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Should Conscription of State Attorneys General Be a Recognized Fourth Form of Federal Agency Action? How Federal Agencies Are Using the States to Expand Their Regulatory Reach and Advance Their Missions

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In this article, the authors discuss whether federal agencies' considerable reliance on state attorneys general to execute and operationalize federal initiatives constitutes a fourth type of federal agency action.

It is axiomatic that there are three recognized forms of federal agency action:

1. Notice-and-comment rulemaking,
2. Administrative adjudications, and
3. Investigations.

But should a fourth type now be recognized?

In recent years, federal agencies have sought to expand their reach and broaden their capabilities by utilizing state attorneys' general ("state AGs") enforcement powers to accomplish federal regulatory goals. For example, commentators note that federal agencies "have enjoyed a synergistic relationship . . . working on privacy and data security issues" in recent years.[1] For their part, state AGs have recognized that there is a particularly "critical role State Attorneys General play" in the federal regulatory context and argued "for increased partnerships between federal enforcers and the states."[2] And while federal agency reliance on state AGs is not entirely new, its recent growth in the face of real and perceived limitations of federal law presents evolving opportunities

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and challenges. How regulators resolve these issues will affect the regulatory landscape for countless industries, in innumerable ways, and shift the balance of power between federal and state governments for years to come.

This article examines whether federal agencies' considerable reliance on state AGs to execute and operationalize federal initiatives constitutes a fourth type of federal agency action—different and distinct from the three forms traditionally recited. To that end, the next section of this article discusses many of the ways—new and old—that federal agencies deputize state AGs and the reasons why they choose to do so. This article then identifies some of the significant challenges federal agencies face because of their reliance on state AGs. Finally, it concludes with a series of predictions about where the trend of federal agency reliance on state AGs is likely to head in the coming years.

Methods and Benefits of Conscripting State AGs

Federal agencies use numerous methods to deputize state AGs, depending on competing regulatory goals. Some of these methods are tried and true; others are recent innovations that permit federal agencies to conscript state AGs in furtherance of federal objectives.

First, federal agencies provide earmarked funding to state AGs for key enforcement initiatives. Federal agencies utilize this tool when states approach regulation differently, and the agency wants to promote uniformity between state and federal law.

Second, federal agencies utilize documents known as "information-sharing agreements" when federal and state regulators have a shared regulatory goal that is so pervasive and widespread it requires rapid dissemination of information.

Third, federal agencies and state AGs may share enforcement authority. This approach allows federal agencies to regulate indirectly through the states, leveraging local expertise while also avoiding a federal investigation.

As discussed further below, each of these tools provides unique opportunities for federal agencies hoping to harness the power and resources of state AGs, a practice that is becoming more prevalent as federal agencies recognize the related benefits and influence of state AG enforcement efforts.

Conscription Through Funding

One action that federal agencies take to coax state AGs into carrying out federal regulatory objectives is to provide state AGs with conditional federal funding. Typically, federal agencies require state AGs to spend these funds enforcing laws and regulations that align with the federal government's policy goals.

This arrangement provides many benefits. For instance, from a federal agency's perspective, providing federal funding has the practical effect of enlisting state AG support in federal enforcement priorities that, whether because of politics, lack of funding, or other reasons, may not otherwise be forthcoming on their own. Consequently, federal agencies and state AGs will often "speak with one voice," thereby ensuring federal priorities are addressed consistently.

An additional benefit to federal agencies is that state AGs can leverage their unique experience and local expertise when operationalizing regulation. Such provincial knowledge allows state AGs to implement federal goals more efficiently than federal agencies could otherwise accomplish on their own. For example, in the antitrust context, state AGs can use federal funds to pursue investigations and enforcement of state competition laws against those industries disfavored by a state for whatever reason, thus optimizing the beneficial impact of such enforcement efforts.

State AGs also benefit from collaboration with federal agencies through funding. With additional financial resources, state AGs are empowered to enforce state regulations without fear of depleting their office's enforcement resources, which may be needed for other competing or preferred priorities. This action, in turn, enables state AGs to pass enforcement benefits along to their constituents, such as through lowered costs, stronger protections, and fewer societal harms.

A recent example is illustrative. In September 2022, the U.S. Department of Agriculture ("USDA") announced a new partnership with state AGs to "ramp up enforcement on the competition laws," using up to $15 million from the Consolidated Appropriations Act to "tackle anticompetitive practices in the agricultural sector and related industries."[3] Industry watchdogs, federal agencies, and the White House have argued that the meat and poultry industries have consolidated too rapidly, harming small farmers and employees alike.[4] For example, the White House claims that large meat and poultry companies produce the inputs upon which farmers rely to bring livestock to market, such as certain grains, and a lack of competition in the industry allows these corporations to raise prices on the inputs, squeezing profits from smaller farmers.[5] But, until the recent announcement, the USDA has not effectively coordinated with state authorities to create "more rigorous enforcement of the competition laws."

