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## Smoke 'Em if You Got 'Em?— Reconsidering the Activist State Attorney General in Light of Climate Change, Tobacco Tactics, & ExxonMobil

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# Smoke ‘Em if You Got ‘Em?— Reconsidering the Activist State Attorney General in Light of Climate Change, Tobacco Tactics, & ExxonMobil

Christopher C. Brewer\*

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\* Juris Doctor candidate at Washington and Lee University School of Law, Class of 2018. I would like to thank Professor David Millon for providing insight and guidance throughout the process of writing this Note (all while he was trying to retire). Additionally, many thanks to my parents for everything.

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### I. Introduction

In the film *Groundhog Day*,<sup>1</sup> Bill Murray awakens on the morning of the titular holiday to find himself forced to relive the same day repeatedly. For Ted Wells, a veteran attorney who defended Big Tobacco in the late 1990s, it may have felt like *Groundhog Day* when Big Oil came calling with a similar problem.<sup>2</sup> The downfall of Big Tobacco came at the hands of a cache of industry internal documents, painstakingly revealed over decades of litigation.<sup>3</sup> These documents exposed a coordinated campaign of disinformation aimed at clouding the scientific consensus that smoking was harmful.<sup>4</sup>

Now, only a few years later, ExxonMobil finds themselves under the same scrutiny. Only this time, something is different. Leading the charge is New York Attorney General Eric Schneiderman, who comes armed with a new investigative tool, the Martin Act. This 1920s-era law, designed to combat securities fraud, gives Schneiderman the power to subpoena mass amounts of documents justified only by an ounce of suspicion.<sup>5</sup> Thus, rather

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1. *GROUNDHOG DAY* (Columbia Pictures 1993).

2. See Paul Barrett & Matthew Philips, *Can ExxonMobil be Found Liable for Misleading the Public on Climate Change?*, BLOOMBERG BUSINESSWEEK (Sept. 7, 2016, 5:00 AM), <https://www.bloomberg.com/news/articles/2016-09-07/will-exxonmobil-have-to-pay-for-misleading-the-public-on-climate-change> (last visited Mar. 3, 2017) (noting that Ted Wells was leading the defense team for Exxon, having previously defended Philip Morris) (on file with the Washington and Lee Law Review).

3. See *infra* Part II.B (detailing the history of tobacco litigation and the development of tactics to expose internal documents).

4. See *infra* Part II.B.3 (explaining the misconduct exposed by internal documents from the tobacco industry, which ultimately lead to judgment against the companies under RICO).

5. See *infra* Part II.A.1 (setting out the powers of the New York Attorney

than takings years of painstaking discovery as it did against Big Tobacco, the coffers of ExxonMobil's internal documents could be opened instantly.<sup>6</sup> Expectedly, outcries of criticism rang out, and soon allegations of collusion, misconduct, and bad faith intent rained down on Eric Schneiderman and his "activist" attorney general colleagues.<sup>7</sup>

This Note examines the complexities of the ExxonMobil investigations, seeking to understand how the investigation unfolded over time and its motivating factors.<sup>8</sup> To properly understand the investigation, one must understand the basis of the attorney general's powers and assess whether those powers are being used improperly. Further, this note seeks to survey the potential consequences of action taken to curb Eric Schneiderman's aggressive tactics.<sup>9</sup> Ultimately, this Note argues that, despite potential risks, the unique circumstances of the ExxonMobil investigation—combined with the rapidly changing political landscape—indicate that moving forward with the investigation is Eric Schneiderman's ideal course of conduct.

Part II of this Note outlines the development, mechanics, and past uses of both the Martin Act and tobacco litigation tactics by "activist" attorneys general.<sup>10</sup> Part III traces the origins of the ExxonMobil investigation, and discusses the convergence of the Martin Act and tobacco litigation tactics, along with the fallout from Exxon's counter-allegations of misconduct.<sup>11</sup> Part IV assess the potential consequences if critics of the Exxon investigation attempt to reign in Eric Schneiderman's conduct back to the

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General under the Martin Act).

6. See *infra* Part II.B.2 (reviewing previous uses of the Martin Act to force companies to open their internal documents to inspection by the attorney general's office).

7. See *infra* Part III.C. (covering the fervent criticisms of Eric Schneiderman's decision to commission an investigation into ExxonMobil under the Martin Act, as well as his alleged ties to environmental activists).

8. See *infra* Part III.A (tracing the origins of the ExxonMobil investigation and the conception of using attorney general subpoena power to gain access to internal documents).

9. See *infra* Part IV (examining the risks Eric Schneiderman faces if he continues to push his investigation forward despite criticisms and allegations of misconduct).

10. *Infra* Part II.

11. *Infra* Part III.

boundaries of acceptable attorney general activism.<sup>12</sup> Finally, Part V establishes the framework under which Eric Schneiderman's conduct can be justified, and argues that the his best course of conduct is to continue forward, despite any consequences.<sup>13</sup>

## *II. The Development of Attorney General Activism: A Case Study of Two Tactics*

State attorneys general have a long history of taking an activist stance toward issues of national policy and working cooperatively to address these issues. Past examples include litigation in antitrust<sup>14</sup>, consumer protection,<sup>15</sup> and environmental law.<sup>16</sup> While some are critical of this “attorney general activism,”<sup>17</sup> these attorneys general have gone more-or-less unchecked and continue to engage in these tactics. But this raises questions as to whether boundaries of acceptable “attorney general activism” exist, and what the fallout might be if those boundaries are crossed. For instance, are there limits on the extent attorneys general may collaborate and form coalitions? Is it acceptable to combine multiple “tools” or “tactics” for more efficient activism?

These are some of the questions surrounding Eric Schneiderman's investigation into ExxonMobil under the Martin Act and its alleged tie to tobacco litigation tactics. Consequently,

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12. *Infra* Part IV.

13. *Infra* Part V.

14. See Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2003–08 (2001) (detailing the rise of attorney general cooperation in multistate litigation).

15. See *id.* at 2007 (citing as an example a 1999 multistate action brought by twenty-seven states against Publisher's Clearing House for deceptive trade practices in advertising).

16. See Lawrence G. Wasden & Brian Kane, *Massachusetts v. EPA: A Strategic and Jurisdictional Recipe for State Attorneys General in the Context of Emission Accelerated Global Warming Solutions*, 44 IDAHO L. REV. 703, 713 (2008) (examining attorney general potential strategies in the wake of the states and environmentalists' victory in *Massachusetts v. EPA*).

17. See Michael DeBow, *Restraining State Attorneys General, Curbing Government Lawsuit Abuse*, 437 POLICY ANALYSIS, May, 2002, at 1 (arguing that attorneys general engage in “lawsuit abuse” which breaches the separation of powers in state government) <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa437.pdf>.

understanding the development and mechanics of the Martin Act and tobacco litigation tactics as tools for attorneys general is crucial to exploring their roles as potential catalysts for violating boundaries of acceptable attorneys general activism.

### *A. State Blue Sky Laws and New York's Martin Act*

Every state has adopted some form of securities law, often referred to as “Blue Sky laws,”<sup>18</sup> which are generally modeled on the Uniform Securities Act.<sup>19</sup> These laws provide for the administration of a regulatory scheme by an established group of commissioners.

#### *1. The Attorney General's Powers Under the Martin Act*

New York's regulatory framework, established under the Martin Act,<sup>20</sup> differs significantly from most state and federal schemes in that it gives “vast investigatory and enforcement powers” to the Attorney General.<sup>21</sup> Indeed, the Martin Act is often characterized as the most powerful securities law in the country.<sup>22</sup>

Specifically, the Martin Act empowers the attorney general to investigate and prosecute any suspected securities fraud or deceitful practices.<sup>23</sup> Much of this power stems from New York Court's broad interpretation of “fraud” to include any “acts tending

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18. See *Blue Sky Laws*, SEC. & EXCH. COMM'N, <https://www.sec.gov/answers/bluesky.htm> (last updated Oct. 14, 2014) (last visited Mar. 3, 2017) (providing a brief definition of Blue Sky laws) (on file with the Washington and Lee Law Review).

19. UNIF. SEC. ACT (UNIF. LAW COMM'N 2002).

20. N.Y. Gen. Bus. Law § 352(1) (McKinney 2013).

21. NINA HART, LEGAL TOOLS FOR CLIMATE CHANGE ADVOCACY: SECURITIES LAW 10 (2015), [https://web.law.columbia.edu/sites/default/files/microsites/climate-change/adaptationhandbook\\_securitieslaw.pdf](https://web.law.columbia.edu/sites/default/files/microsites/climate-change/adaptationhandbook_securitieslaw.pdf).

22. See Nina Hart, *Moving at a Glacial Pace: What Can State Attorneys Do About SEC Inattention to Nondisclosure of Financially Material Risks Arising From Climate Change?*, 40 COLUM. J. ENVTL. L. 99, 107 (2015) (pointing to the Martin Act's broad definition of fraud as a reason for this characterization).

23. See *People v. Federated Radio Corp.*, 244 N.Y. 33, 38–9 (1926) (construing the Martin Act to condemn “all deceitful practices contrary to the plain rules of common honesty”).

to deceive or mislead the public,” regardless of a showing of intent or scienter.<sup>24</sup> Moreover, the attorney general may investigate any suspected wrongdoing that an entity “shall have employed, or employs, or is about to employ.”<sup>25</sup> Thus, actual proof of such fraudulent conduct or wrongdoing is not necessary to commence an investigation.<sup>26</sup> This broad discretionary power is further bolstered by the plenary power of attorney general discretion, making decisions of whether to investigate an entity not reviewable.<sup>27</sup>

The attorney general’s powers under the Martin Act are not limited, however, to discretion in undertaking an investigation. Once an investigation commences, the attorney general may issue subpoenas for testimony, documents, and any other information relevant or material to the investigation.<sup>28</sup> An individual’s failure to comply with these requests “without reasonable cause” results in a misdemeanor.<sup>29</sup> Because the state’s request for information is investigatory in nature, witnesses subpoenaed for testimony are not given the right to counsel or a right against self-incrimination.<sup>30</sup> Additionally, while in most cases counsel may be present, they are barred from objecting to questions, taking notes, and receiving a transcript of the testimony.<sup>31</sup> The entire process may be carried on as a completely private matter, barring

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24. *People v. Cadplaz Sponsors*, 69 Misc. 2d 417, 419 (N.Y. Sup. Ct. 1972) (enjoining a building developer from using an information bulletin containing inaccurate information to solicit investors for a building project).

25. N.Y. Gen. Bus. Law § 352(1) (McKinney 2013).

26. *See* ANDREW LORIN, *THE INVESTMENT PROTECTION BUREAU: AN OVERVIEW OF FINANCIAL MARKETS REGULATION AND ENFORCEMENT IN NEW YORK* 5 (2006), [http://policydialogue.org/files/events/Lorin\\_investment\\_protection\\_bureau\\_1.pdf](http://policydialogue.org/files/events/Lorin_investment_protection_bureau_1.pdf) (explaining that Martin Act proceedings differ from private litigation because no proof of reasonable reliance or damages is required).

27. *See People v. Bunge Corp.*, 250 N.E.2d 204, 206 (N.Y. 1969) (“We cannot agree that the Legislature intended to grant the courts the authority to judicially review the Attorney-General’s exercise of discretion in dealing with a Martin Act violation.”).

28. N.Y. Gen. Bus. Law § 352(1) (McKinney 2013).

29. N.Y. Gen. Bus. Law § 352(4) (McKinney 2013).

30. *See* Lorin, *supra* note 26, at 8 (noting that attorneys are often surprised to learn that because these proceedings are not adjudicative in nature, their client does not have a right to counsel).

31. *See id.* at 9 (clarifying that testimony transcripts are only available once the Attorney General’s investigation is complete and require a request under New York’s Freedom of Information Law).

disclosure by any witness or state official at risk of a misdemeanor.<sup>32</sup>

The attorney general may also conduct a public Martin Act investigation.<sup>33</sup> To proceed publicly, the Attorney General seeks an order from the New York Supreme Court directing witnesses to appear before the court or produce any information requested.<sup>34</sup> The order may include an injunction to preserve the status quo while the investigation proceeds if the court finds it proper or expedient.<sup>35</sup> Further, the attorney general may continue to subpoena persons privately while a public investigation is active.<sup>36</sup> The potential reputational and business damage of a public criminal investigation makes the public Martin Act investigation a powerful leverage tool for the attorney general, with significant “shock value.”<sup>37</sup>

Additionally, while investigatory powers already incentivize cooperation by investigation targets, these actors are further incentivized by the risk that noncompliance could lead the attorney general to institute a civil action against them.<sup>38</sup> Civil actions under the Martin Act carry additional consequences for defendants, such as enjoinder by the attorney general if the defendant is believed to be engaged in or is about to engage in any

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32. See Frank C. Razzano, *The Martin Act: An Overview*, 1 J. BUS. & TECH. L. 125, 128 (2006) (remarking that disclosure may be proper if given permission by the Attorney General).

33. See *id.* (separating coverage of the Act’s investigative powers into public and private investigations).

34. N.Y. Gen. Bus. Law §§ 354, 355 (McKinney 2013).

35. See *Abrams v. Long Beach Oceanfront Assoc. Ltd. P’ship*, 518 N.Y.S.2d 323 (N.Y. Sup. Ct. 1987) (denying a motion to vacate a Martin Act order and injunction); see also Robert G. Morvillo & Robert J. Anello, *White Collar Crime: Securities, Investigations and Prosecutions Under the Martin Act*, N.Y. L.J. (Mar. 31, 2003), <http://www.newyorklawjournal.com/id=900005383709/WhiteCollar-Crime?%20&slreturn=20170010071551> (last visited Mar. 3, 2017) (citing an investigation by then-Attorney General Elliot Spitzer that obtained an injunction against a brokerage firm) (on file with the Washington and Lee Law Review).

