over state-level corruption than state prosecutors do, so some undeniably corrupt acts may simply be beyond their ability to prosecute.[254] As the Supreme Court has explained in narrowly construing the reach of a federal criminal law: "[F]or nearly two centuries it has been 'clear' that, lacking a police power, 'Congress cannot punish felonies generally,'" and "a criminal act committed wholly within a State 'cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States.'"[255] As *The New York Daily News*, in its bizarrely critical endorsement of the AG, noted, "Schneiderman should have vocally opposed Gov. Cuomo's shut-down of the Moreland anti-corruption commission—particularly because Schneiderman had deputized most of the panel's members as assistant

attorneys general."[256]

Conclusion

Many state attorneys general conscientiously fulfill their duties. However, others, like those discussed above, fail to heed limits on their power. Instead of focusing on their duty to defend state agencies in court and provide legal advice, they have chosen to use lawsuits as a weapon to undemocratically impose new rules on the public. In the process, they all too often usurp the lawmaking authority of state legislatures or Congress. To slake their ambitions and enrich political allies, they have propagated corruption, undermined constitutional checks and balances, and imposed great costs on the economy.

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