Opening Statement

My name is Matthew Hardin. Although I testify in my individual capacity, I currently serve as the chief prosecutor ("Commonwealth's Attorney") in Greene County, Virginia. I was previously a litigator from 2014-2017, using federal and state Freedom of Information laws to obtain government documents nationwide.

Many public records I and my colleagues obtained detailed a campaign by plaintiffs' attorneys and activists to recruit "a single sympathetic state attorney general…[or] even grand juries convened by a district attorney" to subpoena records of private parties targeted by the tort bar. This campaign was in fact successful, as headlines well-document, and was followed by a coordinated effort by political donors, again with the assistance of activists, to enlist state law enforcement apparatuses to investigate private parties and otherwise support a private agenda.

A report released by the Competitive Enterprise Institute and authored by Christopher Horner, entitled "Law Enforcement for Rent," details many of those documents I helped uncover.

The lead plaintiffs' attorney behind the effort to recruit attorneys general admitted the campaign's political nature, in addition to its pursuit of financial settlements, in an interview with The Nation magazine:

> I've been hearing for twelve years or more that legislation is right around the corner that's going to solve the global- warming problem, and that litigation is too long, difficult, and arduous a path. ... Legislation is going nowhere, so litigation could potentially play an important role.[1]

Also apparently recognizing the problematic nature of these collaborations, the same plaintiffs' attorney worked with attorneys general offices against which I litigated, Vermont and New York State, to mislead a reporter from the *Wall Street Journal* who called, apparently to inquire about a separate issue entirely. One federal court noted this behavior, asking, "Does this reluctance to be open [about collaborating with plaintiffs' attorneys and activists with a litigation agenda] suggest that the attorneys general are trying to hide something from the public?"[2]

My experience and the experience of others forced to litigate numerous open records requests to determine how public offices came to be used in this way suggests the answer is "yes".

---

[1] Zoe Carpenter, "The Government May Already Have the Law It Needs to Beat Big Oil," The Nation, July 15, 2015, https://www.thenation.com/article/the-government-may-already-have-the-law-it-needs-to-beat-big-oil/. Possibly realizing the problem, Pawa subsequently denied the sentiment when asked about it in April 2016 by a reporter from the *Washington Times*.

[2] Order, transferring *Exxon v. Eric Schneiderman and Maura Healey* from the Northern District of Texas to the Southern District of New York, Kinkeade, J., C.A. No. 4:16-CVK-469-K (N.D. TX, Mar. 29 2017), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20170329_docket-416-cv-00469_order-1.pdf, at 8.

One public record I obtained in litigation in the Vermont courts was an agenda for a meeting among activists, "prospective funders", attorneys general offices and plaintiffs' lawyers, titled "Potential state causes of action against major carbon producers". One academic hosting the meeting described it to attorneys general offices as "a private event for staff from state attorney general offices" to pursue this agenda. One academic invited to address the gathering boasted in an email to a major donor to her institution (and the host institution) that this meeting was "about going after climate denialism—along with a bunch of state and local prosecutors nationwide".

It is difficult to imagine this being anything other than a national scandal and the subject of numerous Pulitzer Prize winning news stories if the players and agenda were different. Which may be why so many media and constitutional watchdogs have chosen instead to avert their gaze. As such, this sort of behavior is becoming normalized, and expanding to the point that congressional committees are apparently joining in.

Please note that if this is acceptable involving parties and issues you favor, it is also acceptable involving parties and issues you do not favor. If the growing use of public office to assist private litigants is permitted to stand here what is the limiting principle dictating that the National Rifle Association, pro-life groups or chemical or fossil fuel companies cannot also chair such use of law enforcement, and otherwise public office?

I come to this Committee both as a prosecutor and to offer my experience on these matters as a civil litigator. I believe in the Rule of Law, and that all citizens are entitled to participate in democracy and have their day in court if they so choose. But I also appear today concerned that private donors and activist groups are seeking to thwart the fair and neutral workings of our democratic policymaking and our litigation system, particularly law enforcement. Civil and criminal litigants are entitled to discovery under the rules of court that apply in their cases. The American system of justice is the envy of the world, and our courts are more than capable of applying those rules equitably.

But what I saw happening as a private litigator was a perversion of justice. Rather than filing suits and seeking their day in court like any other litigant, powerful special interests sought to enlist law enforcement to obtain public records seemingly to assist their tort litigation campaigns, as well as to make policy through the use of law enforcement office. When tort lawyers teamed up with Attorneys General, using either Common Interest or "Secundment" agreements, the public rightly showed an interest in what its government was up to, and many citizens and interested groups filed Freedom of Information or state-level equivalent requests.

But those requests were frustrated over and over again, with states often using the excuse that correspondence between plaintiffs' lawyers and the AG offices they sought to enlist in their cause — successfully, all too often — were privileged law enforcement and even "whistleblower" materials. Apparently there is a grave "chilling effect" on tort lawyers turning to law enforcement

for a boost to their flagging litigation campaigns in the event the public is allowed to see how these offices came to be used in this way.

The public has a substantial interest in learning how private law firms are recruiting elected officials to further private goals and what if any such discussions state OAGs had. Disclosure of such records sought will provide a significant benefit to the public by demonstrating how private law firms recruit attorneys general to support or otherwise collaborate in their contingency-fee campaigns as well as provide transparency on the operations of an elected, constitutional officer or his/her office.

A possible chilling effect on tort lawyers recruiting sympathetic attorneys general to subpoena documents and otherwise assist "strategies to win access to internal documents,"[3] cannot plausibly outweigh the public's interest in seeing such records, or in preserving our system and its protections. Therein lies the irony, private tort lawyers are enlisting instrumentalities of government to pursue private records, while the public are blockaded from seeing how public office is being used to this end.

When private litigators can enlist the government to pursue their private-party targets, the playing field is no longer even. Government attorneys share what they wish with their favorite plaintiffs' lawyers, but hide it from average citizens with an interest in what their tax dollars are paying for. And civil, or even criminal, defendants are deprived of a crucial tool they would otherwise have to defend themselves with: the rules of discovery.

Bringing government and its power to bear tips the scales of the ordinary litigation process. My experience revealed private attorneys collaborating with Attorneys General to bring law enforcement resources to bear in what would otherwise be a private dispute. But the danger of allowing private litigants to bring the resources of Congress to bear is just as acute.

This committee may today glean testimony, documents, or other helpful information for a civil litigant, which that litigant could not have obtained using the ordinary tools accorded to every other citizen. Congress through its committees is changing the justice system, in which every citizen ought to have a fair and free opportunity for trial and appeal.

Now, favored citizens and causes not only have the ordinary right of trial and appeal but, if disgruntled or left unsatisfied in their preparations for trial, can come to this Committee and persuade Congress to use its powers of investigation and oversight to obtain information unavailable elsewhere.

Let's make the justice system work the way it was intended to. Let's try civil cases in civil court. Let's get prosecutors back in the business of prosecuting crime, not "going after" opponents of

---

[3] Order, transferring *Exxon v. Eric Schneiderman and Maura Healey.*

one's agenda "with a bunch of state and local prosecutors nationwide". And let's keep Congress's thumb off the scales, and its focus on its Article I responsibilities.