



CIVIL SUBPOENAS UNILATERALLY ISSUED BY STATE ATTORNEYS-GENERAL ARE CONSTITUTIONALLY SUSPECT

by Philip Hamburger

What is the power of a state attorney general to pry into private papers? In November 2015, New York Attorney General Eric Schneiderman issued a subpoena to Exxon Mobil Corp. demanding that the company turn over many of its records, so that he could investigate it for allegedly making fraudulent statements about the climate.¹ Many Americans cheered. But such subpoenas come with constitutional dangers.

Federal and state constitutional law traditionally left government no power to demand testimony, papers, or other information, except under the authority of a judge or a legislative committee. In the absence of a legislative investigation, and prior to a court case, the government could demand information only by getting a warrant signed by a judge based on probable cause, or by asking a court overseeing a grand jury to issue a subpoena. Over the past century, however, the law has changed. Now, a government administrator or even an attorney general can simply demand information by issuing a subpoena under his own signature.

By way of excuse, attorneys-general claim to be acting merely in a civil rather than a criminal capacity. To be sure, attorneys-general mostly seek civil remedies, sidestepping the burdens of the criminal process. They always, however, retain their central power to bring criminal prosecutions—as Attorney General Schneiderman is quick to say. He boasts of his “unique statewide criminal jurisdiction” over financial crimes,² and his subpoena to Exxon Mobil, which appears to have been issued directly by the attorney general under New York’s Martin Act rather than by a grand jury, could ultimately result in a criminal prosecution. Even if the consequences remain merely civil, such a claim is not reassuring. Ordinary civil subpoenas come only after a case has begun and thus are subject to ongoing, regular judicial supervision. An attorney general’s subpoena, in contrast, precedes any charges and thus does not grow out of judicially-supervised court proceedings.

Another excuse attorneys-general may offer is that administrative agencies have gradually acquired a subpoena power, and prosecutors are not doing more than the agencies do. The agencies’ subpoena power, however, is fraught with dangers too. Even though such power has long been upheld as constitutional, it is a poor justification for the very different practice of allowing prosecutors to issue subpoenas. An attorney general nowadays possesses both the discretion to demand information and the power to initiate criminal charges. His subpoena is thus even more worrisome for privacy and the polity than an administrative subpoena.

The laws authorizing attorneys-general to subpoena information tend to be very open-ended. Under the Martin Act, for example, the state’s attorney general can subpoena information whenever he considers it relevant to an investigation of what he considers a material misrepresentation by a corporation. Even more loosely, under New York’s Executive Law, he can subpoena information “[w]henever in his judgment the public interest requires

¹ Chris Mooney, *New York is Investigating Exxon Mobil for Allegedly Misleading the Public About Climate Change*, WASH. POST, Nov. 5, 2015.

² Criminal Enforcement and Financial Crimes Bureau, New York State Office of the Attorney General, available at <http://www.ag.ny.gov/bureau/criminal-enforcement-and-financial-crimes-bureau>.

it” and the Governor approves. The attorney general thus becomes an inquisitor who can render any person—corporate or individual—an open book for government inspection.

An attorney general’s ostensible concern about fraud or the “public interest” is no justification for allowing him to rifle through private papers. When he thereby extracts the basis for a criminal prosecution, he evades the grand jury process. When he lays the groundwork for a civil enforcement proceeding, he evades the due process of law, for there ordinarily is no discovery for a plaintiff until he commences a civil action. Even worse, when a prosecutor uses a subpoena to extract a remunerative settlement, it is akin to extortion—via an end-run around the courts. But that is not all, for attorneys-general use settlements to regulate in ways that the legislature did not. Dissatisfied with enacted regulations, attorneys-general employ their subpoenas to impose restrictions in settlement that failed to pass muster in the political process. The unlawful intrusion into private papers thus evades the constitutional paths for both adjudicating and legislating.

Corporations need the freedom to explore ideas and test them in private when deciding what they will say in public. Of course, when investigated by a grand jury under the supervision of a court, or when charged in a civil action in court for actual concrete harms, corporations must disclose many of their private papers. But until then, they need their privacy as much as individuals do. If they cannot consider and reconsider difficult scientific questions in private, they may abandon many of their scientific inquiries altogether, with high costs for the public.

Most sobering of all are the implications for freedom of speech and political dissent. Conclusions about climate change, on either side of the question, are often difficult to distinguish from political opinion. Although the truth about the climate may lie in complex empirical data, such data is open to dispute. The attorney general’s subpoena therefore looks disturbingly like harassment for dissenting scientific and political opinion. The attorney general’s investigation can also be viewed as an attack on the scientific method—an essential foundation of modern life. The attorney general’s understanding of the climate may be true, but for purposes of science, what is far more important than truth is the freedom to dispute it. If his subpoena persuades corporations to diminish their attempts to test and question the truth, he will have chilled scientific and political dissent and achieved an American version of Soviet Lysenkoism.³

Attorney General Schneiderman’s claim that he is investigating fraud confirms the assault on freedom of speech. Under the Martin Act, fraud is defined in a manner that does not require proof of intent, reliance, or harm. The remaining elements are merely misrepresentation of a material fact and falsity, even if by omission. Such an open definition of fraud is dangerous as applied to things like the climate controversy, for it is apt to become a means of criminalizing unpopular scientific or political speech.⁴ The government cannot constitutionally be in the business of investigating Americans for espousing scientific falsehoods (or truths), let alone political ones, and if the government can take aim at fraud without having to prove concrete harms, there is little stopping it from using subpoenas, prosecutions, and threats of prosecution to suppress constitutionally protected speech.

Even where the attorney general does not go that far, a statute such as the Martin Act, which treats false speech as fraud without proof of harm, must be considered dangerously overbroad. When a statute allows an executive officer to turn institutions inside out, without going through the courts, on the basis of standards as open-ended as the “public interest” or fraud without harm, he acquires a license to pry that, as shown by the Exxon Mobil subpoena, threatens to expose and punish dissenting scientific and political belief.

Whatever the truth about the climate, and whatever Exxon Mobil has said or not said about it, an attorney general should not have the power to subpoena records. Prosecutors should go to the courts for subpoenas. When the courts allow prosecutors to circumvent the judicial subpoena power, they are inviting profoundly dangerous constitutional violations.

³ The term is derived from a campaign led by a Soviet official, Trofim Lysenko, to discredit science-based agriculture and genetics.

⁴ See Walter Olson, *Another Step Toward Climate Speechcrime: New York Subpoenas*, OVERLAWYERED, Nov. 9, 2015, available at <http://overlawyered.com/2015/11/another-step-forward-on-climate-speechcrime-new-york-subpoenas/>.