36. See *Lorin*, *supra* note 26, at 9 (pointing out that persons or entities not named as respondents in the public § 354 proceedings may still be subpoenaed privately).

37. See Morvillo & Anello, *supra* note 35 (describing the Martin Act public investigation as giving the Attorney General “awesome power”).

38. See Razzano, *supra* note 32 at 131 (detailing the increased powers available to the attorney general once a civil action has been commenced).



practice declared to be fraudulent.<sup>39</sup> Particularly, if the application for a permanent injunction shows that the defendant has refused “to answer a material question” or “to produce a book or paper relevant to the inquiry” when ordered by the attorney general, “such refusal shall be prima facie proof that such defendant is or has been engaged in fraudulent practices . . . .”<sup>40</sup> This potential exposure greatly incentivizes any subject of a Martin Act investigation to dutifully comply.

## 2. *The Expansion of the Martin Act’s Role as a Tool of Activist Enforcement*

Originally passed in 1921, the Martin Act remained underutilized for much of its early life.<sup>41</sup> It was not until Elliot Spitzer took office in 1999 that the attorney general’s office began to use the Martin Act to aggressively investigate corporations.<sup>42</sup> During his time in office, Spitzer pursued multiple Martin Act investigations aimed at combatting fraud on Wall Street and targeting the banking, hedge fund, and mutual fund industries.<sup>43</sup> These investigations proved successful as he obtained large settlements against several large financial institutions such as Merrill Lynch.<sup>44</sup> With the door of the Martin Act now ajar, Spitzer’s

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39. N.Y. Gen. Bus. Law § 353 (McKinney 2013).

40. *Id.*

41. See Hart, *supra* note 21 at 107 (noting that early use of the Martin Act was reserved for “uranium boiler rooms and promoters of shady Canadian mining stock” (quoting Nicholas Thompson, *The Sword of Spitzer*, LEGAL AFF. (May/June 2004), [http://www.legalaffairs.org/issues/May-June-2004/feature\\_thompson\\_mayjun04.msp](http://www.legalaffairs.org/issues/May-June-2004/feature_thompson_mayjun04.msp) (last visited Mar. 3, 2017) (on file with the Washington and Lee Law Review))).

42. See Morvillo & Anello, *supra* note 35 (“Among the recent high-profile uses of the Martin Act are Attorney General Spitzer’s investigation into whether stock analysts were operating under conflicts of interest when they issued reports on companies that were also clients of their firm’s investment banking business . . . .”).

43. See Sarah Kelly-Kilgore, *Ninety and Kicking? How New York’s Martin Act is Only Getting Stronger with Age*, AM. CRIM. L. REV. (Feb. 2, 2011), <http://www.americancriminallawreview.com/aclr-online/ninety-and-kicking-how-new-yorks-martin-act-only-getting-stronger-age/> (last visited Mar. 3, 2017) (elaborating on the expanded use of the Martin Act under Attorney General Spitzer) (on file with the Washington and Lee Law Review).

44. See Hart, *supra* note 41, at 107 (remarking that prior to Spitzer taking

successor, Andrew Cuomo, continued to undertake investigations into the financial sector.<sup>45</sup>

In 2007, Attorney General Cuomo commenced an unprecedented expansion of aggressive Martin Act use into a new arena: energy.<sup>46</sup> That fall, Cuomo issued Martin Act subpoenas to five energy companies to determine whether these companies had failed to include material information in their SEC disclosures regarding risks related to climate change.<sup>47</sup> The subpoenas sought information regarding each companies' "analyses of [their] climate risks and disclosures of such risks to investors."<sup>48</sup> These investigations coincided with Cuomo joining a group of investors and environmental groups to petition the SEC for interpretive guidance on information disclosures regarding financial risks associated with climate change.<sup>49</sup> Seeking clarification under existing law, the petition expressed concern that there may be

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office, it was an unspoken rule that the Martin Act would not be used against Wall Street (citing Nicholas Thompson, *The Sword of Spitzer*, LEGAL AFF. (May/June 2004), [http://www.legalaffairs.org/issues/May-June-2004/feature\\_thompson\\_mayjun04.msp](http://www.legalaffairs.org/issues/May-June-2004/feature_thompson_mayjun04.msp) (last visited Mar. 3, 2017) (on file with the Washington and Lee Law Review))).

45. See Kate Kelly, Amir Efrati & Ruth Simon, *State Subprime Probe Takes a New Tack*, WALL ST. J. (Jan. 31, 2008, 12:01 AM), <http://www.wsj.com/news/articles/SB120173938230430417> (last updated Jan. 31, 2008) (last visited Mar. 3, 2017) (reporting on investigations by Andrew Cuomo into the subprime mortgage crisis) (on file with the Washington and Lee Law Review).

46. See Hart, *supra* note 41, at 131 (citing examples of Attorney General Cuomo's willingness to be an active participant in initiatives related to climate change and the environment).

47. See Felicity Barringer & Danny Hakim, *New York Subpoenas 5 Energy Companies*, N.Y. TIMES (Sept. 16, 2007), [http://www.nytimes.com/2007/09/16/nyregion/16greenhouse.html?\\_r=0](http://www.nytimes.com/2007/09/16/nyregion/16greenhouse.html?_r=0) (last visited Mar. 3, 2017) (quoting notices of the investigation sent to the companies as stating "[s]elective disclosure of favorable information or omission of unfavorable information concerning climate change is misleading") (on file with the Washington and Lee Law Review).

48. See Hart, *supra* note 41, at 106 (quoting Letter from N.Y. Office of Att'y Gen. to Paul Hanrahan, President and CEO, AES Corp. Accompanying Subpoena (Sept. 14, 2007), <http://www.ag.ny.gov/sites/default/files/press-releases/archived/aes%20corporation.pdf>).

49. PETITION FOR INTERPRETIVE GUIDANCE ON CLIMATE RISK DISCLOSURE, File No. 4-547 (Sept. 18, 2007), <https://www.sec.gov/rules/petitions/2007/petn4-547.pdf>.

widespread nondisclosure of material information relating to climate change.<sup>50</sup>

The posture of Cuomo's investigations is important for a number of reasons. For one, each of the companies complied with the investigations, presumably because of the Martin Act's penalties for noncompliance.<sup>51</sup> After investigating the companies' internal documents, the investigations ended with a settlement agreement in which the company agreed to correct their SEC disclosures and filing practices to account for climate change information.<sup>52</sup> Finally, Cuomo's motive was more-or-less straightforward—a concern with the extent of climate information disclosures under SEC guideline—as the tandem petition for guidance from the SEC shows.<sup>53</sup> This at least shows a semblance of the attorney general's office willingness to work in concert with the federal government.<sup>54</sup> The characteristics that define Cuomo's investigations sketch a rough baseline of previously acceptable use of the Martin Act in a climate context. Furthermore, this baseline is a useful measuring stick when considering characterizations of Eric Schneiderman's later investigations as aggressive<sup>55</sup> and the product of ulterior motives, such as pursuing tobacco style litigation tactics.<sup>56</sup>

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50. See Hart *supra* note 41, at 104 (noting that the petition identified growing awareness of financial risks posed by climate change, and potential violations of selective disclosure law).

51. See *supra* notes 20–40 and accompanying text (discussing the potential consequences of noncompliance with a Martin Act investigation).

52. See *Informing Investors of Climate Risk: the Impact of Securities Law in the Environmental Context*, 46 ENVTL. L. REP. NEWS & ANALYSIS 10455, 10459–62 (2016) [hereinafter *Informing Investors of Climate Risk*] (summarizing each of the settlement agreements and commenting on Cuomo's actions).

53. See Hart, *supra* note 37, at 105–11 (explaining the interrelated timeline of Cuomo's Martin Act investigations and petitions to the SEC).

54. See *Informing Investors of Climate Risk*, *supra* note 52, at 10459 (commenting that the settlement agreements were focused solely on the adequacy of disclosures in the SEC context).

55. See *id.* at 10460 (noting that a settlement brokered by Eric Schneiderman against a coal company differed from Cuomo's because it included much more detailed public findings and actual allegations of violations of the Martin Act).

56. See Brendan Nyhan, *The Limits of the 'Tobacco Strategy' on Climate Change*, N.Y. TIMES (Nov. 6, 2015), <https://www.nytimes.com/2015/11/07/upshot/the-limits-of-the-tobacco-strategy-on-climate-change.html> (last visited Mar. 3, 2017) (assessing the parallels and differences between Eric

*B. History of U.S. Tobacco Litigation and Plaintiff's Tactics*

*1. Early Tobacco Litigation*

In the mid-1950s, two research groups published scientific studies that presented strong evidence linking cigarette smoking to health hazards.<sup>57</sup> With the publication of this evidence, a grueling six-decade-long battle against tobacco companies began.<sup>58</sup> Responding to these studies, the tobacco industry began to implement a “sophisticated disinformation campaign designed to deceive the public about hazards of smoking,”<sup>59</sup> while also conceiving litigation tactics to protect themselves in the courts.<sup>60</sup> The defensive tactics focused heavily on burdening plaintiff’s counsel through delay and evasiveness, while also driving up litigation costs for plaintiff’s counsel.<sup>61</sup> Tobacco companies achieved much of this delay and obfuscation through resisting all discovery attempts, which lead to extensive battles over motions, court hearings, and protective orders.<sup>62</sup>

For much of the history of tobacco litigation, the tactics proved to be fruitful and plaintiffs saw little success.<sup>63</sup> The first “wave” of

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Schneiderman’s investigation into Exxon Mobil and strategies previously used by tobacco opponents) (on file with the Washington and Lee Law Review).

57. See generally E.L. Wynder & E.A. Graham, *Experimental Production of Carcinoma with Cigarette Tar*, 13 *CANCER RES.* 855 (1953); R. Doll & A.B. Hill, *A Study of Aetiology of Carcinoma of the Lung*, 2 *BRIT. MED. J.* 1271 (1952).

58. See Michael V. Ciresi, Roberta B. Walburn & Tara D. Sutton, *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 *WM. MITCHELL L. REV.* 477, 482 (1999) (tracing the beginnings of tobacco litigation back to the 1950s).

59. SETH SHULMAN, CLIMATE ACCOUNTABILITY INST., ESTABLISHING ACCOUNTABILITY FOR CLIMATE CHANGE DAMAGES: LESSONS FROM TOBACCO CONTROL 5, 8 (2012), <http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf> [hereinafter SHULMAN, ESTABLISHING ACCOUNTABILITY].

60. See Ciresi, Walburn, & Sutton, *supra* note 58, at 480–82 (1999) (providing in depth discussion of the history of tobacco litigation and tactics).

61. See *id.* at 481–82 (listing examples of delaying tactics, such as excessive depositions and bombarding plaintiff’s counsel with massive amounts of useless information).

62. See *id.* (remarking that even when discovery proceeded, tobacco company counsel would pursue confidentiality orders to shield their disclosures).

63. See Arthur B. LeFrance, *Tobacco Litigation: Smoke, Mirrors, and Public Policy*, 26 *AM. J.L. & MED.* 187, 190 (2000) (“From 1954 to 1994, a period of forty years, approximately 813 claims were filed by private citizens in tort actions in

litigation against tobacco companies consisted mostly of personal injury suits by individual smokers following the publication of scientific studies in the 1950s.<sup>64</sup> Faced with the tobacco companies' defensive tactics—most notably stunting access to internal documents—plaintiffs struggled to prove a causal linkage between smoking and lung cancer.<sup>65</sup> The second “wave” of tobacco litigation began in the 1980s, which plaintiffs again brought as personal injury suits.<sup>66</sup> These cases struggled to achieve victory as the tobacco industry shifted its collective argument to a “common knowledge defense,” asserting that smoking hazards were a known fact and smokers who continued smoking were engaged in “freedom of choice.”<sup>67</sup>

Despite limited progress, the second era of cases did achieve one noteworthy victory in the discovery process.<sup>68</sup> In *Cipollone v. Liggett Group Inc.*,<sup>69</sup> the plaintiff succeeded on a pretrial motion compelling the tobacco industry to release “thousands of pages of confidential internal documents” that showed the existence of a conspiracy to “prevent the release of damaging information on the health hazards of cigarette smoking.”<sup>70</sup> Although *Cipollone* and its companion case *Haines v. Liggett Group, Inc.*<sup>71</sup> were eventually

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state court against tobacco companies. Only twice did courts find in favor of the plaintiff . . .”).

64. See Ciresi, Walburn & Sutton, *supra* note 58, at 482–86 (detailing the results of early attempts to litigate against tobacco companies).

65. See *id.* (noting that in one such unsuccessful case, *Latrigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963), access to R.J. Reynolds' internal documents, which contained acknowledgement by company scientists that data confirms a relationship between smoking and cancer, could have altered the verdict in the trial).

66. See *id.* at 485 (pointing out that this wave of cases arose in the wake of the surgeon general's reports and the federally-mandated warning labels on cigarettes).

67. Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 870 (1992).

68. See Ciresi, Walburn & Sutton, *supra* note 58, at 486–87 (“These documents offered the first glimpse of the treasures that would be found in the industry's files.”).

69. 683 F. Supp. 1487 (D.N.J. 1998).

70. Christine Hatfield, *The Privilege Doctrines—Are They Just Another Discovery Tool Utilized by the Tobacco Industry to Conceal Damaging Information?*, 16 PACE L. REV. 525, 565 (1996).

