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"Special Solitude": The Growing Power of State Attorneys General

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Attorney General of Virginia, 1998-2001

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KEYNOTE ADDRESS

“SPECIAL SOLICITUDE”: THE GROWING POWER OF STATE ATTORNEYS GENERAL

*Mark L. Earley **

The most powerful elected position in the United States today, with respect to checking any perceived overreach of presidential or federal power, is not in Congress, the House of Representatives or the Senate, but is among the fifty state attorneys general.

When Attorney General Shapiro of the Commonwealth of Pennsylvania was asked to run for the United States Senate, he declined saying, “I’m going to run for attorney general because that is the most impactful elected position in America today.” I think he is right.

Historically, the roots of the attorney general’s office go back to seventeenth-century England where the attorney general was independent of the king. All thirteen colonies of the United States had attorneys general, and today all fifty states have attorneys general. By and large, they have broad jurisdiction, and they operate independent of the executive branch. Forty-three of those fifty attorneys general are elected by popular vote. The other seven are appointed either by the Supreme Court, the governor, or the legislature of their state.

Offices of attorneys general range from small to large. New York is probably the largest. There are 700 attorneys with Attor-

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ney General Schneiderman in New York. On most days, offices of attorneys general are found representing and providing counsel to their states in routine day-to-day matters. For example, when I was Attorney General of Virginia, we had attorneys that represented the various departments of state government such as the universities, the Department of Transportation, the State Police, the Department of Consumer Affairs, etc. That continues across the states today.

I mentioned that most of them today are independent. It was interesting: in February 2017, the Maryland legislature passed a bill that finally made the Maryland Attorney General independent of the governor. In Maryland, based on a prior supreme court decision of that state, if the attorney general was going to file suit against the federal government, they had to have the governor's permission. A recent bill in that state unshackled the attorney general from the governor and made that position independent.

When you combine the independence of attorneys general with their broad jurisdiction, it is a powerful position. What has really made it more powerful is a ruling by the Supreme Court in 2008 in *Massachusetts v. EPA*. That ruling significantly broadened the attorney general's power by ruling that the states did not have to show the traditional indicia of standing to file suit against the federal government. The Justices said that states have "special solicitude" when it comes to standing. Everything that you have seen during the Obama Administration where Republican attorneys general pushed back against executive orders, such as the Affordable Care Act ("ACA"), and everything you have seen since the beginning of the Trump Administration, such as suits filed against the travel ban, the EPA, etc., all stem from and were made possible by that decision in 2008. It has dramatically changed the landscape.

In 2017, the Washington Attorney General Bob Ferguson was named one of the one hundred most influential people in America by *Time Magazine*—a state attorney general. Why? He has sued the Trump Administration seventeen times during the first year. And he is not unusual. He says he has a three-prong test about whether to file suit against the federal government: (1) are the people of my state affected?; (2) do I have a good legal argument?; and (3) do I have standing? With the ruling in 2008 by the Supreme Court, the answer to all of those questions can be yes in almost every exercise of federal power or any lack of exercise of

federal power. And attorneys general have rushed into this broadened interpretation of standing since 2008, flexing their new power.

If you were a senator or a congressman after the Trump Administration issued its initial travel ban, what did you do? Maybe called a press conference to say how you thought it was great, or how you thought it was bad? If you are a state attorney general, what did you do? You filed suit, and you were able to block the ban. Of the United States Senators today, nine are former attorneys general—another example of their growing influence and power in shaping American politics and in checking executive power.

Over the last twenty years, there were four milestones along the road to enhancing the attorney general's ability to check executive power. The four things are: (1) the litigation against the tobacco companies in the 1990s; (2) the creation of the Republican Attorneys General Association and the Democratic Attorneys General Association; (3) national fundraising for state attorney general races; and (4) the aforementioned 2008 Supreme Court ruling in *Massachusetts v. EPA*.

First, the tobacco litigation. The whole idea of state attorneys general coming together to file suit against someone or something was not unheard of; there have been multistate actions for many years. But the suit against tobacco companies changed everything. It was the biggest civil settlement ever reached in United States history. It was \$206 billion over twenty-five years. It put attorneys general around the United States in the headlines and on the news every day. It made them national players like nothing had done before. The trend continued with suits against Microsoft and Google. After the foreclosure crisis, they sued five national banks, winning \$26 billion relating to foreclosure abuses. They sued Moody's and Standard & Poor's. The list goes on and on. The amount of money recovered in these actions was staggering. A lot of this money would come back to the offices of attorneys general, and some of them would have control over where those monies were spent. Sometimes it enabled them to beef up their staffs. The increased muscling up of their staffs from these settlements and the new-found power among attorneys general after their success in suing the tobacco companies was like rocket fuel for them working together to take on a big target, whether it was suing companies in the private sector, or in the public sector, in checking executive power.

The second milestone was a big change in partisan activity among attorneys general by the creation of the Republican and Democratic Attorneys General Associations. A bit of historical context is in order. Attorneys general came together initially in 1907 to form the National Association of Attorneys General (“NAAG”). They came together in the early 1900s to devise an antitrust strategy vis-a-vis Standard Oil. At that time, their efforts were staffed out of the offices of attorneys general around the United States. As time grew on, NAAG became its own entity in which every attorney general’s office would contribute annual fees to fund it. It became a preeminent national organization on par with the National Governors Association and the National Lieutenant Governors Association.

Now, what I am about to share with you is from my own personal experience. I had a front row seat at this as Attorney General of Virginia. In the late 1990s, many Republican attorneys general did not feel NAAG was bipartisan, like the National Association of Governors or the National Association of Lieutenant Governors. For example, those two organizations always alternated the Chairmanship among Republicans and Democrats from year to year regardless of the throw weight of Democrats versus Republicans across the United States—one year a Republican, the next year a Democrat. Whether the Republicans had ten seats and the Democrats forty, they always alternated. That was not true at the National Association of Attorneys General.