Accordingly, the USDA initiative will bring significant benefits to the federal government. Through provision of federal funding to the state AGs, the USDA has effectively goaded states into enforcing a high-priority item on the Biden administration's agenda. What is more is that state AGs will be able to employ their local expertise to regulate the industries more efficiently, while still fully in accordance with federal objectives.

Conscription Through Information-Sharing Agreements

While funding may incentivize state AGs to enforce state law in accordance with federal priorities, information sharing between the federal government and state AGs seeks to address problems so widespread that the only effective response is for regulators to amalgamate and distribute their information with each other.[6] Particularly, the federal government benefits by taking advantage of information gathered from the individual states. When the federal government uses intelligence it receives from the states, it is better able to implement policies and regulations that effectively address the problem. State AGs also benefit by sharing investigatory findings and preventing redundancies in enforcement.[7]

An example of a current federal enforcement priority addressed through information-sharing agreements with state AGs is robocalling. Robocalls are automated calls, many of which originate from outside the United States, typically via international gateways to the American telephone network.[8] To make the calls appear legitimate, foreign robocallers allegedly spoof caller IDs with legitimate American phone numbers, making the call appear as if it originated within the United States. Robocalls can negatively impact consumers, telecommunications providers, and law enforcement efforts alike. Between enforcement costs, costs to telecommunications providers, and financial losses incurred by victims of fraud, estimates place the societal cost of robocalls at $13.5 billion annually.[9]

More than 40 states have agreed to provide information to the Federal Communications Commission ("FCC") in an effort to prevent foreign robocallers from contacting Americans.[10] These agreements, many of which have been formalized in memoranda of understanding, have helped federal regulators take critical steps toward building a record against alleged bad actors without exclusive reliance on their own investigatory resources.[11]

Moreover, information-sharing agreements have allowed both the "FCC's Enforcement Bureau and state investigators [to] seek records, talk to witnesses, interview targets, examine consumer complaints, and take other critical steps to build a record against possible bad actors."[12] Faster distribution of information between the states and the federal agencies thus creates a network effect in regulatory actions, resulting in increased efficiency and decreased duplication of resources.

Conscription Through Shared Enforcement Authority

Federal agencies often share enforcement authority with states to extend their regulatory capacity and ensure enforcers at both levels of government obtain a favorable outcome. This shared authority stems primarily from two sources.

First, certain federal-enabling statutes grant enforcement authority not only to a federal agency but also to the states.

Second, state and federal agencies often regulate the same industries and practices under separate state and federal regulatory schemes.

Both necessitate significant buy-in from federal and state actors. In recent years, some federal agencies have taken a step further toward increasing the states' responsibility. This subsection explores both sources of shared authority and examples of how federal agencies use this structure to their advantage.

Federal Delegation of Enforcement Authority

Many federal statutes expressly grant enforcement authority not only to the relevant federal agency but also to the state AGs.[13] These statutes specifically require states to notify the federal agency before filing suit, allowing the federal government to intervene where necessary.[14] Often, responsibilities for state investigations and judicial enforcement actions under these laws falls on state AGs.[15]

A good example of this is the Consumer Financial Protection Act, which contemplates shared enforcement authority between the Consumer Financial Protection Bureau ("CFPB") and state AGs.[16] In 2010, Congress acknowledged in the Consumer Financial Protection Act the important role state AGs play in the consumer protection arena and assigned shared enforcement authority to the CFPB and state enforcers.[17] Specifically, the Consumer Financial Protection Act states that "the attorney general of any state may bring a civil action . . . to enforce provisions of this title or regulations issued under this title."[18] The Consumer Financial Protection Act also instructs state AGs to consult with the CFPB before initiating an action, which guarantees the CFPB's involvement in state-level enforcement actions if desired.[19]

Since 2010 regulators have continued to recognize the critical role state governments play in promoting consumer protection policy.[20]

In May 2022 the CFPB issued an interpretive rule that reiterated and bolstered state enforcement authority, demonstrating a continued commitment to "promoting state enforcement, not suffocating it."[21] The interpretive rule affirmed that states may enforce not only the Consumer Financial Protection Act but also the other 18 consumer laws that fall within the CFPB's domain.[22]

In addition, the rule expanded the list of companies and individuals against whom states can pursue claims.[23]

Finally, it clarified that states may continue enforcement actions even after the CFPB brings an action.[24] All three aspects of the interpretive rule reveal the CFPB's continued intent to deputize the states and encourage complementary state enforcement—with the understanding that state AGs can offer additional resources that the agency can employ to enhance the CFPB's mission of consumer protection.[25]

Concurrent Regulation of Same Industry or Subject Matter

Shared and overlapping enforcement authority under federal and state laws also leads to federal agencies and states regulating the same industries and practices in many scenarios. In other words, businesses and other industry actors often must comply with both federal and state law concurrently. As a result, a single incident or business practice may raise dual red flags—one for a federal agency and one for a state AG. In the subsections that follow, several examples of this phenomenon are discussed that are instructive, but, of course, do not constitute an exhaustive list.