71. 140 F.R.D. 681 (D.N.J. 1992).

vacated on appeal,<sup>72</sup> they served as the “first indications of the extent of the role of tobacco company lawyers in shielding documents from discovery on improper claims of privilege.”<sup>73</sup> This small discovery victory would prove to be influential on tactics attorneys employed against the tobacco industry in later cases.<sup>74</sup>

## 2. Changing Strategy in Recent Tobacco Litigation

In 1994, new information regarding the tobacco industry’s conduct came to light through hearings before the U.S. House of Representatives and disclosures from the U.S. Food and Drug Administration.<sup>75</sup> Additionally, Merrell Williams, a paralegal for a firm representing tobacco company Brown & Williamson, publicly leaked reams of the company’s internal documents.<sup>76</sup> In light of these new findings, a third “wave” of litigation began.<sup>77</sup> This string of cases, however, differed significantly from past litigation because it was not limited to individual claims; rather these cases included states “seeking wide-scale injunctive relief and to recover the costs to the state for medical care for injured smokers.”<sup>78</sup> The State of Minnesota—joined by Blue Cross and Blue Shield of Minnesota and with Attorney General Hubert Humphrey’s backing—filed a complaint against the tobacco industry,<sup>79</sup> alleging

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72. See *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 92–94 (3d Cir. 1992), *vacating* 140 F.R.D. 681 (D.N.J. 1992) (finding that the District Court improperly exercised its reconsideration function under the Federal Magistrate Act when it considered evidence not originally before the magistrate judge).

73. Ciresi, Walburn & Sutton, *supra* note 58, at 487.

74. *Infra* notes 81–84 and accompanying text.

75. See Ciresi, Walburn & Sutton, *supra* note 58, at 488 (remarking that the hearings were chaired by U.S. Representative Henry Waxman).

76. See *id.* at 487 (elaborating on the extent of the conduct exposed by the “Merrell Williams Documents,” which showed manipulation of the scientific record and promotion of a controversy over the linkage between smoking and disease).

77. *Supra* notes 53–73 and accompanying text.

78. See Ciresi, Walburn & Sutton, *supra* note 58, at 487–88 (indicating that this third wave of litigation also included large class action suits on behalf of smokers).

79. See *Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 491 (Minn. 1996) (listing Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, B.A.T. Industries P.L.C., Lorillard Tobacco Company, The American Tobacco Company, Liggett Group, Inc., the Council for

a “50-year long conspiracy to defraud America about the hazards of smoking, to stifle development of safer cigarettes, and to target children as new customers.”<sup>80</sup>

Recognizing the tremendous value of internal industry documents, the Minnesota legal team focused their tactics from the start on using the legal discovery process to gain access to internal documents and bring them to public light.<sup>81</sup> The battle to obtain these documents was unprecedented—the industry constantly fought disclosure, which forced Minnesota to bring countless motions to compel.<sup>82</sup> Moreover, the industry undertook extensive efforts to hide documents from discovery, such as “listing them under different corporate entities, ‘laundering’ scientific documents by passing them through attorneys in order to claim attorney-client privilege, and playing word games in order to claim they didn’t have any documents on the topics sought by plaintiff.”<sup>83</sup>

Minnesota’s arduous fight to pursue this strategy ultimately compelled the disclosure of some thirty-five million pages of internal industry documents.<sup>84</sup> These documents were crucial to advancing Minnesota’s claims and helped shift the focus of litigation toward investigation into the industry’s conduct.<sup>85</sup> After

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Tobacco Research, and the Tobacco Institute as defendants).

80. *Minnesota Litigation and Settlement*, PUB. HEALTH L. CTR. <http://publichealthlawcenter.org/topics/tobacco-control/tobacco-control-litigation/minnesota-litigation-and-settlement> (last visited Mar. 3, 2017) (on file with the Washington and Lee Law Review); *see also e.g.*, Ciresi, Walburn & Sutton, *supra* note 58, at 487–88 (commenting that Blue Cross and Blue Shield of Minnesota “was the first private payer of health care costs to sue the industry”).

81. *See* SHULMAN, ESTABLISHING ACCOUNTABILITY, *supra* note 59, at 8 (explaining that Minnesota Attorney General Humphrey received criticism for emphasizing the importance of obtaining internal documents during the litigation).

82. *See* Ciresi, Walburn & Sutton, *supra* note 58, at 489–518 (detailing each distinct battle between Minnesota and the cigarette industry through the discovery process in *Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490 (Minn. 1996)).

83. *See* SHULMAN, ESTABLISHING ACCOUNTABILITY, *supra* note 59, at 8 (citing a statement by one of the key litigators in *Humphrey*, Roberta Walburn, that during pre-trial discovery, Philip Morris was spending around \$1.2 million every week in legal defense).

84. *See* Ciresi, Walburn & Sutton, *supra* note 58, at 489 (observing that prior to the Minnesota litigation, only several million documents had been produced industry wide, almost all after 1981).

85. *See* SHULMAN, ESTABLISHING ACCOUNTABILITY, *supra* note 59, at 8 (“As

a fifteen-week trial, the case settled before submission to the jury.<sup>86</sup> Perhaps even more importantly, the release of documents exposed the tobacco industry's lies and deceitful practices to the public.<sup>87</sup> With the public perception of the tobacco industry shifting, these documents would become a crucial component of later actions against the tobacco industry.

### *3. The Culmination of Tobacco Litigation: United States v. Philip Morris USA Inc.*

The release of documents in *Humphrey v. Philip Morris, Inc.*<sup>88</sup> opened a massive record of information which exposed the tobacco industry's use of deceitful and manipulative practices over several decades.<sup>89</sup> From these facts, litigators could lay an evidentiary foundation for charges of conspiracy or racketeering against the tobacco industry.<sup>90</sup> The potential to assert these charges came to fruition in 1999, when the United States Department of Justice filed suit against several tobacco companies for fraudulent and unlawful conduct under the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>91</sup> Relying heavily on the documents

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Roberta Walburn explained, their legal team was able to say to the judge and jury, 'You don't have to believe us or our experts; just look at the companies' own words.'").

86. See *Minnesota Litigation and Settlement*, *supra* note 80 (remarking that the settlement still stands as the fourth largest legal settlement in history).

87. See SHULMAN, ESTABLISHING ACCOUNTABILITY, *supra* note 59, at 9 (recognizing that the information gleaned from the document release became front-page news).

88. 551 N.W.2d 490 (Minn. 1996).

89. See SHULMAN, ESTABLISHING ACCOUNTABILITY, *supra* note 59, at 9 ("Formerly secret documents revealed that the heads of tobacco companies had colluded on a disinformation strategy as early as 1953.").

90. See *id.* at 9 (acknowledging the importance of these potential charges in later tobacco litigation).

91. 18 U.S.C. §§ 1961–68 (2012). See *United States v. Philip Morris (DOJ Lawsuit)*, PUB. HEALTH L. CTR, <http://publichealthlawcenter.org/topics/tobacco-control/tobacco-control-litigation/united-states-v-philip-morris-doj-lawsuit> (last visited Mar. 3, 2017) (noting that the DOJ also sued for reimbursement of tobacco-related medical expenses, however, these claims were dismissed) (on file with the Washington and Lee Law Review). The Racketeer Influenced and Corrupt Organizations Act (RICO) was passed by Congress in 1970 with the intent of eradicating organized criminal activity and "preserve marketplace integrity by investigating, controlling, and prosecuting persons who participate or conspire to



obtained through the Minnesota litigation, the DOJ alleged that the tobacco companies had:

engaged in a decades-long conspiracy to (1) mislead the public about the risks of smoking, (2) mislead the public about the danger of secondhand smoke; (3) misrepresent the addictiveness of nicotine, (4) manipulate the nicotine delivery of cigarettes, (5) deceptively market cigarettes characterized as “light” or “low tar,” while knowing that those cigarettes were at least as hazardous as full flavored cigarettes, (6) target the youth market; and (7) not produce safer cigarettes.<sup>92</sup>

Following extensive litigation, the U.S. District Court for the District of Columbia issued a 1,683 page opinion finding Philip Morris and other tobacco companies guilty of violating RICO by fraudulently covering up the health risks associated with smoking and marketing their products to children.<sup>93</sup> The tobacco companies filed an appeal to the U.S. Court of Appeals for the District of Columbia Circuit; after review, however, the three-judge panel unanimously upheld the District Court’s decision.<sup>94</sup> Reflecting on what is viewed as monumental victory for tobacco control, litigators involved in *United States v. Philip Morris USA Inc.* continue to note the importance that internal documents played in the outcome of the case, especially those obtained from the Minnesota litigation.<sup>95</sup>

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participate in racketeering.” *Racketeer Influenced and Corrupt Organizations Act*, BLACK’S LAW DICTIONARY (10th ed. 2014). While generally associated with combatting organized criminal operations, the law applies broadly to any habitual criminal action that occurs in interstate commerce. *See id.* (citing to David R. McCormack’s explanation that two or more acts of racketeering shown in a complaint constitutes a pattern of racketeering activity necessary to attach liability under RICO).

92. *Id.*

93. *See United States v. Philip Morris USA Inc.*, 499 F. Supp. 2d 1 (D.D.C. 2006) (“As set forth in these Final Proposed Findings of Fact, substantial evidence establishes that Defendants have engaged in and executed—and continue to engage in and execute—a massive 50-year scheme to defraud the public, including consumers of cigarettes, in violation of RICO.”), *aff’d in part, vacated in part*, 566 F.3d 1095 (D.C. Cir. 2009), *and order clarified*, 778 F. Supp. 2d 8 (D.D.C. 2011).

94. *See United States v. Philip Morris USA Inc.*, 566 F.3d 1095 (D.C. Cir. 2009) (upholding the district court’s decision but vacating some of the additional remedies sought).

95. *See SHULMAN, ESTABLISHING ACCOUNTABILITY*, *supra* note 59, at 9 (referencing comments by Sharon Eubanks, one of the central litigator of the case).

Former tobacco litigators also recognize that obtaining these internal documents through discovery is a long and arduous process.<sup>96</sup> As the litigation war against Big Tobacco continues, and activist litigators consider new targets, it's unsurprising that these actors have considered ways to speed up the process.<sup>97</sup> Just as state attorneys general played a breakthrough role in the fight against big tobacco, perhaps they could also play a role in “improving” tobacco tactics through their subpoena powers under statutes like the Martin Act.<sup>98</sup>

### III. “Oil is the New Tobacco:” Tracing the Origins of the ExxonMobil Investigation

In January 2007, the Union of Concerned Scientists published a sixty four page report documenting ExxonMobil's alleged use of disinformation tactics—similar to those used by the tobacco industry—to mislead the public and create uncertainty surrounding the science of climate change.<sup>99</sup> Only five months removed from the verdict in *United States v. Philip Morris*,<sup>100</sup> the report made substantial comparisons between ExxonMobil and Big Tobacco, declaring that “ExxonMobil has underwritten the most

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96. See Lincoln Caplan, *Will the “Tobacco Strategy” Work Against Big Oil?*, NEW YORKER (Nov. 17, 2015), <http://www.newyorker.com/news/news-desk/will-the-tobacco-strategy-work-against-big-oil> (last visited Mar. 3, 2017) (pointing out that the grueling effort and time that has been invested into tobacco litigation, which is entering its seventh decade) (on file with the Washington and Lee Law Review).

97. See *id.* (commenting that a “fourth wave” of tobacco litigation has already begun, even though third wave tobacco litigation cases are still ongoing).

98. See Part III.A (discussing how tobacco litigators and climate activists conceived the idea of combining attorney general subpoena power with the tobacco litigation goal of exposing industry internal documents).

99. See SETH SHULMAN, UNION OF CONCERNED SCIENTISTS, *SMOKE, MIRRORS & HOT AIR: HOW EXXONMOBIL USES BIG TOBACCO'S TACTICS TO MANUFACTURE UNCERTAINTY ON CLIMATE SCIENCE* 1–2 (2007), [http://www.ucsusa.org/sites/default/files/legacy/assets/documents/global\\_warming/exxon\\_report.pdf](http://www.ucsusa.org/sites/default/files/legacy/assets/documents/global_warming/exxon_report.pdf) [hereinafter SHULMAN, *SMOKE, MIRRORS & HOT AIR*] (identifying the Union of Concerned Scientists as a Massachusetts-based non-profit focused on environmental health that “combines independent scientific research and citizen action to develop innovative, practical solutions and secure responsible changes in government policy, corporate practices, and consumer choices”).

100. 499 F. Supp. 2d 1 (D.D.C. 2006); *supra* Part II.C.2.

sophisticated and successful disinformation campaign since Big Tobacco misled the public about the incontrovertible scientific evidence linking smoking to lung cancer and heart disease.”<sup>101</sup> According to the report, ExxonMobil utilized its vast resources and government access to promote scientific uncertainty, shift political focus, and create doubt among the public.<sup>102</sup> Specifically, the report cited Exxon’s funneling of \$16 million between 1998 and 2005 to some forty think tanks and advocacy groups that raised doubts about the scientific consensus that carbon dioxide and other heat-trapping emissions cause global warming.<sup>103</sup> Despite the negative publicity that resulted from the report’s publication, any notion of pursuing the fossil fuel industry as the next tobacco remained mostly quiet.<sup>104</sup>

*A. Conceiving the Possibilities of Tobacco Tactics and  
Attorney General Powers*

In 2012, these notions became more than a mere possibility. In June 2012, scientists, academics, and lawyers descended on La Jolla, California, for a workshop hosted by the Union of Concerned Scientists together with the Climate Accountability Institute.<sup>105</sup> Titled “The Workshop on Climate Accountability, Public Opinion, and Legal Strategies” (“The La Jolla Conference”), the conference sought to “compare the evolution of public attitudes and legal strategies related to tobacco control with those related to anthropogenic climate change.”<sup>106</sup> The workshop focused on assessing the question of holding private entities liable for the effects of climate change.<sup>107</sup>

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101. SHULMAN, SMOKE, MIRRORS, & HOT AIR, *supra* note 99, at 3.

102. *See id.* at 1 (contending that ExxonMobil adopted the tobacco tactic of public supporting organizations which attempted to better understand climate science to “cover” its funding of organizations that seek to confuse understanding).

103. *See id.* at 3 (asserting that many of these organizations have an overlapping collection of staff, board members, and scientists).

104. *See* Barrett & Philips, *supra* note 2 (“The idea of ‘making oil the next tobacco’ percolated quietly for several years and reemerged in June 2012 . . .”).