Because of that lack of bipartisanship, and partly because, in the eyes of many Republican attorneys general, the dominant focus of NAAG in suing private industry like tobacco and Microsoft did not fit with a more traditional approach of focusing on issues within their state or criminal justice issues, the Republicans, while not withdrawing from NAAG, decided to form a separate organization called the Republican Attorneys General Association (“RAGA”), in 1999. The purpose was to raise money nationally to elect more Republican attorneys general nationwide.

The Democrats were opposed to the idea. There was a lot of discussion within NAAG about how this was going to upset the fraternity and collegiality of attorneys general. The Republicans initially agreed not to use any of the money raised to run against incumbent Democrats, but rather only in open-seat races.

It was such a successful move by the Republicans that despite their opposition, three years later Democrats formed their own association—The Democratic Attorneys General Association (“DAGA”). And as of 2016, RAGA had raised \$23 million nationwide to fund attorney general Republican candidates, and DAGA had raised \$10 million.

For better or worse, the third milestone was this dramatic influx of national political campaign donations flowing into state attorneys general races. The development of national fundraising for both Republican and Democratic attorneys general has significantly impacted how attorneys general align around multistate issues. And even though you still see some very significant bipartisan, multistate activities against private companies, when it comes to checking executive and federal power, it is largely partisan. During the Obama Administration, all of the suits filed against the federal government were by Republican attorneys general trying to stop the Obama Administration, and the same thing is true today with Democratic attorneys general filing against the Trump Administration.

The money that is now being raised in attorneys general races around the country is an astounding change and, as a result, attorneys general are coming into office with a national agenda on their mind rather than just a state agenda.

The fourth milestone that has really rocketed attorneys general to this preeminent position of being able to check executive power is the aforementioned decision in *Massachusetts v. EPA*. Massachusetts, along with some other states, sued the EPA toward the end of the Bush Administration. They asserted that the EPA had dragged its feet to do rulemaking about regulating greenhouse gas emissions for motor vehicles. It was an attempt to force the EPA to take action. The filing states felt they had standing to file on the basis that they would be harmed by the EPA’s inaction, as failure to regulate greenhouse gases was contributing to global warming and would have a detrimental effect on their states.

The Supreme Court, in an all too familiar 5-4 decision, ruled that the states did not have to show any particularized harm and the states had a “special solicitude” to bring a state action. The decision opened the flood gates to the state attorneys general being a powerful check on any perceived abuse of executive or federal power.

As an example of how these milestones have provided increased activity and power on the part of the attorneys general to challenge executive power, one only needs to recall that on the same day that President Obama signed the Affordable Care Act, Florida Attorney General McCollum, South Carolina Attorney General McMaster, and a number of other Republican attorneys general filed suit asking the Supreme Court to find it unconstitutional. They were unsuccessful, except the Court did find that the Medicaid expansion provisions of the ACA were unconstitutional. That then led to twenty states opting out of Medicaid expansion, which severely hampered the ability of the Affordable Care Act to do what it was intended to do.

And then we come to the Trump Administration, and we have moved from a rather bland, small-track NASCAR race to the Indy 500. Close to thirty suits have been filed in the first year of the Trump Administration. I mentioned the Washington State Attorney General has filed seventeen. In addition, when the Maryland Attorney General's Office got its independence in 2017, as discussed earlier, the *Washington Post* headline read: "Maryland Frees State Attorney General to Fight Trump Administration."

Washington and Maryland are not alone. The Connecticut Attorney General has filed suit with a number of others against the EPA, basically to get the Trump Administration and the EPA to follow through with the rules the Obama Administration had made with respect to regulating emissions for vehicles. They are spurring lawsuits as well against the Trump Administration travel ban. New York Attorney General Schneiderman, two days before Trump took office, issued legal guidelines and road maps to the cities of New York and others who considered themselves sanctuary cities about how they could resist what was perceived as federal overreach in immigration policies at the local level. The Massachusetts Attorney General is leading a multistate working group trying to preserve the Affordable Care Act and filing suits on that front. To the extent those opposed to the Trump Administration call themselves the resistance, the leaders of the resistance on the cutting edge are the state attorneys general. This is a wholly new phenomenon in shaping pushback and challenges to federal executive power.

One interesting note, James Tierney, the former Attorney General of Maine, who now teaches on the role of the state attorneys general at Harvard University, and one of the foremost scholars

on the office of the state attorney general, thinks that the Supreme Court may be looking for an opportunity to change the standing rule it articulated in *Massachusetts v. EPA*, because Justice Roberts does not like the Supreme Court being drawn into every national partisan policy issue, and he is interested in reducing the number of cases that come to the Supreme Court.

Tierney has also observed that, in the later days of the Obama Administration, Justice Department lawyers, in answering suits filed by Republican attorneys general, were giving the Court as their last reason to rule in the Obama Administration’s favor, that the states do not have standing and the Supreme Court should revisit its ruling in *Massachusetts v. EPA*. One can assume the Sessions Justice Department is going to be arguing that same thing.

How does one view the growing power of the attorneys general to challenge executive and federal power? One can view it as a glorious playing out of the freewheeling and adaptable democratic system of checks and balances. Or one might view it as the grotesque free fall of an orderly administration of government that is now hopelessly divided, reflecting a divided nation no longer able to govern itself in the traditional means to which we have become accustomed.

I am not sure which one it is, but I know this—it is different. And I know now, to be an attorney general in the United States is to occupy one of the most significant places of power to effectively check executive and federal power.

Thank you.