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## THE STATE ATTORNEY GENERAL'S ROLE IN GLOBAL CLIMATE CHANGE

JOHN W. SUTHERS<sup>†</sup>

Thank you for the invitation to join you and participate in this law review Symposium on a very timely topic. While I have no scientific expertise whatsoever on the subject of global climate change, as a state attorney general I do have some knowledge about the legal efforts of various state AGs to deter global warming. So I will discuss that and, perhaps in doing so, inject a point of view into the Symposium that will be sufficiently controversial to spice things up a little bit.

You should know that, while I take pride in the fact that I can and do work effectively with both sides of the political aisle and that I believe I have been successful conducting the work of the Colorado Attorney General's Office on the basis of what the law requires as opposed to what politics suggests, I am, nevertheless, a pretty conservative Republican. I am a big fan of capitalism and market economics. Given my philosophical bent, it may not surprise you that I have not seen the Al Gore movie, "An Inconvenient Truth" and that I do not presently subscribe to the "sky is falling" school of thought when it comes to global warming. But while I do not personally keep a carbon score card and purchase carbon credits, I do accept as fact that the earth has experienced a discernable warming over the last several decades. Whether it is due to increased human-generated greenhouse gas emissions or is a cyclical event of the sort the earth has previously experienced, I suspect I am less certain about than most of the rest of you here today. But I am convinced that the emission of large amounts of carbon dioxide and other pollutants into the atmosphere is not a good thing for the environment and, therefore, I am wholly supportive of efforts by public policy makers to curb such pollution. And, to the extent greenhouse gases are causing global warming, we should do something about it.

So that leads me to the essence of my remarks this afternoon. What should be the proper role of *state* attorneys general in regard to global climate change? I will first give you my answer to that question, and then elaborate on my response. I believe the proper role of state attorneys general in combating global warming is to enforce the civil and criminal laws passed by their respective state legislatures to protect environmental quality, to cooperate in the enforcement of federal laws designed to combat the problem, to contest federal positions that are con-

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trary to states' rights and principles of federalism, and to properly represent the state health and environment agencies that are clients of the state attorney general.

Now as self-evident as that may sound, I would suggest to you that my view of the proper role of state AGs in this effort would be regarded with some disdain by a few of my AG colleagues, and certainly so among many environmental groups in this country who believe that state AGs have the very broad authority and responsibility to act in whatever the AGs believe is the broader public interest, whether or not they are statutorily vested with the authority to do so. You see, as to the state attorneys general, the global warming debate is a microcosm of a much larger debate about the proper role of state attorneys general. Let me frame the debate for you by alluding to my own experience.

When I was sworn in as attorney general of Colorado in January of 2005, I understood my role would be significantly different than my work as a district attorney or as United States Attorney. Those public offices did virtually nothing but litigation. The district attorney's office prosecuted criminal cases and had limited civil jurisdiction in consumer protection and public health areas. As U.S. Attorney, my office did all the criminal and civil litigation for the United States in the District of Colorado. As attorney general, I understood I would be legal advisor to all departments, agencies, boards, and commissions in Colorado State government. My office would issue legal opinions, both formal and informal, on a wide variety of subjects pertinent to the operation of the State. I also understood I would be involved in a broad range of civil litigation on behalf of the State of Colorado, both as plaintiff and defendant, in addition to the criminal prosecution responsibilities I had had.

But as to my role as the protector of the broad public interest, primarily in regard to Colorado's civil and criminal statutes relating to consumer protection and environmental protection, I still saw myself as assuming the familiar role of a law enforcer. In fact, I would be the chief law enforcement officer in Colorado. It would be my job to enforce criminal and civil laws passed by the state legislature to protect consumers from fraud and deception and to enforce a variety of statutes enacted to protect the public from air and water pollution and other health hazards.

And I do not believe I was naïve. I was well aware that state attorneys general had been involved in some controversial litigation, including the massive civil suit against tobacco companies that had culminated in a settlement agreement in 1999 involving as much as \$240 billion,<sup>1</sup>

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1. See NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, MASTER SETTLEMENT AGREEMENT, available at [http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724\\_1032468605\\_cigmsa.pdf](http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605_cigmsa.pdf).

and that many free market conservatives questioned whether that was a proper exercise of the State police power.<sup>2</sup> I knew that several attorneys general, like Eliot Spitzer of New York, had made quite a name for themselves taking on corporate America, and that many on Wall Street and elsewhere thought they were overreaching. No, I was not naïve, but neither was I fully prepared for what I found when I joined the ranks of state attorneys general.