105. SHULMAN, ESTABLISHING ACCOUNTABILITY, *supra* note 59, at 3 (introducing the workshop generally before an in-depth discussion of its findings).

106. *Id.*

107. *See id.* (describing the general purpose for convening the La Jolla

The results of the workshop were twofold. First, the participants emphasized the importance of building a catalogue of peer-reviewed research on individual corporation's contributions to climate change.<sup>108</sup> This research would have present value in the ongoing battle of public opinion while having future value as part of the groundwork of liability in future legal action.<sup>109</sup> Second, the attendees concluded that while there are multiple strategies for holding private entities liable, the key to altering public opinion and laying the groundwork for eventual legal victory was obtaining and publicizing internal corporate documents.<sup>110</sup> Specifically, the participants recognized the breakthrough role internal documents played in tobacco litigation.<sup>111</sup> Drawing parallels between the tobacco and fossil fuel industries, "many participants suggested that incriminating documents may exist that demonstrate collusion among the major fossil fuel companies, trade associations, and other industry sponsored groups."<sup>112</sup> Indeed, as one participant remarked "the tobacco fight is now the climate fight."<sup>113</sup>

The La Jolla conference was not focused solely on assessing the potential of utilizing tobacco litigation strategies—it also sought to improve these strategies. Recognizing discovery is a lengthy process, lawyers present at the workshop emphasized

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Conference).

108. See Elana Schor & Andrew Restuccia, *Exxon Scrambles to Contain Climate Crusade*, POLITICO (May 9, 2016, 5:28 AM), <http://www.politico.com/story/2016/05/exxon-climate-campaign-222920> (last visited Mar. 3, 2017) (identifying the La Jolla Conference as the conceiving event of these tactics in a climate context) (on file with the Washington and Lee Law Review).

109. See *id.* (quoting Center for International Environmental Law president Carroll Muffett as remarking that "[f]or a long time, fossil fuel companies have benefitted from the idea that everyone is responsible for climate change—and if everyone is responsible, then nobody is responsible").

110. See SHULMAN, ESTABLISHING ACCOUNTABILITY, *supra* note 59, at 11 (listing a variety of legal strategies, such as filing lawsuits under public nuisance laws or claims of libel).

111. See *id.* at 7–10 (extensively discussing the development of tactics used to expose tobacco companies, the timeline these tactics generally follow, and the potential applicability of these tactics to climate change scenarios).

112. *Id.* at 9.

113. *Id.*

alternative avenues to gain access to internal documents.<sup>114</sup> Specifically, they noted that through a single sympathetic state attorney general and her subpoena powers, there was potential to gain significant access to documents.<sup>115</sup> Despite the conference facilitating these discussions and findings, it would still be years before any major internal documents surfaced.<sup>116</sup>

### *B. The Exposure of ExxonMobil*

These documents, however, did not surface from the work of a prosecutor or congressman, but rather from work of journalists. In September and October of 2015, *InsideClimate News* and the *Los Angeles Times* published reports (“the reports”) claiming that Exxon scientists had known about the implications of climate change and its environmental effects as far back as the 1970s, and further, that Exxon’s executives deliberately mislead the public about these findings.<sup>117</sup> Citing internal company documents, the news organizations reported that despite company scientists making findings regarding climate science, top Exxon executives were publicly raising doubts about these same sorts of findings by

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114. See *id.* at 11 (recognizing the potential of using congressional hearings as a means of obtaining access to internal documents).

115. See *id.* (“In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.”).

116. See Barrett & Philips, *supra* note 104 (reporting on the timeline leading up to ExxonMobil coming under scrutiny for climate change controversy).

117. See *id.* (noting that overlapping reports were released in the months immediately leading up to international climate talks in Paris); see also Neela Banerjee, Lisa Song & David Hasemyer, *Exxon: The Road Not Taken, Part 1: Exxon’s Own Research Confirmed Fossil Fuels’ Role in Global Warming Decades Ago*, INSIDECLIMATE NEWS (Sept. 16, 2015), <https://insideclimatenews.org/news/15092015/Exxons-own-research-confirmed-fossil-fuels-role-in-global-warming> (last visited Mar. 3, 2017) (covering four decades of Exxon’s engagement with emerging climate science through internal company documents, interviews with former employees, and other primary sources) (on file with the Washington and Lee Law Review); Sara Jerving, Katie Jennings, Masako Melissa Hirsch & Susanne Rust, *What Exxon Knew About Earth’s Melting Arctic*, L.A. TIMES (Oct. 9, 2015), <http://graphics.latimes.com/exxon-arctic/#about> (last visited Mar. 3, 2017) (reporting on the gap ExxonMobil’s public position regarding climate change and its internal planning on issues of climate change) (on file with the Washington and Lee Law Review).

the 1990s.<sup>118</sup> Additionally, the *Los Angeles Times* piece presented evidence that, throughout the 1990s, Exxon relied on climate change projections when it altered its Arctic exploration plans, while publicly undermining and denying such projections.<sup>119</sup>

As expected, the reports “sparked waves of internet outrage, some mainstream media moralizing, and the Twitter hashtag #ExxonKnew.”<sup>120</sup> Entering damage control mode, Exxon’s public-relation’s staff began holding daily meetings to craft a response plan to contain the issue.<sup>121</sup> Before Exxon could properly begin to respond, however, the momentum surrounding the controversy began picking up steam. On October 14, 2015, Democratic Representatives Ted Lieu and Mark DeSaulnier of California sent a letter to U.S. Attorney General Loretta Lynch requesting the Department of Justice investigate whether Exxon’s alleged misinformation practices had violated federal law.<sup>122</sup> The situation was further amplified two weeks later, when 2016 Democratic presidential candidate Hilary Clinton voiced her support for a Justice Department investigation during a New Hampshire Town Hall.<sup>123</sup>

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118. See Banerjee, Song & Hasemyer, *supra* note 117 (quoting then-CEO and Chairman of Exxon, Lee Raymond, arguing in 1997 against the Kyoto Protocols, which were created as a step toward curbing emissions).

119. See Jerving, Jennings, Hirsch & Rust, *supra* note 117 (interviewing former ExxonMobil scientists who studied the potential impact of climate change on infrastructure and business prospecting in the Arctic).

120. Barrett & Philips, *supra* note 104.

121. See *id.* (quoting one Exxon public affairs executive as remarking “We all sat around the table and said ‘This feels very orchestrated’ . . .”).

122. See *Reps Lieu, DeSaulnier Request Investigation Into Allegations of ExxonMobil Deception on Climate Change*, OFFICE OF UNITED STATES REPRESENTATIVE TED LIEU (Oct. 16, 2015), <https://lieu.house.gov/media-center/press-releases/rep-lieu-desaulnier-request-investigation-allegations-exxonmobil> (last visited Mar. 3, 2017) (remarking in the attached letter to U.S. Attorney General Loretta Lynch that the actions allegedly taken by Exxon resemble those used by Big Tobacco) (on file with the Washington and Lee Law Review).

123. See Timothy Cama, *Hillary Joins Calls for Federal Probe of Exxon Climate Change Research*, THE HILL (Oct. 29, 2015, 4:22 PM), <http://thehill.com/policy/energy-environment/258589-clinton-joins-calls-for-federal-probe-of-exxon> (last visited Mar. 3, 2017) (citing a quote from Hilary Clinton noting “[t]here’s a lot of evidence they [Exxon] misled people”) (on file with the Washington and Lee Law Review).

Shortly after Clinton's comments, Exxon lobbyists descended on the congressional offices of House Democrats, including representative Lieu.<sup>124</sup> During their visits, "[t]he lobbyists handed out a 10-page presentation titled *Managing Climate Change Risks*," while conveying the message that Exxon "believes in climate change and that its being caused by humans, and we support a carbon tax."<sup>125</sup> Additionally, Exxon attempted to turn the tables on its accusers by alleging the company was the target of a politically motivated conspiracy.<sup>126</sup> In a twist of irony, the company pointed to the Rockefeller family—the same Rockefeller family whose John D. Rockefeller founded Exxon forerunner Standard Oil—as the orchestrator of the alleged conspiracy.<sup>127</sup> Pointing to funding the family's charities provided to both the *Los Angeles Times* and *InsideClimate*, Exxon attacked the role of the Rockefellers in encouraging campaigns against it.<sup>128</sup> While both journalistic organizations were quick to respond that their donors have no editorial control, Exxon and policy groups continued to attack the perceived conflict of interest.<sup>129</sup>

Despite its attempts at damage control, the anti-Exxon sentiment surrounding the controversy only intensified. On October 30, forty environmental and social justice groups submitted a letter to Attorney General Lynch demanding a racketeering probe into Exxon's alleged actions.<sup>130</sup> Additionally, Representatives Lieu and

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124. See Schor & Restuccia, *supra* note 108 (quoting multiple representatives summarization of their meeting with Exxon representatives).

125. Barrett & Philips, *supra* note 104.

126. See John Schwartz, *Exxon Mobil Accuses the Rockefellers of a Climate Conspiracy*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/21/science/exxon-mobil-rockefellers-climate-change.html> (last visited February 9, 2017) (reporting on the back-and-forth accusations between Exxon and the alleged groups conspiring against them) (on file with the Washington and Lee Law Review).

127. See *id.* (quoting one Rockefeller descendant as acknowledging the "obvious historical irony").

128. See *id.* (pointing out that Rockefeller funds also provide support to other organizations that have been critical of Exxon, such as Greenpeace).

129. See *id.* ("Breitbart News has called the investigation of Exxon a 'RICO conspiracy,' using the acronym for the federal racketeering law, and the industry-oriented site Natural Gas Now published an article declaring, 'It's time to RICO the Rockefellers.'").

130. See Barrett & Philips, *supra* note 104 (listing the Environmental Defense Fund, Sierra Club, and Natural Resources Defense Council as some of the

DeSaulnier approached the Securities and Exchange Commission that same day, requesting a fraud probe against Exxon.<sup>131</sup> It became apparent that the tide against ExxonMobil was only rising, when on November 4, 2015, New York Attorney General Eric Schneiderman initiated an investigation to determine whether Exxon Mobil had lied to the public or investors about the risks of climate change.<sup>132</sup> Relying on the Martin Act, Schneiderman issued a subpoena demanding extensive internal financial records, emails, and other documents from a period spanning nearly four decades.<sup>133</sup>

*C. The Convergence of Tobacco Litigation Strategy, the Martin Act, and ExxonMobil*

The use of the Martin Act to investigate a company in the energy industry was not a novel or overly contentious endeavor given past investigations under Andrew Cuomo.<sup>134</sup> What was novel, and ultimately gave rise to the storm of controversy that merits this Note's discussion, were the events that unfolded in the months following Schneiderman's investigation. On March 29, 2016, Attorney General Eric Schneiderman convened a press conference to announce the formation of an "unprecedented

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organizations that signed onto the letter).

131. See *id.* (noting that as of the writing of the article, that probe request was still pending, and that Attorney General Lynch had since requested the FBI to examine whether the federal government should initiate an investigation).

132. See Justin Gillis & Clifford Krauss, *Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General*, N.Y. TIMES (Nov. 5, 2015), <http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html> (last visited Mar. 3, 2017) (reporting that the investigation is focused on statements the company made to investors about climate risks) (on file with the Washington and Lee Law Review).

133. See Timothy Cama, *Exxon Reveals Subpoena in New York Climate Change Case*, THE HILL (Oct. 24, 2016, 10:50 AM), <http://thehill.com/policy/energy-environment/302463-exxon-reveals-subpoena-in-new-york-climate-change-case> (last visited Mar. 3, 2017) (noting some of the documents demanded are related to research conducted by Exxon regarding the causes and effects of global warming) (on file with the Washington and Lee Law Review).

134. See *supra* notes 45–56 and accompanying text (discussing former Attorney General Andrew Cuomo's investigations into energy companies under the Martin Act).



coalition” of top state law enforcement officials.<sup>135</sup> The coalition, comprised of seventeen Attorneys General and former Vice President Al Gore, vowed to use its collective arsenal of investigatory tools to aggressively defend and further build upon the progress made by President Obama in combatting climate change.<sup>136</sup> This press conference signaled the “coming out party” for a growing number of state attorneys general who had joined Schneiderman in initiating investigations aimed at ExxonMobil, claiming that the company may have misled the public and investors about its own knowledge of climate change dangers.<sup>137</sup>

The announcement came at the end of a daylong event Schneiderman organized to educate his fellow attorneys general on his investigation into Exxon.<sup>138</sup> As the comments from the other attorneys general at the press conference showed, Exxon was certainly on their minds in making the announcement. Massachusetts Attorney General Maura Healy, who issued her own subpoena to Exxon shortly after, remarked that “fossil fuel companies that deceived investors and consumers about the dangers of climate change should be—must be—held accountable.”<sup>139</sup> “We can all see the troubling disconnect,” she

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135. A.G. Schneiderman, *Former Vice President Al Gore and a Coalition of Attorneys General from Across the Country Announce Historic State-Based Effort to Combat Climate Change*, N.Y. STATE OFFICE OF THE ATTORNEY GEN. (Mar. 29, 2016), <http://www.ag.ny.gov/press-release/ag-schneiderman-former-vice-president-al-gore-and-coalition-attorneys-general-across> (last visited Mar. 3, 2017) [hereinafter *Schneiderman Announcement*] (on file with the Washington and Lee Law Review).

136. *See id.* (quoting former Vice President Al Gore as declaring “Attorney General and law enforcement officials around the country have long held a vital role in ensuring that the progress we have made to solve the climate crisis is not only protect, but advanced”).

137. John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies*, N.Y. TIMES (Mar. 3, 2016), <http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html> (last visited Mar. 3, 2017) [hereinafter Schwartz, *Climate Change Inquiry Gains Allies*] (reporting that attorneys general from Vermont, Maryland, Massachusetts, Virginia, Connecticut and the Virgin Islands attended) (on file with the Washington and Lee Law Review).