FTC and DOJ Joint-Action Protocols

The Federal Trade Commission ("FTC") and the Antitrust Division of the U.S. Department of Justice ("DOJ") acknowledge that "some mergers and acquisitions may become subject to simultaneous federal and state investigations."[26] In response to this reality, the FTC and DOJ developed a protocol for joint investigations.[27] They hoped to "maximiz[e] cooperation . . . and minimize[e] the burden on the parties."[28] To facilitate joint action, and to ensure that state enforcers can support federal agencies' enforcement efforts, this protocol contemplated common issues that arise when government officials of varying levels of government work together. Those issues include the following: questions about how to share and handle confidential information, how to conduct conferences between enforcement officials, how to identify and depose witnesses, paths to settlement, and what kinds of statements should be made to the press.[29]

By developing these protocols, the FTC and DOJ have signaled not only that they anticipate overlapping efforts but also that they hope to add a third overlapping layer—the help of states—so that the FTC and DOJ can use local insights to further develop federal strategies and cases.[30]

Narrow Preemption Authority—CFPB Interpretive Rule

A relatively new addition to their toolkit, federal agencies have also recently begun to recognize that sometimes they need to shy away from exercising their right to assert federal preemption. In many instances, when federal law and state law conflict, federal law preempts the state law.[31] However, to allow states more regulatory flexibility and to spearhead initiatives that align with federal goals, federal agencies have selectively chosen at times recently to grant states additional leeway to create more stringent standards.

One example from the consumer protection context demonstrates this trend and highlights how federal agencies can use this tool to their advantage. The Fair Credit Reporting Act, originally enacted in 1970, restricts federal regulators' ability to preempt state consumer protections, thereby granting states enhanced authority and flexibility to pass their own laws.[32] By further clarifying that the federal government may preempt states only in very narrow circumstances in its recent June 2022 interpretive rule, the CFPB handed states the keys to begin developing consumer protection laws that transcend federal requirements.[33] Although the CFPB maintains some authority to preempt certain state laws regarding credit reporting, these "express preemption provisions have a narrow and targeted scope."[34]

The new guidance from the CFPB also particularly emphasized the states' "flexibility to preserve fair and competitive credit reporting markets by enacting state-level laws that are stricter than the federal Fair Credit Reporting Act."[35] As the CFPB acknowledged, this flexibility will allow states to pass and enforce laws that reflect the unique problems that face their citizens and to experiment with innovative new methods of regulating consumer reporting—all in an area that the federal government wants to prioritize as well.[36]

In addition to expanding states' enforcement authority of federal consumer protection laws, the CFPB's new interpretive rule further suggests that the CFPB hopes to expand consumer protection goals by deputizing state regulators rather than working against them.[37] By conferring additional flexibility on the states to create stricter standards, the CFPB is able to indirectly utilize state resources and to benefit from more stringent state laws to advance its core consumer protection mission.[38] Indeed, in one press release explaining its recent interpretive rules, the CFPB promised to "continue to consider other steps to promote state enforcement of . . . federal consumer financial protection law."[39]

Waiving Preemption—Clean Air Act

Federal agencies can also afford states greater regulatory flexibility by expressly waiving preemption. Preemption waivers allow states to set their own, stricter standards than what is otherwise permissible under federal law.

A prominent example of such a waiver is found in the Clean Air Act ("CAA").[40] While the CAA generally preempts states from adopting their own emission control standards for new motor vehicles,[41] Congress authorized the U.S. Environmental Protection Agency ("EPA") to waive federal preemption for certain standards developed by California (and any state that adopts California's standards), given California's historic commitment to regulation of vehicle emissions, that exceed those set by the EPA under federal law.[42] The EPA is required to waive preemption unless it makes certain statutory findings, such as that the proposed state standard is arbitrary and capricious.[43]

For decades, the EPA has granted California various preemption waivers and some states have followed California's, rather than the EPA's, standards,[44] which has had significant consequences for the automotive industry. California accounts for approximately 11% of all new car sales in the United States.[45] Moreover, 13 other states follow California's standards, including populous ones like New York and Massachusetts.[46] Together, California and the 13 states adopting California's standards account for 40% of the automotive market, resulting in many auto manufacturers being forced to design automobiles that will meet California's, rather than the EPA's, dictates.[47]