In March of 2005 I attended my first meeting of the National Association of Attorneys General (NAAG) in Washington, D.C. In the weeks prior to the meeting I was flooded with invitations to go to elegant private dinners and social receptions hosted by law firms for various interest groups while I was in Washington. That is not something that occurred when I went to district attorney or U.S. Attorney meetings. I was also invited to a meeting of the Republic Attorneys General Association (RAGA), which would take place the day before the NAAG meeting. I was informed that the Democrat attorneys general would be attending a meeting of DAGA, the Democrat Attorneys General Association. I learned that many companies and interest groups contributed to both RAGA and DAGA. I recall being a bit perplexed. What was the propriety and necessity of such an effort to influence attorneys general?

When I came into the room for my first NAAG meeting, the scene looked very much like what I experienced at National District Attorneys Association meetings and at meetings where all the U.S. Attorneys got together. Tables were assembled to create a rectangle and a name card and a Colorado State flag marked the place I was to sit. But when the NAAG president called the meeting to order, I noticed that, in addition to the attorneys general sitting around the table, there were about 150 people sitting at tables in the rear of the room. I whispered to a colleague sitting adjacent to me. “Who are all the people in the back?” I asked. He glanced at me in a way to suggest it was a dumb question and then smiled. “They’re here to lobby you,” he said.

And indeed they were. I found that the attorneys general are subject to intense lobbying in much the same fashion as legislators. But instead of seeking your vote, the lobbyists are hoping that you will or will not sign on to *amicus curiae* briefs in the appellate courts, or more importantly, that they can convince you to refrain from initiating or joining a lawsuit against their company or their interests. In rare instances, an attorney general will be encouraged to join a litigation that is regarded as helping the lobbyist’s client. Lobbyists spend a great deal of time and money educating attorneys general about various issues that may become fodder for litigation in the future. Interest groups are now investing mil-

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2. Michael DeBow, *Restraining State Attorneys General, Curbing Government Lawsuit Abuse*, POLICY ANALYSIS, May 10, 2002, available at <http://www.cato.org/pubs/pas/pa437.pdf>.

lions of dollars in attorney general races in the various states in an attempt to protect their interests.

How did it come to this? Fifteen years ago no one cared much about state attorney general races. There was no RAGA and DAGA. NAAG meetings were quiet affairs largely free from outside pressures. A few of my attorney general colleagues who had held office for a long time lived through the transition and probably have a better perspective than mine. But from what I have been able to ascertain and personally observe, the current situation is a confluence of interrelated trends. The bottom line is that state attorneys general have become more litigious, more high profile, and more politically ambitious. Precisely in which order these occurred or which trend led to others, I am not certain. But I do know that the current situation coincides with a phenomenon knowledgeable observers refer to as attorney general “activism.”

Now what exactly is attorney general activism? Is it capable of definition or is it simply a case of “you know it when you see it”? Let me give you a few “I knew it when I saw it” examples and then try to define it.

In the aftermath of Hurricane Katrina in 2005, gas prices rose sharply. The public was angry, perceiving that the rise in price was more the result of corporate opportunism than market forces. The state AGs, all wanting to be perceived as diligent problem solvers, weighed in with their concerns. The Federal Trade Commission (FTC) and several AGs initiated investigations.<sup>3</sup> Colorado had initiated gas pricing investigations in approximately eight out of the previous dozen years.<sup>4</sup> I distinctly recall a nationwide phone conference in which the FTC gave the AGs a preview of the report they were issuing the next day. Essentially, the FTC found no systematic wrongdoing.<sup>5</sup> It concluded that the rise in prices was attributable to market forces, including the highly volatile spot and futures markets.<sup>6</sup> Various AG investigations reported similar

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3. FEDERAL TRADE COMMISSION, INVESTIGATION OF GASOLINE PRICE MANIPULATION AND POST-KATRINA GASOLINE PRICE INCREASES (2006), available at <http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf>; see, e.g., CONSUMER PROTECTION UNIT CIVIL LITIGATION DIVISION, STATE OF IDAHO OFFICE OF THE ATTORNEY GENERAL, REPORT ON POST-HURRICANE KATRINA GASOLINE PRICES IN IDAHO, available at <http://www2.state.id.us/ag/newsrel/2006/GasReport2006.pdf>; CALIFORNIA STATE ATTORNEY GENERAL BILL LOCKYEAR, REPORT ON GASOLINE PRICING IN CALIFORNIA, UPDATE MARCH 2004, available at <http://ag.ca.gov/antitrust/gasoline/pdf/gasoline.pdf>; STATEMENT FROM THE OFFICE OF THE ILLINOIS ATTORNEY GENERAL LISA MADIGAN, RISE IN GAS PRICES INVESTIGATED IN WAKE OF HURRICANE KATRINA, available at [http://www.illinoisattorneygeneral.gov/consumers/gas\\_prices.html#more\\_info](http://www.illinoisattorneygeneral.gov/consumers/gas_prices.html#more_info).