138. *See* Wade, *infra* note 159 (covering the events of the meeting and referencing a statement by the New York Attorney General’s Office that the office routinely collaborates with other states and receives input from outside organizations).

139. Jeff Jacoby, *Healey’s Exxon Investigation Runs Into the Bill of Rights*, BOSTON GLOBE (Dec. 11, 2016), <https://www.bostonglobe.com/opinion>

continued, “between what Exxon knew, what industry folks knew, and what the company and industry chose to share with the investors and with the American public.”<sup>140</sup> The statements of Schneiderman, Gore, and many of the other attorneys general present echoed these sentiments.<sup>141</sup> Notably, Al Gore went as far as analogizing the coalition to the actions taken against tobacco companies in the late 1990s.<sup>142</sup>

With the announcements by Massachusetts and the U.S. Virgin Islands that they would join New York and California<sup>143</sup> with parallel investigations into internal documents, Exxon’s belief that a conspiracy was forming against them largely felt confirmed.<sup>144</sup> Expectedly, Exxon and its supporters publicly rebuked the validity of the investigations.<sup>145</sup> The critic’s rationales were sweeping—ranging from allegations of a politically-

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/editorials/2016/12/11/healey-exxon-investigation-runs-into-bill-rights/2bUcNHtZjvbs07YZIxFkJ/story.html (last visited Mar. 3, 2017) (on file with the Washington and Lee Law Review).

140. *Id.*

141. See *Schneiderman Announcement*, *supra* note 135 (quoting U.S. Virgin Islands Attorney General Earl Walker as saying “If Exxon Mobil has tried to cloud [the public’s] judgement, we are determined to hold the company accountable”).

142. See Schwartz, *Climate Change Inquiry Gains Allies*, *supra* note 137 (noting that Gore emphasized how crucial state attorneys general had been to that effort).

143. California Attorney General Kamala Harris had launched her own probe into ExxonMobil in January, prior to the New York press conference. See Ivan Penn, *California to Investigate Whether Exxon Mobil Lied About Climate Change Risks*, L.A. TIMES (Jan. 20, 2016, 3:00 AM), <http://www.latimes.com/business/la-fi-exxon-global-warming-20160120-story.html> (last visited Mar. 3, 2017) (reporting that U.S. Representative for California Ted Lieu praised the move) (on file with the Washington and Lee Law Review).

144. See Barrett & Philips, *supra* note 104 (“Exxon executives say their view of #ExxonKnew as a conspiracy was confirmed by the gathering of 15 state attorneys general and Gore in New York on March 29.”).

145. See Katie Brown, *Greens’ Attempt to Tie Big Tobacco with American Oil: An Absurd Apples-and-Snickers Bars Comparison*, ENERGY IN DEPTH (June 22, 2016, 12:12 PM), <https://energyindepth.org/national/greens-attempt-to-tie-big-tobacco-with-american-oil-an-absurd-apples-and-snickers-bars-comparison/> (last visited Mar. 3, 2017) (sampling the criticisms leveled at the attorneys general and the validity of their investigations) (on file with the Washington and Lee Law Review)

motivated conspiracy<sup>146</sup> to improper use of subpoena power<sup>147</sup>— and even violation of the first amendment.<sup>148</sup> Some legal scholars expressed skepticism about the legal strategy of the attorneys general, such as Vermont Law School professor Pat Parenteau’s remark that “[t]he most serious question is whether the attorney general has any basis to suspect that Exxon has engaged in activities that violate that statues about obtaining money by false pretense and fraud.”<sup>149</sup> Additionally, Columbia Law School

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146. See Marita Noon, *May Free Speech Reign and Scientific Inquiry Prevail*, HEARTLAND INST. (July, 6, 2016), <http://blog.heartland.org/2016/07/may-free-speech-reign-and-scientific-inquiry-prevail/> (last visited Mar. 3, 2017) (remarking that “climate change activists have been secretly coordinating with one another to prosecute individuals, organizations, and companies that are their ideological foes,” and that this coordination includes working with state attorneys general) (on file with the Washington and Lee Law Review).

147. See Philip Hamburger, *A Climate Courtroom Crusade Scorches Due Process*, WALL ST. J. (May 11, 2016, 7:02 PM), <https://www.wsj.com/articles/a-climate-courtroom-crusade-scorches-due-process-1463007726> (last visited Mar. 3, 2017) (criticizing attorneys’ general subpoena power as combining grand-jury and prosecutorial functions, allowing attorneys general like Eric Schneiderman to “engage in roving investigations” that threaten “liberty and due process”) (on file with the Washington and Lee Law Review).

148. See Michael A. Carvin & Yaakov M. Roth, *Op-Ed: AG’s Subpoenas Over Climate Change Flout Constitution*, NAT’L L. J. (Dec. 31, 2015), <http://www.nationallawjournal.com/id=1202746113687/OpEd-AGs-Subpoenas-over-Climate-Change-Flout-Constitution?slreturn=20170121204804> (last visited Mar. 3, 2017) (arguing that the First Amendment protects actors who seek to exercise their right to take positions in active policy debates and prevents the government from punishing speech it disagrees with) (on file with the Washington and Lee Law Review). *But see* John B. Williams, Peter J. Fontaine and Catherine Reilly, *Rebuttal: AG’s Pursuit of Oil Giants is Legally Sound*, NAT’L L. J. (Jan. 25, 2016), <http://www.nationallawjournal.com/id=1202747714889/Rebuttal-AGs-Pursuit-of-Oil-Giants-Is-Legally-Sound> (last visited Mar. 3, 2017) (responding to the previous Op-Ed by arguing that the investigation does not target “falsity alone, but also whether ExxonMobil made deliberately false or misleading statements and/or omissions in order to mislead investors regarding the business impact of climate change”) (on file with the Washington and Lee Law Review).

149. See Bob Simison & David Hasemyer, *Exxon Fights Subpoena in Widening Climate Probe, Citing Violation of Its Constitutional Rights*, INSIDECLIMATE NEWS (Apr. 14, 2016), <https://insideclimateneeds.org/news/13042016/exxon-virgin-islands-subpoena-climate-change-investigation-violates-rights-claude-walker> (last visited Mar. 3, 2017) (referring to the investigation commissioned by U.S. Virgin Islands attorney general Claude Walker) (on file with the Washington and Lee Law Review); *see also* Lincoln Caplan, *Will the “Tobacco Strategy” Work Against Big Oil?*, NEW YORKER (Nov. 17, 2015), <http://www.newyorker.com/news/news-desk/will-the-tobacco-strategy-work-against-big-oil> (last visited Mar. 3, 2017) (“Is the ‘tobacco strategy’ the way to try to document that ExxonMobil fraudulently

Professor Merritt B. Fox questioned whether the information sought by the investigations would have been material enough to investors to find that ExxonMobil's public statements were misleading under the Martin Act, given the market was "well supplied with information about climate change."<sup>150</sup> In a later-published opinion piece, Professor Fox criticized Eric Schneiderman's subpoena as an abuse of his Martin Act powers, considering the disconnect from possible securities violations and the likely motive of seeking corporate documents for public policy reasons.<sup>151</sup>

While Exxon and its supporters were voicing their disapproval, other Exxon-backers immediately went on the offensive.<sup>152</sup> Specifically, the Energy & Environmental Legal Institute (E&E Legal),<sup>153</sup> which has been described as "an anti-environmentalist research machine,"<sup>154</sup> obtained internal email correspondence between the offices of the attorneys general present at the New York conference.<sup>155</sup> The emails revealed that

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deceived the public about climate change and hold the giant energy company accountable? It is a promising but hugely expensive and grueling model.") (on file with the Washington and Lee Law Review).

150. See *Securities Disclosures and Climate Change in View of Peabody and ExxonMobil* (panel discussion), COLUM. L. SCH. SABIN CTR. FOR CLIMATE CHANGE L. (May 25, 2016), [http://www.kaltura.com/index.php/extwidget/preview/partner\\_id/1758691/uiconf\\_id/33931461/entry\\_id/0\\_xr29aj21/embed/auto?&flashvars\[streamerType\]=auto](http://www.kaltura.com/index.php/extwidget/preview/partner_id/1758691/uiconf_id/33931461/entry_id/0_xr29aj21/embed/auto?&flashvars[streamerType]=auto) (last visited Mar. 3, 2017) (raising suspicion over why Eric Schneiderman would pursue a case "so unlikely" to "be a winner" during his remarks at a panel discussion) (on file with the Washington and Lee Law Review).

151. See Merritt B. Fox, *Exxon Mobil is Being Investigated, but Here's the Real Problem*, NAT'L L. J. (Aug. 15, 2016), <http://www.nationallawjournal.com/id=1202765027711/Exxon-Mobil-is-Being-Investigated-But-Heres-the-Real-Problem?slreturn=20160820150633> (last visited Mar. 3, 2017) (positing that it's unlikely that the subpoena will turn up information that could plausibly support an argument that ExxonMobil violated the Martin Act) (on file with the Washington and Lee Law Review).

152. See Schor & Restuccia, *supra* note 108 (listing examples of individuals and groups that went on the offensive in support of Exxon).

153. See *Who We Are*, E&E LEGAL, <https://eelegal.org/who-we-are/> (last visited Mar. 3, 2017) (describing the group's mission as seeking to "address and correct erroneous federal and state government actions that negatively impact energy and the environment").

154. Schor & Restuccia, *supra* note 108.

155. See Christopher C. Horner, *Email Bombshell: Attorneys General Worked with Green Groups to Punish Political Opponents*, COMPETITIVE ENTERPRISE INST.

the New York conference included two undisclosed presentations.<sup>156</sup> The first presentation, on “the imperative of taking action now against climate change,” was led by Peter Frumhoff, director of science and policy for the Union of Concerned Scientists, the same organization that published early reports on Exxon’s alleged use of Big Tobacco tactics to create scientific uncertainty, as well as organized the 2012 La Jolla Conference.<sup>157</sup> “Climate change litigation” was the subject of the second presentation, conducted by Matthew Pawa of Pawa Law Group, P.C., who previously presented at the 2012 La Jolla Conference.<sup>158</sup> Additionally, the emailed revealed that the attorneys general had proposed the possibility of using RICO if Exxon was found to have misled the public, as well as inviting former tobacco litigator Sharon Eubanks to the conference.<sup>159</sup> Given the connection to the

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(Apr. 18, 2016), <https://cei.org/content/email-bombshell-attorneys-general-worked-green-groups-punish-political-opponents> (last visited Mar. 3, 2017) (indicating the emails were obtained via an open records law request to the Vermont state Attorney General’s office) (on file with the Washington and Lee Law Review).

156. *See id.* (referring to an agenda contained in one of the obtained emails, which scheduled forty-five minute windows for each presentation).

157. *Id.*; *see also supra* notes 105–116 and accompanying text (discussing the organization and goals of the 2012 La Jolla Conference).

158. *Id.*; *see also supra* notes 105–116 and accompanying text (focusing on the Conference’s findings regarding tobacco litigation tactics and the potential to port such tactics to other fields).

159. *See* Terry Wade, *U.S. State Prosecutors Met With Climate Groups as Exxon Probes Expanded*, REUTERS (Apr. 15, 2016, 7:21 PM), <http://www.reuters.com/article/us-exxonmobil-states-idUSKCN0XC2U2> (last visited Mar. 3, 2017) (summarizing the contents of the obtained emails) (on file with the Washington and Lee Law Review). The emails also included a “Common Interest Agreement,” in which the signatories agreed to maintain confidentiality and protect as privilege the discussions during the conference. *See* Horner *supra* note 155 (criticizing the agreement as a sign the attorneys general sought to hide their coordination). Critics attached the agreement as a sign that the attorneys general sought to hide their discussions, a criticism bolstered by an email exchange in which a member of Eric Schneiderman’s staff requested that Mr. Pawa not confirm his attendance at the event if asked. *See* Katie Brown, *New Emails Reveal Attorneys General Signed Agreement to Keep #ExxonKnew Strategy Documents Secret*, ENERGY IN DEPTH (July 6, 2016, 4:04 PM), <https://energyindepth.org/national/new-emails-reveal-attorneys-general-signed-agreement-to-keep-exxonknew-strategy-documents-secret/> (last visited Mar. 3, 2017) (quoting Schneiderman’s staff member’s response to Mr. Pawa, asking that “if you speaker to the reporter, [do] not confirm that you attended or otherwise discuss the event”) (on file with the Washington and Lee Law Review).

La Jolla Conference, which had focused on assessing strategies for legal action against the fossil fuel industry—including tactics to obtain internal documents developed during tobacco litigation—allegations of collusion and misconduct abounded.<sup>160</sup>

Despite efforts to beat back these allegations and criticism,<sup>161</sup> Attorney General Schneiderman and his coalition soon found themselves face-to-face with Exxon's response.<sup>162</sup> On April 13, 2016, ExxonMobil filed suit in Texas seeking to block the U.S. Virgin Island's subpoena on the grounds that it was an politically motivated fishing expedition, which violated constitutional amendments on free speech, unreasonable search and seizure, and equal protection.<sup>163</sup> Another suit followed in June, this time

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160. See Margaret A. (Peggy) Little, *The Climate Change Inquisition, Part II—the Scandal Unfolds*, FEDERALIST SOC'Y (Apr. 20, 2016), <http://www.fed-soc.org/blog/detail/the-climate-change-inquisition-part-ii-the-scandal-unfolds> (last visited Mar. 3, 2017) (criticizing the attorneys general alleged collusion as being commissioned in bad faith, outside of their powers, and in violation of the Constitution) (on file with the Washington and Lee Law Review); see also Rich Lowry, *Eric Schneiderman and His Gang of AGs are Trampling the First Amendment*, NAT'L REV. (Apr. 19, 2016 12:00 AM), <http://www.nationalreview.com/article/434219/exxon-climate-change-case-outrageous> (last visited Mar. 3, 2017) (condemning the attorneys general for flaunting their political motives and harassing Exxon's first amendment rights) (on file with the Washington and Lee Law Review).

161. See John Schwartz, *Exxon Mobil Fraud Inquiry Said to Focus More on Future Than Past*, N.Y. TIMES (Aug. 19, 2016), [https://www.nytimes.com/2016/08/20/science/exxon-mobil-fraud-inquiry-said-to-focus-more-on-future-than-past.html?\\_r=0](https://www.nytimes.com/2016/08/20/science/exxon-mobil-fraud-inquiry-said-to-focus-more-on-future-than-past.html?_r=0) (last visited Mar. 3, 2017) (interviewing Eric Schneiderman, who rebukes accusations that he is abusing his prosecutorial powers for political ends) (on file with the Washington and Lee Law Review).

162. See Amy Harder, Devlin Barrett, & Bradley Olson, *Exxon Fires Back in Court Over U.S.'s Climate Probe*, WALL ST. J. (Apr. 14, 2016, 3:08 PM), <https://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535> (last visited Mar. 3, 2017) (reporting on Exxon's first challenge to the state attorneys' general investigations—filing in federal court to block the subpoena issued by the attorney general of the U.S. Virgin Islands) (on file with the Washington and Lee Law Review).

163. See *id.* (citing arguments put forth in the complaint that the subpoena was issued based on an ulterior motive). ExxonMobil's complaint alleged seven causes of action: conspiracy, violation of the company's First, Fourth, and Fourteenth Amendment Rights, violation of the company's rights under the Dormant Commerce Clause, federal preemption, and abuse of process. See First Amended Complaint, *infra* note 165, at 41–47 (seeking a declaratory judgment that the subpoenas violate the causes of action alleged, and a permanent injunction prohibiting the enforcement of the subpoenas).

against Massachusetts Attorney General Maura Healey, and was later amended that fall to include New York Attorney General Eric Schneiderman.<sup>164</sup> Citing the same claims of constitutional violations as the U.S. Virgin Islands suit, the complaint emphasized that the investigations were “an unlawful exercise of government power to further political objectives.”<sup>165</sup> As these events unfolded in the courts, a Congressional response emerged in July, when the House Science, Space and Technology Committee issued subpoenas to the New York and Massachusetts attorneys general and eight environmental organizations.<sup>166</sup> Led by Republican Chairman Lamar Smith of Texas, the committee sought documents related to whether the attorneys’ general investigations were the product of a coordinated strategy encouraged by environmental groups.<sup>167</sup>

Ultimately, Attorney General Walker caved to the mounting opposition, withdrawing the U.S. Virgin Island’s subpoena in July.<sup>168</sup> Healey and Schneiderman, however, have steadfastly

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164. See David Hasemyer, *2016: Exxon vs. Climate Change, a Battle with Many Fronts*, INSIDECLIMATE NEWS (Dec. 28, 2016), <https://insideclimatenews.org/news/23122016/exxon-climate-change-investigation-attorneys-general> (last visited Mar. 3, 2017) (noting that ExxonMobil had been complying with New York’s investigation up to the time of filing, already producing over 1.2 million pages of documents) (on file with the Washington and Lee Law Review).

165. First Amended Complaint for Declaratory and Injunctive Relief at 5, *Exxon Mobil Corp. v. Healey*, No. 4:16-CV-469-K (N.D. Tex. 2016), <https://assets.documentcloud.org/documents/3217539/New-York-Sued-11-10.pdf> [hereinafter First Amended Complaint]. See also *ExxonMobil Asks Federal Court to Invalidate New York Attorney General’s Subpoena*, EXXONMOBIL (Oct. 17, 2016, 10:51 AM), <http://news.exxonmobil.com/press-release/exxonmobil-asks-federal-court-invalidate-new-york-attorney-generals-subpoena> (last visited Mar. 3, 2017) (notifying the public through a press release that evidence of the attorneys’ general collaboration with activists shows a lack of impartial investigating) (on file with the Washington and Lee Law Review).

166. See Steve Mufson, *Republicans Just Escalated the War Over ExxonMobil and Climate Change*, WASH. POST (July 13, 2016), [https://www.washingtonpost.com/news/energy-environment/wp/2016/07/13/republicans-just-escalated-the-war-over-exxonmobil-and-climate-change/?utm\\_term=.9a88f54b991e](https://www.washingtonpost.com/news/energy-environment/wp/2016/07/13/republicans-just-escalated-the-war-over-exxonmobil-and-climate-change/?utm_term=.9a88f54b991e) (last visited Mar. 3, 2017) (reporting the outcries from environmental groups over the committee’s subpoenas) (on file with the Washington and Lee Law Review).

167. See *id.* (quoting committee member Darin LaHood, “[p]rosecutors shouldn’t be in this business . . . It really is an abuse of power”).

168. See Noon, *supra* note 146 (reporting on Attorney General Walker’s decision to withdraw his subpoena, and quoting ExxonMobil supporters who cite

defended their acts and refused to cooperate with the Representative Smith's investigation.<sup>169</sup> Additionally, both Healey and Schneiderman have filed motions to dismiss in the ExxonMobil lawsuit, but neither have been ruled on as of this Note's publication.<sup>170</sup>

In light of the backlash over Schneiderman's investigation, this Note recognizes that the perceived reemergence of tobacco tactics, bolstered by use of the Martin Act, has struck a nerve in the debate regarding increasing activism by state attorneys general. And that if these actions are deemed to have crossed the boundaries of acceptable use of attorney general powers, then significant consequences may exist.

#### *IV. Potential Consequences of Pushing the Boundaries of Attorney General Activism*

The question remains as to what are the possible consequences if these investigations are found to be beyond the boundaries of attorney general powers, and whether in the face of these consequences, Eric Schneiderman should reevaluate the direction of the investigation going forward. Given the uncertainty regarding the outcomes of the court proceedings and investigations, the assessment of these consequences is largely hypothetical.<sup>171</sup> This, however, does not detract from the importance of assessing what could follow from attempts to curb perceived attorneys general overreach. The relevance of this question is highlighted by attorneys general confirming their intent to continue being active agents for change,<sup>172</sup> and opponents

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this decision as a sign these investigations are groundless).

169. See Hasemyer, *supra* note 164 (providing a broad timeline of the multiple investigations and lawsuits that unfolded over 2016).

170. See David Hasemyer, *Exxon Ramps Up Free Speech Argument in Fighting Climate Fraud Investigations*, INSIDE CLIMATE NEWS (Jan. 13, 2018), <https://insideclimatenews.org/news/13012018/exxon-climate-change-investor-fraud-investigations-lawsuit-free-speech-new-york> (last visited Mar. 27, 2018) (summarizing the most recent procedural history of the ExxonMobil lawsuit) (on file with the Washington and Lee Law Review).

171. *Infra* note 220 and accompanying text.

172. See Vivian Yee, *To Combat Trump, Democrats Ready a G.O.P. Tactic: Lawsuits*, N.Y. TIMES (Dec. 14, 2016), <https://www.nytimes.com/2016/12/14/nyregion/donald-trump-democrats-lawsuits.html> (last visited Mar. 3,



making clear their interest in curtailing attorneys' general ability to do so.<sup>173</sup>

It should first be noted that from a strictly legal standpoint, Schneiderman's opponents have essentially no basis to challenge his conduct as improper under the Martin Act. As discussed above, the Martin Act equips the attorney general with wide investigative latitude.<sup>174</sup> The broad definition of fraud that New York state and federal courts endorse, coupled with the ability to commence an investigation without proof of fraudulent conduct, essentially provides a blank check to the attorney general to investigate any perceived threat to the public interest.<sup>175</sup> In the words of one court, the Martin Act should "be liberally and sympathetically construed in order that its beneficent purpose may, so far as possible, be attained."<sup>176</sup> In the face of this sweeping mandate, it is unlikely that any attempt to challenge an investigation as improper under the Martin Act would survive.<sup>177</sup> That is not to say, however, that there are not alternative avenues to check the Schneiderman's conduct, as there are conceivable prudential-type checks.<sup>178</sup>

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2017) (reporting that state attorneys general, including Eric Schneiderman, "have vowed to use their power to check and balance Mr. Trump's Washington") (on file with the Washington and Lee Law Review).

173. See Charlie Gasparino & Brian Schwartz, *Trump Administration Looks to Neuter NYS Martin Act*, FOX BUS. (Nov. 15, 2016), <http://www.foxbusiness.com/markets/2016/11/15/trump-administration-looks-to-neuter-nys-martin-act.html> (last visited Mar. 3, 2017) (pointing to discussions by now-President Donald Trump's transition team member Paul Atkins about ways to preempt state securities laws with new legislation) (on file with the Washington and Lee Law Review).

174. See *supra* notes 20–37 and accompanying text (discussing the broad investigatory powers of the attorney general under the Martin Act).

175. See, e.g., *Bishop v. Commodity Exchange, Inc.*, 564 F. Supp. 1557 (S.D.N.Y. 1983) (endorsing a broad interpretation of fraud under the Martin Act as including all deceitful practices contrary to the plain rules of common honesty); *People v. Federated Radio Corp.*, 244 N.Y. 33 (1926) (interpreting fraudulent conduct to include all acts with the tendency to deceive or mislead, even if not intended to be fraudulent by design).

176. *People v. F.H. Smith Co.*, 243 N.Y.S. 446, 449 (N.Y. App. Div. 1930).

177. See *supra* note 27 and accompanying text (explaining that attorney general investigative discretion is protected from review by the office's plenary power as the state's sole law enforcement officer).

178. See *Infra* Part IV.A–B (discussing possible approaches that opponents of Eric Schneiderman could take to limit his power without having to overcome the broad grant of authority under the Martin Act).

Specifically, federal preemption of the Martin Act and the potential shift to heightened scrutiny of attorney general investigative motive, could potentially reign in attorney general conduct.<sup>179</sup>

#### A. *Martin Act Preemption*

To begin, the unorthodox use of the Martin Act in concert with tobacco litigation tactics could reignite the debate over whether the Act is, or should be, preempted by federal securities law.<sup>180</sup> In the wake of the Martin Act's resurgence under Elliott Spitzer, critics of his perceived activism raised concerns about the overlapping functions of the SEC and state Blue Sky laws like the Martin Act.<sup>181</sup> Writing in the *New York Times*, then-chairman of the House Committee on Financial Services Michael Oxley remarked:

What we are witnessing is nothing less than a regulatory coup that would usurp the proper role of the S.E.C. and the self-regulatory organizations. This could result in disastrous balkanization of oversight, meaning that every Wall Street firm would have to cut its private deal with every state attorney general or face the potential threat of fraud charges.<sup>182</sup>

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179. *Infra* Part IV.A–B.

180. “[T]he term ‘preemption’ refers to the displacement of state law by federal states (or by courts seeking to fill gaps in federal states).” Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, n.3 (2000).

181. See Robert A. McTamaney, *New York's Martin Act: Expanding Enforcement in an Era of Federal Securities Regulation*, 18 WASH. LEGAL FOUND. LEGAL BACKGROUNDER, Feb., 2003, at 4 (noting that Congressman Michael Oxley and then-Chairman of the SEC both had advocated for reigning in state activism in securities regulation), <http://www.wlf.org/upload/022803LBMctamaney.pdf>.

182. Michael Oxley, *Who Should Police The Financial Markets*, N.Y. TIMES (June 9, 2002), <http://www.nytimes.com/2002/06/09/business/1-who-should-police-the-financial-markets-447650.html> (last visited Mar. 3, 2017) (on file with the Washington and Lee Law Review). Representative Oxley was the co-author of the landmark anti-corporate fraud Sarbanes-Oxley Act of 2002, designed to restore confidence in U.S. markets following the historic bankruptcies of Enron and WorldCom. See *Michael G. Oxley: In Memoriam*, BAKER HOSTETLER, <https://www.bakerlaw.com/michaelgoxley> (last visited Mar. 3, 2017), (“[Sarbanes-Oxley], increased accountability and transparency in financial reporting, strengthened corporate boards and governance, and created a new accounting oversight board for public companies.”) (on file with the Washington and Lee Law Review).

Echoing these concerns over “balkanization,” Congress went so far to propose an amendment to the Securities Fraud Deterrence and Investor Restitution Act of 2003<sup>183</sup> that would have preempted state enforcement of disclosure requirements and “other yet-unknown fraudulent practices.”<sup>184</sup> The so-called “anti-Spitzer amendment” was ultimately dropped from the bill, but its proposal is evidence of the climate of concern surrounding state attorney general activism through Blue Sky laws.<sup>185</sup> Ultimately, the fervor over Spitzer’s investigations fizzled, and the breadth of the Martin Act continued to grow.<sup>186</sup>

With the Martin Act in the spotlight once again, and pundits raising concerns for its scope and role, it is not inconceivable that the conversation about preemption may return. Federal preemption of state law can occur in three ways: express, field, and conflict.<sup>187</sup> “Express” preemption occurs when a federal law includes language explicitly revoking specific powers from the states.<sup>188</sup> If the Court determines that a federal statute was intended to cover an entire “field,” or is so broad that the “field” is covered, then it state power may be “field” preempted.<sup>189</sup> Lastly, “conflict” preemption arises when the Court finds that a state law “actually conflicts” with the federal law.<sup>190</sup>

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183. Securities Fraud Deterrence and Investor Restitution Act of 2003, H.R. 2179, 108th Cong. (as introduced and referred to the H. Comm. on Fin. Servs., May 21, 2003).

184. See Jonathan Mathiesen, *Dr. Spitzlove or: How I Learned to Stop Worrying and Love “Balkanization”*, 2006 COLUM. BUS. L. REV. 311, 325 (explaining that the amendment would have added “disclosure” and “conflict of interest” to the catalog of state requirements preempted by the National Securities Market Improvement Act of 1996).

185. See *id.* at 326 (describing further proposals of legislative preemption from legal academia).

186. See *supra* notes 45–56 and accompanying text (covering previous New York Attorney General Elliott Spitzer’s novel and expansive use of the Martin Act after it had laid dormant for years).