4. See, e.g., ATTORNEY GENERAL SALAZAR ANNOUNCES RESULTS OF YEAR-LONG GAS PRICE FIXING INVESTIGATION IN GRAND JUNCTION AREA (2000), available at [http://www.ago.state.co.us/press\\_detail.cfm?pressID=536](http://www.ago.state.co.us/press_detail.cfm?pressID=536).

5. See FEDERAL TRADE COMMISSION, *supra* note 3, at viii.

6. *Id.*

conclusions.<sup>7</sup> I thought that would be the end of the matter and expected the phone call to wrap up quickly. But a veteran attorney general from the Midwest interjected and made what I considered an amazing assertion. In fact, I had to write it down. “Just because we haven’t found anything illegal, doesn’t make it right and doesn’t mean we shouldn’t do anything about it,” he said. “We need to do something about these obscene profits.”

Folks, that is the mindset of an activist AG. Luckily, market forces shifted a short time later and attorney general interest in the issue declined at the same rate as gas prices.

As to AG activism on the issue of global warming, let me cite you to two cases. In 2006, shortly before he left office, California Attorney General Bill Lockyer filed suit against the world’s six largest car makers.<sup>8</sup> In this suit California sought to recover damages for all environmental damage caused by automobiles since their invention.<sup>9</sup> In *California v. General Motors Corp.*, it was California’s contention that cars are a “public nuisance” the manufacturers inflicted upon it.<sup>10</sup> The suit ignored the fact that the California legislature long ago passed the nation’s strictest auto emission standards and that the companies had specially equipped a significant portion of their fleet in order to comply with those standards. The suit also did not deal with the reality that California constructed an enormous highway system to accommodate this alleged public nuisance. The suit was eventually dismissed by the federal district court in the fall of 2007 on the grounds it raised political questions outside the jurisdiction of the courts.<sup>11</sup> Folks, I believe this was a case of AG activism.

Several Eastern attorneys general, including Eliot Spitzer and his successor Andrew Cuomo, do not like coal fired power plants. So Spitzer, Richard Blumenthal in Connecticut, and several fellow state AGs sued the nation’s five largest coal burning utilities, even though none of the utilities were located in their states.<sup>12</sup> In *Connecticut v. American Electric Power Co., Inc.* the AGs sought a reduction in carbon dioxide emissions.<sup>13</sup> The AGs viewed these emissions as a public nuisance and claimed they needed to bring the case because the federal government and coal burning utility companies had failed to implement any

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7. See CONSUMER PROTECTION UNIT CIVIL LITIGATION DIVISION, *supra* note 3, at 50-51; CALIFORNIA STATE ATTORNEY GENERAL BILL LOCKYER, *supra* note 3, at 2-3; STATEMENT FROM THE OFFICE OF THE ILLINOIS ATTORNEY GENERAL LISA MADIGAN, *supra* note 3, at paras. 2-3.

8. Complaint, *California v. General Motors Corp.*, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (No. C06-05755 MJJ).

9. *Id.* at \*2.

10. *Id.*

11. *California v. General Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

12. See *Connecticut v. American Elec. Power Co., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

13. *Id.* at 260.

meaningful measures to address this matter of national and worldwide significance.<sup>14</sup> The U.S. District Court in the Southern District of New York dismissed the action as raising non-justiciable political questions.<sup>15</sup>

Ladies and gentlemen, therein lies the rub. Unlike some of my colleagues, I do not believe that state AGs have the authority to act in whatever they believe is the broader national or international interest and to usurp the jurisdictional authority of Congress and federal regulatory agencies in the process. I believe many of these are in fact political or policy questions to be resolved by legislative bodies.

I also believe basic principles of federalism are being undermined. Over the last year, Andrew Cuomo, Eliot Spitzer's successor as Attorney General of New York, has taken creative legal steps in an attempt to deter new coal fired utility plants in Kansas and Colorado. To me, the notion that the attorney general of New York has the jurisdictional authority to attempt to block utility plants in Kansas and Colorado is an affront to the most basic tenets of federalism. If the attorneys general of a few Eastern states want to control carbon emissions in Colorado and Kansas, they need to lobby the legislators and regulators in those states and/or fight and win battles in Congress that will result in national air quality standards applicable to every state. Otherwise, they should leave it to the people of Colorado to regulate their own utilities. And incidentally, the new coal fired utility unit in Colorado had been approved as part of an agreement between industry and environmentalists because two older coal units would also be retrofitted as part of the deal and the three of them together would have less total emissions than the two currently operational units.