187. See Nelson, *supra* note 180, at 226 (noting that this is the general framework laid out by the United States Supreme Court).

188. See *id.* at 226–227 (describing the two-step framework the court uses to assess an express preclusion provision).

189. See *id.* at 227 (“The Court has indicated that a federal regulatory scheme may be ‘so pervasive’ as to imply ‘that Congress left no room for the States to supplement it.’”).

190. See *id.* at 228 (stating that a conflict exists if compliance with both the state and federal laws would be “physically impossible” or if the state law would

The outrage over the Schneiderman investigations could push multiple actors to challenge the Martin Act as preempted. The most pertinent example is the Trump Administration, which has adopted a stern stance of deregulation, especially in the securities and financial sector.<sup>191</sup> In the days following the election, one report emerged that Paul Atkins, a member of the Trump transition team, was considering “ways to ensure that federal securities laws preempt state [Blue Sky] laws,” like the Martin Act, by devising “legislation that would supersede them with existing federal statutes.”<sup>192</sup> While there has been no further comment on this proposal in the early days of the administration, this report alone was enough to elicit a fervent response from supporters of state regulation, including Eric Schneiderman, who warned “any attempt to gut these consumer and investor protections would severely undercut state policy powers and only embolden those who seek to defraud and exploit everyday Americans.”<sup>193</sup> Additionally, some commentators have noted that an attempt to preempt Blue Sky laws could be politically treacherous because of risks of filibuster and negative publicity.<sup>194</sup>

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be an obstacle to accomplishing the full purpose of the federal law).

191. See Sarah N. Lynch, *Trump's SEC Pick Clayton Points to Capital Formation, Not Enforcement*, REUTERS (Jan. 5, 2017, 3:52 AM), <http://www.reuters.com/article/us-usa-trump-sec-idUSKBN14N1Y9> (last visited Mar. 3, 2017) (pointing to Donald Trump's selection of Walter “Jay” Clayton to head the SEC as a sign that the agency will focus on reducing regulations that critics cite as burdensome on corporate growth) (on file with the Washington and Lee Law Review).

192. See Gasparino & Schwartz, *supra* note 173 (reporting that Atkins, a former SEC commissioner, has “long advocated against state officials overstepping their authority through such statutes”).

193. See *Statement by A.G. Schneiderman on Reports that the Presidential Transition Team is Considering Ways to Dismantle State Consumer and Investor Protection Statutes, also Known as Blue Sky Laws*, N.Y. STATE OFFICE OF THE ATTORNEY GEN. (Nov. 17, 2016), <https://ag.ny.gov/press-release/statement-ag-schneiderman-reports-presidential-transition-team-considering-ways> (last visited Mar. 3, 2017) [hereinafter *Schneiderman Response to Trump*] (“At a time of regulatory uncertainty at the federal level, it is essential that we maintain that very laws that have helped state and local law enforcement keep consumers and investors safe for over one hundred years.”) (on file with the Washington and Lee Law Review).

194. See Gasparino & Schwartz, *supra* note 173 (quoting Columbia Law School professor John Coffee, who also noted that “many Republicans believe in state regulation”).

While the feasibility of a move to expressly preempt the Martin Act is beyond to scope of this Note, it should be noted that critics have previously argued that, in fact, the Martin Act is already preempted by federal law.<sup>195</sup> Arising out of the “Anti-Spitzer” sentiment of the early 2000s, one commentator posited that federal legislation had established a comprehensive regime that provided a solution to all manners of securities regulation.<sup>196</sup> Against this all-pervasive regime, the Martin Act adversely affected the SEC’s ability to regulate comprehensively and with uniformity as instructed by Congress.<sup>197</sup> Thus, the Martin Act would not survive under any theory of preemption, with the exception of the “fraud” savings clause in the National Securities Markets Improvements Act of 1996 (NSMIA).<sup>198</sup> Under this savings clause, states retained “jurisdiction . . . to investigation and . . . enforcement actions with respect to fraud and deceit, or unlawful conduction by a broker or dealer, in connection with securities and securities transactions.”<sup>199</sup> Although no case emerged to test this theory, the commentator later argued that even under the NSMIA savings clause, the “fraud” left to the states to continue to regulate was “fraud” as defined by the federal

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195. See McTamaney, *New York’s Martin Act*, *supra* note 181, at 4 (speculating on why the Martin Act has not already been found to be preempted by the federal securities regime); see also Mathiesen, *supra* note 184, at 334–50 (arguing that the SEC possess the authority to administratively preempt the Martin Act).

196. See Robert A. McTamaney, *The Assured Guaranty Case & New York’s Martin Act: Pre-Emption Delayed is Justice Denied*, 29 WASH. LEGAL FOUND. LEGAL BACKGROUNDER, Mar., 2011, at 1 (pointing to the Securities Act of 1933, Private Securities Litigation Reform Act of 1995, National Markets Improvement Act of 1996, Securities Litigation Uniform Standards Act of 1998, Sarbanes-Oxley Act of 2002, and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 as comprising the all-pervasive federal scheme), [http://www.wlf.org/Upload/legalstudies/legalbackgrounder/03-25-2011McTamaney\\_LegalBackgrounder.pdf](http://www.wlf.org/Upload/legalstudies/legalbackgrounder/03-25-2011McTamaney_LegalBackgrounder.pdf).

197. See McTamaney, *New York’s Martin Act*, *supra* note 181, at 4 (predicting that a case would come forward to test this theory, especially given Elliott Spitzer’s expanded use of the Martin Act at the time).

198. National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, §102(c)(1), 110 Stat. 3419–20 (codified at 18 U.S.C. §77r (2012)); see also McTamaney, *New York’s Martin Act*, *supra* note 181, at 3 (arguing that this savings clause served as a back door for Martin Act enforcement, despite belief that the NSMIA stripped Blue Sky laws of most of their power).

199. National Securities Markets Improvement Act §102(c)(1), 110 Stat. at 3419–20.

government.<sup>200</sup> Because definition of fraud under the Martin Act is far broader than the federal requirements—for instance omitting the need for scienter—it follows that the Martin Act would fail to meet the standard of fraud that the savings clause exception preserved.<sup>201</sup> Additionally, another observer has theorized that the SEC has the authority to “administratively preempt” the Blue Sky laws, even in light of the NSMIA savings clause.<sup>202</sup>

Although the theories proposed above have not been explicitly proven, they make a reasonable case that preemption of the Martin Act remains a possibility.<sup>203</sup> Considering the fervent criticism of Eric Schneiderman’s actions, combined with the deregulatory stance of the Trump administration, this possibility of preemption becomes a discernable consequence that could result from action taken to restrict attorney’s general activism.<sup>204</sup> For New York, preemption of the Martin Act would strip the attorney general of a valuable tool that places a significant role in policing securities fraud, especially given the role securities play in the state economy.<sup>205</sup> Furthermore, preemption of Blue Sky laws nationwide may have broader damaging effects, as empirical data has suggested that concurrent state-federal enforcement of securities fraud laws has some positive externalities which have the potential to outweigh opposing costs.<sup>206</sup> Thus, the risk of Martin

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200. See McTamane, *The Assured Guaranty Case*, *supra* note 196, at 2–3 (“If [Congress] had intended to hand the states a blank check to regulate whatever conduct the states wished to pursue, Congress, however unlikely, would have simply said so.”).

201. See *id.* at 2 (asserting that if each state could define the breadth of the NSMIA savings clause, then the “balkanized” regulation that preceded the NSMIA would continue).

202. See Mathiesen, *supra* note 184, at 340–47 (examining the process by which an agency may preempt a state law and noting citing examples of the Supreme Court acknowledging an agency’s ability to do so).

203. See *supra* notes 196–201 and accompanying text (reviewing arguments that the Martin Act is essentially already preempted, and that a single test case is needed to prove it).

204. See *supra* notes 191–193 and accompanying text (looking into the potential that the Trump administration may attempt to gut the Martin Act, and the concerned response of Eric Schneiderman).

205. See *Schneiderman Response to Trump*, *supra* note 193 (“In the past few years alone, multi-state fraud investigations into Wall Street’s role into the collapse of the housing market have recovered over \$95 billion in fines, penalties, and most important, consumer relief.”).

206. See Amanda M. Rose, *State Enforcement of National Policy: A Contextual*

Act preemption is a noteworthy consequence with far-reaching effects that could follow from attempts to curb attorneys general over-stepping their boundaries.

*B. Increased Scrutiny of Attorney General Investigative Motive in Multistate Actions*

The second potential consequence that could follow in response to the ExxonMobil investigation is a push to increase the scrutiny of attorneys' general investigative motive. The most fervent criticisms of Eric Schneiderman and the ExxonMobil investigation have centered on the belief that his investigation under the Martin Act has an ulterior motive other than policing for securities fraud. Indeed, the politically charged public statements, perceived similarities to tobacco litigation tactics, and evidence of cooperation with activists have all contributed to allegations that the investigation was conceived in bad faith.<sup>207</sup> This has led to calls for reigning in alleged abuse of prosecutorial discretion characterized by bad faith intent and improper political bias.<sup>208</sup> But have these calls been answered?

For one, the House Science, Space and Technology Committee ("The Committee") investigation has specifically targeted the attorney's general investigative motive.<sup>209</sup> In a letter sent to Eric Schneiderman, the committee raised concerns that the investigation constitutes a politically motivated attack on

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*Approach (with Evidence from the Securities Realm)*, 97 MINN. L. REV. 1343, 1344–52 (2013) (assessing rough empirical evidence of the costs and benefits of concurrent state-federal regulation in the securities context, and advancing the possibility that careful reform could help increase the overall efficiency of securities fraud enforcement in the U.S.).

207. See *supra* notes 138–144 and accompanying text (sampling the various criticism aimed at Eric Schneiderman, including questions of whether he really is investigating securities fraud with the Martin Act).

208. See *supra* notes 142–145 and accompanying text (explaining that critics and ExxonMobil have pointed to evidence of cooperation amongst attorneys general and environmental activists as evidence of an ulterior political motive).

209. See *Committee Scrutinizes Motives of "Green 20"*, HOUSE COMMITTEE ON SCI., SPACE, & TECH. (May 18, 2016), <https://science.house.gov/news/press-releases/committee-scrutinizes-motive-green-20> (last visited Mar. 3, 2017) ("The Committee is concerned that these efforts to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty . . .") (on file with the Washington and Lee Law Review).

ExxonMobil's free speech rights.<sup>210</sup> Citing the evidence of cooperation with environmental activists, the Committee questioned "the impartiality and independence of current investigations," warning that coordination with interest groups may rise to "an abuse of prosecutorial discretion."<sup>211</sup> Although Schneiderman has refused to comply with the investigation thus far, Committee Chairman Lamar Smith is not backing down either, issuing subpoenas for records pertaining to the attorney's general investigative strategy.<sup>212</sup>

Echoing the concerns of both the Committee and critics in the media, ExxonMobil's lawsuit to block Eric Schneiderman's investigation is rife with allegations of an improper motive.<sup>213</sup> As discussed above, each of ExxonMobil's foremost alleged causes of action—violation of the company's rights under the First, Fourth and Fourteenth Amendments—point to the same factual information that has prompted backlash regarding the investigation.<sup>214</sup> For instance, the complaint alleges that the politically charged public statements made by Schneiderman show an improper political bias, violating the company's Fourteenth

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210. Cf. John Schwartz, *Exxon Mobil Fights Back at State Inquiries into Climate Change Research*, N.Y. TIMES (June 16, 2016), <https://www.nytimes.com/2016/06/17/science/exxon-mobil-fights-back-at-state-inquiries-into-climate-change-research.html> (last visited Mar. 3, 2017) (citing a letter sent by a coalition of state attorneys general not involved in the "AGs for Clean Power" coalition, which called the investigations "a grave mistake" that "raises substantial First Amendment concerns") (on file with the Washington and Lee Law Review).

211. Letter from House Comm. on Sci., Space, and Tech. to Eric Schneiderman, Attorney General of N.Y. (May, 18, 2016), <https://science.house.gov/sites/republicans.science.house.gov/files/documents/05.18.16%20SST%20Letter%20to%20NY%20AG.pdf>.

212. See Phil McKenna, *State AGs Rally To Defend NY, Mass. Investigations of Exxon From Lamar Smith Subpoenas*, INSIDE CLIMATE NEWS (Mar. 1, 2017), <https://insideclimatenews.org/news/01032017/exxon-climate-investigation-lamar-smith-state-attorneys-general> (last visited Mar. 3, 2017) (reporting that the Committee has also subpoenaed multiple environmental advocacy organizations and the SEC, demanding documents related to any discussions with attorneys general regarding ExxonMobil) (on file with the Washington and Lee Law Review).

213. See *supra* notes 161–165 and accompanying text (discussing the lawsuits filed by ExxonMobil in response to the multiple investigations commissioned by state attorneys general).

214. See *supra* note 163 and accompanying text (elaborating on the facts and causes of action alleged in Exxon Mobil's complain, as well as the relief sought).



Amendment due process right to a disinterested prosecutor.<sup>215</sup> The complaint further argued that purported shifts in the focus of the investigation show that the attorney general's office did not bring the investigation in good faith, as Schneiderman was searching for a legal theory.<sup>216</sup> Thus, because the investigation was brought in bad faith, it constitutes "an abusive fishing expedition into 40 years of ExxonMobil's records, without any legitimate basis for believing that ExxonMobil violated New York Law," which violates the company's Fourth Amendment protection from unreasonable searches and seizures.<sup>217</sup> While these claims must play out in court before their validity can be judged, the allegations of improper investigative motive have already struck a nerve with the court.<sup>218</sup> Ruling on a jurisdictional issue before Eric Schneiderman was joined in the case, the court ordered discovery of Massachusetts Attorney General Maura Healey to investigate the court's concern that her investigation was brought in bad faith.<sup>219</sup>

The above examples illustrate the relevance of these concerns regarding the investigative motive and intent of the ExxonMobil investigations. At this point it is difficult to predict the conclusions the Congressional investigation or ExxonMobil lawsuit will yield.<sup>220</sup> What is less difficult, however, is to imagine the

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215. See First Amended Complaint, *supra* note 165, at 12–16, 44 (arguing that the overt political nature of Schneiderman's statements show he had already made up his mind as to what the end result of the investigation would be).