My definition of AG activism is this: It is when a state attorney general attempts to remedy a real or perceived problem through means other than that intended by those elected to make public policy. My test in determining whether to exercise state power to sue someone is simply this: Has a law been violated and is there sufficient evidence to prove it in court? I will not bring a legal action to stop conduct if a legislature has not provided me a means to do so either by express statutory authority or by statutory recognition that I retain certain common law powers.

Now, do I lobby the legislature if I believe they should change the law and give me broader jurisdiction? You bet I do. Do I join multi-state actions? You bet I do, if I believe the defendant has violated Colorado law. For example, we recently caught pharmaceutical companies whose patents on certain products were about to expire paying off potential generic competitors to stay out of the market. That is a violation of the anti-trust laws of Colorado and a multi-state action is a very efficient

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14. *Id.* at 271.

15. *Id.* at 274.

and effective means to resolve it. In fact, culpable corporate defendants often view this as the preferred method for resolution of such issues.

The aggressive litigation posture taken by some of my fellow state attorneys general has led critics to question whether they are engaged in a violation of the separation of powers. By using perceived common law powers to achieve public policy objectives they deem desirable, they are, in essence, legislating and regulating by litigation. They are shaping public policy, traditionally the legislative function. But the consent decrees by which they resolve the litigation and secure policy changes are not subject to either legislative or executive approval.

The aggressive litigation pursued by the state AGs has caused them to assume a much higher public profile. Mainstream media have generally reported the attorney general activism favorably and many attorneys general have assumed a populist image that plays very well with voters. State attorneys general are now routinely running for higher office. That in turn has, in my opinion, attracted more lawyers who have primarily a political background rather than a legal background, to run for the office. It is very common now for successful state legislators to run for attorney general. They may or may not have extensive legal backgrounds in prosecution or in the private sector. Not surprisingly, in many of the meetings I have been in with fellow attorneys general that included discussions of actual or potential litigation or expressions of frustration about social or economic problems facing the country, some of my brethren sound a lot more like policy-making legislators than law-enforcing prosecutors.

So the bottom line is this: When it comes to commencing litigation, whether environmental or otherwise, I still believe my only appropriate consideration should be whether Colorado law has been violated or whether federal law gives me jurisdiction to pursue prescribed remedies. I believe attorneys general should seek to solve problems only through remedies provided by the Constitution and by the legislature of their respective state or by Congress. That can include common law remedies the legislature recognizes within the attorney general's jurisdiction. I do not believe it is appropriate for attorneys general to pursue consumer protection or environmental litigation that does not derive from constitutional or legislative authority, but rather represents the attorney general's personal view of what constitutes the broad public interest. By the way, in utilizing available state and federal legislative remedies, including the Comprehensive Environmental Response, Compensation, and Liability Act,<sup>16</sup> my office is engaged in a significant amount of environmental litigation to protect air and water quality in Colorado.

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16. See 42 U.S.C. § 103 (2006).



And to emphasize that these jurisdictional issues are not simple ones, I will tell you that my office is willing, if directed by our clients in the executive branch, to join California, New York and other states in suing the federal government to preserve the right of states to set emission standards for cars purchased and driven in their state. Regardless of my personal views as to the wisdom of doing so, I believe that is a proper exercise of state power. I also acknowledge that it was the right of several states to sue the Environmental Protection Agency and challenge its determination that it lacked authority under the Clean Air Act to regulate carbon dioxide as a pollutant.<sup>17</sup> That was a question that needed to be answered and I saw the suit as an acknowledgement that this is a problem that needs a national and international solution.

Ironically, I believe some of my more activist colleagues are facing the prospect of losing some front page exposure. I am pleased that it appears the federal government is becoming more engaged in the global warming debate and what to do about it. If there is a coherent national policy on the issue, it is my hope that my state brethren will be less tempted to run roughshod over the basic framework of federalism. But then again, I would not be surprised to see the Attorney General of California or the Attorney General of New York up the ante in the near future and bring a suit against China and India. After all, why should international boundaries stand in the way of what they believe is good for the citizens of California or New York? When you want to be governor, senator, or perhaps President, sometimes your ambition knows no boundaries.

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17. See *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).