216. See First Amended Complaint, *supra* note 165, at 30–31 (asserting that after ExxonMobil complied with New York's requests for information about its climate change research, the investigation suddenly shifted to focus on information about ExxonMobil's oil reserves, under the theory that these reserves had been overstated by not accounting for global climate change efforts).

217. First Amended Complaint, *supra* note 165, at 43–44.

218. See *Exxon Mobil Corp. v. Healey*, No. 4:16-CV-469-K, 2016 WL 6091249, at \*1 (N.D. Tex. Oct. 13, 2016) (issuing an order and opinion directing that jurisdictional discovery be conducted before the court reaches a decision on ExxonMobil's motion for a preliminary injunction or Attorney General Healey's motion to dismiss).

219. See *id.* at \*2 ("The Court finds the allegations about Attorney General Healey and the anticipatory nature of Attorney General Healey's remarks about the outcome of the Exxon investigation to be concerning to this court. The foregoing allegations about Attorney General Healey, if true, may constitute bad faith in issuing [the subpoena] . . .").

220. See Hasemyer, *supra* note 164 (reporting on the landscape of the ExxonMobil investigations and accompanying proceedings, while acknowledging that a long fight is still to come).

conclusions that might be reached in the public forum. Since the rise of the “activist” attorney general,<sup>221</sup> there has been ongoing debate over the need to restrain attorney’s general powers.<sup>222</sup> This includes arguments advocating for greater restrictions on attorney general discretion to ensure that investigations are not brought with improper intent.<sup>223</sup> Concerns with attorney general intent are even found in the American Bar Association’s most recent standards for prosecutorial investigation, which states that prosecutors must not “conduct an investigation for an improper motive and thus the prosecutor should not allow personal or political considerations to improperly influence decisions regarding a criminal investigation.”<sup>224</sup> As with the risk of preemption, the nature of the ExxonMobil investigation could be novel and alarming enough to propel the idea of greater scrutiny of investigative intent from discussion to action.<sup>225</sup> Whether through the court proceedings already in motion, or through a legislative response, a push for greater scrutiny of prosecutors is a cognizable consequence that could follow from attempts to curb an attorneys’ general power.

But are these consequences enough to deter Schneiderman from continuing his investigation? He certainly has the option to

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221. See *supra* notes 14–17 and accompanying text (providing a brief summary of the early efforts by “activist” attorneys general).

222. See DeBow, *supra* note 17, at 1 (arguing the need for reforms that would redefine the role of the state attorney general to curb the use of aggressive litigation to shape public policy). *But cf.* Lynch, *supra* note 14, at 2000–02 (minimizing critic’s concerns that multistate litigation violates principles of federalism and separation of powers).

223. See Ronald A. Cass, *Power Failure: Prosecution, Power, and Problems*, 16 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 29, 36 (2015) (“[J]udges might be more skeptical of rules that broadly vouchsafe prosecutor’s discretion, whether in facilitating inquiries before irreparable damage is done or in assuring more searching scrutiny for legal assertions on which prosecutions—frequently in connection with regulatory crimes—are based.”).

224. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS, § 1.2(d), cmt. (AM. BAR ASS’N 2014), [http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/Pros\\_Investigations.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Pros_Investigations.authcheckdam.pdf). These standards are not intended to give rise to a cause of action or be the basis for civil liability, but rather to provide professional guidance to prosecutorial officials. See *id.* § 1.01(b) (defining “prosecutor” to include any prosecutor or attorney who serves as an attorney in a governmental criminal investigation).

225. See Cass, *supra* note 223, at 36 (advocating a year before the ExxonMobil investigation that attorney general investigative intent needs greater scrutiny).

claw back his investigation and continue down more traditional activist attorney general routes, such as classic multistate litigation<sup>226</sup> or working in concert with the SEC to seek disclosure.<sup>227</sup> Yet if recent statements are any indication, Schneiderman seems determined to power forward for now.<sup>228</sup> This raises two questions: (1) are these risks not significant enough to counsel against moving forward, and (2) do the circumstances of this investigation suggest instead that moving forward is the best possible outcome?

*V. Framing Eric Schneiderman's Ideal Path Forward in Light of Potential Consequences*

The answers to the above questions are implicit in framing Eric Schneiderman's ideal course of conduct going forward. Despite potential risks, the unique circumstances of the ExxonMobil investigation—combined with the rapidly changing political landscape—indicate that moving forward with the investigation is Eric Schneiderman's ideal course of conduct. To begin, the broader question that has carried throughout the discussion of this investigation is simply “has Eric Schneiderman gone too far?”<sup>229</sup> While instinctively it may appear the answer is yes, the above discussion shows that from a purely legal standpoint, his actions are within the powers granted by the Martin Act.<sup>230</sup> Furthermore,

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226. See *supra* notes 14–17 and accompanying text (providing an overview of previously successful multistate litigation efforts led by attorneys general).

227. See *supra* notes 46–56 and accompanying text (explaining early use of the Martin Act in the field of energy and how Elliot Spitzer worked in concert with the SEC to seek guidance on disclosure). See also Hart, *supra* note 22 (advocating for Eric Schneiderman to use the Martin Act as a tool to encourage the SEC to continue to update their disclosure requirements to better relate to current understandings of climate change).

228. See Yee, *supra* note 172 (citing statements from Eric Schneiderman after the election stating that he has already begun meeting with other attorneys general about defending Obama's clean-power plan from any Republican challenge).

229. See *supra* notes 146–151 and accompanying text (discussing the varying criticisms of the ExxonMobil investigation, including questions of whether it is beyond Eric Schneiderman's authority).

230. See *supra* notes 174–179 and accompanying text (explaining that the broad grant of authority in the Martin Act makes it difficult to make any claim that an investigation is outside of the attorney general's discretion).

although there are potential consequences for pushing the boundaries of Martin Act use, none of these risks are one-hundred percent guaranteed to occur.<sup>231</sup> Because his conduct is not outright improper, and there is no guaranteed consequences for his actions, there seems to be little incentive to turn back, especially considering how far into the investigation he already is.<sup>232</sup>

The rapidly shifting political landscape since the election of Donald Trump, especially in the climate context, also counsels against turning back. First, Donald Trump's administration has made clear their disdain for regulation, especially in regards to the SEC and Environmental Protection Agency (EPA).<sup>233</sup> This is, of course, tied to the Republican Party's belief in the principles of federalism: protecting state sovereignty from encroachments by federal regulation.<sup>234</sup> This interest in devolving power from the federal government back to the states is best exemplified by the penchant of Republican state attorneys general to sue the Obama administration.<sup>235</sup> Thus, as the Trump administration continues to

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231. See *supra* Part IV.A–B (discussing the potential consequences that could come from action taken to curb Eric Schneiderman's conduct and noting that there are drawbacks to each avenue of checking his power).

232. See *supra* note 170 and accompanying text (announcing that Attorney General Schneiderman had joined Massachusetts Attorney General Maura Healey in filing a countersuit in a Massachusetts federal court seeking to compel Exxon to comply with the investigation).

233. See Juliet Eilperin & Brady Dennis, *White House Eyes Plan to Cut EPA Staff by One-Fifth, Eliminating Key Programs*, WASH. POST (Mar. 1, 2017), [https://www.washingtonpost.com/news/energy-environment/wp/2017/03/01/white-house-proposes-cutting-epa-staff-by-one-fifth-eliminating-key-programs/?utm\\_term=.12d57e4d14b7](https://www.washingtonpost.com/news/energy-environment/wp/2017/03/01/white-house-proposes-cutting-epa-staff-by-one-fifth-eliminating-key-programs/?utm_term=.12d57e4d14b7) (last visited Mar. 3, 2017) (noting that a White House plan to cut EPA jobs reflects President Trump's statements as a candidate that he'd like to get rid of the EPA "in almost every form") (on file with the Washington and Lee Law Review).

234. See *Republican Platform: Preamble*, REPUBLICAN NAT'L COMMITTEE, <https://www.gop.com/platform/preamble/> (last visited Mar. 3, 2017) ("This means relieving the burden and expense of punishing government regulations. And this means returning to the people and the states the control that belongs to them.") (on file with the Washington and Lee Law Review).

235. See Terrence Henry, *What Does the Texas Attorney General do for Fun? "Sue the Obama Administration"*, STATE IMPACT (Aug. 15, 2012), <https://stateimpact.npr.org/texas/2012/08/15/what-does-the-texas-attorney-general-do-for-fun-sue-the-obama-administration/> (last visited Mar. 3, 2017) (quoting then-Texas Attorney General Greg Abbott as stating "[w]hat I really do for fun is I go into the office [and] I sue the Obama administration") (on file with the Washington and Lee Law Review).

cut back on federal involvement in certain policy issues, the states are given more opportunity to regulate in those fields as they choose.

This is especially apparent in the field of climate change, as the Trump administration has made clear that this is a non-issue to the administration and their intention to wash the federal government's hands of any involvement.<sup>236</sup> With the federal government potentially stepping back from climate change entirely, this leaves a sort-of "vacuum" of policy regulation which, by principles of federalism, should be filled by the states.<sup>237</sup> Herein lies the rub: Because Schneiderman's actions are not outright improper, there is a legitimate argument that policing this policy issue falls within his discretion as attorney general. Republican pundits may call foul, but the broad powers of the Martin Act and the principles of federalism give Schneiderman a backstop to lean on in justifying his actions.<sup>238</sup> Furthermore, Schneiderman's discretion is not unchecked, as he is an elected official, subject to the political process, and may lose power if the people of New York reject his decisions.<sup>239</sup>

Therefore, if the federal government is going to wash its hands of regulating in the field of climate change, the door is open to state attorneys general to exercise their discretion police in that field as they see fit. In this context, the broad powers of the Martin Act make it difficult to affirmatively stamp Eric Schneiderman's actions as outright wrong, and the lack of guaranteed consequences leaves little incentive to turn back on the investigation. Thus, it is in Eric Schneiderman's best interest to continue his investigation despite these risks.

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236. See Andrea Thompson, *Climate and Energy Experts Speak Out on Trump's Views*, SCIENTIFIC AMERICAN (Nov. 10, 2016), <https://www.scientificamerican.com/article/climate-and-energy-experts-speak-out-on-trump-s-views/> (last visited Mar. 3, 2017) (reporting that Donald Trump has previously referred to climate change as a hoax) (on file with the Washington and Lee Law Review).

237. See *supra* note 234 and accompanying text ("[T]he states and the people retain authority over all unenumerated powers.").

238. See *supra* notes 174–179 and accompanying text (noting that without a strictly legal means of accusing Schneiderman's conduct as improper, opponents will struggle to make an outright case against such conduct).

239. See Lynch, *supra* note 14, at 2002 ("Today, state attorneys general are independent executive officers popularly elected in forty-three states.").

## VI. Conclusion

The ExxonMobil investigation has stretched the boundaries of activist attorney general conduct far beyond their previous lines. The combination of the Martin Act's broad grant of powers, with the connection to tobacco tactics and the politically charged subject matter of climate change, make this a complex and polarizing issue. Moreover, the country's rapidly changing political landscape makes it difficult to weigh these issues and consider the proper boundaries for an activist attorney general. It remains apparent, however, that Eric Schneiderman sees no boundaries, and has no intention of backing down in the face of contentions that he has gone too far.<sup>240</sup>

And why should he? Like his predecessors, Schneiderman has pushed the door of the Martin Act, opening it farther than ever before. Each time one of his predecessors pushed the door open, they stood in the face of the backlash and continued forward, stretching the boundaries of activist attorney general conduct to a new norm. Sure, Schneiderman's actions are the most novel and extreme use of the Martin Act to date, and they may carry consequences for the Martin Act's future. But no reward comes without risk, as Sharon Eubanks once quipped in response to questions about the risk of losing RICO; "[i]f you have a statue, you should use."<sup>241</sup> Allegations of misconduct may continue over Schneiderman's coordination with activist groups, but even his opponent's hands are not clean, as evidenced by a report that former-Oklahoma attorney general and now-Administrator of the EPA Scott Pruitt coordinated lawsuits against the EPA with major oil and gas producers.<sup>242</sup>

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240. See *A.G. Schneiderman Leads Coalition of 23 AGs in Suit to Block Illegal Rollback of Net Neutrality*, N.Y. STATE OFFICE OF THE ATTORNEY GEN. (Feb. 22, 2018), <https://ag.ny.gov/press-release/ag-schneiderman-leads-coalition-23-ags-suit-block-illegal-rollback-net-neutrality> (last visited Mar. 27, 2018) (announcing the formation of a similar coalition of state attorneys general that jointly filed a lawsuit to block the repeal of net neutrality) (on file with the Washington and Lee Law Review).

241. SHULMAN, ESTABLISHING ACCOUNTABILITY, *supra* note 59, at 14.

242. See Coral Davenport & Eric Lipton, *The Pruitt Emails: E.P.A. Chief was Arm in Arm with Industry*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/scott-pruitt-environmental-protection-agency.html> (last visited Mar. 3, 2017) (noting that oil and gas industry executives held secret meetings with Pruitt to coordinate ways to combat

In 2016, the country saw Donald Trump redefine what it means to be a political candidate. In 2017, we watched as he pushed our definition of what it means to be president. Perhaps 2018 is the year that Eric Schneiderman pushes our understanding of the state attorney general's role as an agent of change. The "activist" attorney general will always be a polarizing and controversial figure, but the shifting tides of the United States' political and enforcement regime may lead us to rethink the boundaries of their ability to be agents of change.

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the Obama administration's environmental agenda) (on file with the Washington and Lee Law Review).