In 2019, however, the EPA under the Trump administration withdrew California's CAA preemption waiver for certain greenhouse gas emissions and zero emission vehicles[48] as part of a final action called "The Safer Affordable Fuel-Efficient Vehicles Rule Part One: One National Program" ("SAFE-1").[49] The EPA based its withdrawal on multiple grounds, including its reinterpretation of various provisions of the CAA and related laws that it believed precluded the previous preemption waiver in favor of one national standard.[50] The EPA also reinterpreted the CAA as not allowing other states to piggyback on California's now-withdrawn waiver.[51] This waiver withdrawal is instructive because it shows that a federal agency can wield its regulatory power to undermine the states when state policy misaligns with the federal government's policy preferences.

The pendulum swung back the other way, however, in March 2022 when the EPA under the Biden administration withdrew the agency's action in SAFE-1.[52] The EPA reasoned that its prior revocation of the waiver was improper, based on a flawed interpretation of the CAA and that even under that flawed interpretation, the EPA misapplied facts and inappropriately withdrew the waiver.[53]

In restoring the waiver, the EPA reempowered California to apply more stringent vehicle emissions standards and for other states to adopt those standards, thereby restoring California's ability to shape vehicle emission standards in the United States. This seesaw saga demonstrates the subtle control federal agencies can exercise over states and that when states are granted regulatory powers through preemption waivers, they can nonetheless be stripped of such autonomy when exercised in a manner that misaligns with federal prerogatives.

Challenges Associated with Deputizing State AGs

Even though the use of state AGs to extend the regulatory reach of federal agencies affords numerous benefits to federal actors, there are also certain challenges associated with such an initiative. This section surveys some of the pitfalls that federal agencies may encounter when they rely on state AGs to do their bidding.

Lack of Accountability

One problem with deputization is accountability. When multiple actors work together, it is more difficult for constituents and, indeed, even those with oversight authority, to know who the decisionmakers are and to hold those decisionmakers accountable.[54] For example, "the power of the purse is one of the key ways in which democratic accountability is served." Yet, allowing federal agencies significant latitude to use agency funds for deputizing programs inevitably "sacrifice[s] or temper[s]" accountability and limits legislative oversight, even if some oversight of the federal agency's "substantive agenda" remains.[55]

Another accountability problem that deputization poses is its negative effects on federal agency diligence. "When only one agency has responsibility for enforcement, it is more likely to be diligent in pursuing that task because it knows it will be accountable for any failures."[56] When federal agencies rely too heavily on state AGs to enforce the law, those federal agencies will take a more passive approach and only piggyback onto it at late stages of state enforcement actions.

One problem this conduct can cause is the creation of "inconsistent standards" across similar enforcement actions, thus leaving industry to wade through a morass of regulatory ambiguity and uncertainty in the aftermath.[57]

Heightened Tensions Between Collaborators

A second significant challenge of deputization is the tension it creates when state AGs disagree with federal agency priorities.

Generally speaking, "[d]ifferences between the institutions in charge of enforcement at the state and federal levels translate, in turn, into differences in enforcement outputs. Enforcement therefore creates new channels for state–federal dialogue and, perhaps, discord."[58] Of course, "state enforcers can and do coordinate with their federal counterparts and with each other," but even in the face of aggressive federal deputization, any collaboration is still at bottom mostly "voluntary and tends to break down in the face of sustained disagreement."[59] When federal agencies and state AGs have different goals and values, deputization can create fissures between the deputized state AG, the federal agency, and other state AGs not participating in the deputization efforts, as well as between participating and nonparticipating state AGs. Such rifts, if leaked, can result in significant scrutiny of the federal agency's actions by the public, press, and legislators. This scrutiny, in turn, has the potential to derail, rather than advance, the federal agency's national goals that drove the deputization in the first place.

In addition, federal agencies ultimately delegate a great deal of authority to state AGs when they deputize them and ask them to work toward some federal initiative in the federal regulator's stead. Although federal agencies benefit from deputization when their interests align with state leaders, they also risk state AGs using federal resources and expanded enforcement power to pursue a goal that differs from federal objectives.

For example, the power to enforce federal laws "can operate as an instrument for state-level policy making" because even "where the federal rule operates unambiguously, enforcement authority allows states to influence policy by adjusting the intensity of enforcement."[60] When there is disagreement about policy goals, state actors may not always do what the federal agencies prefers or anticipates.

Thus, differences in opinion may lead not just to discord but also to frustration of federal objectives and lack of uniformity across states. In these ways, federal agencies that deputize state AGs run the risk of enhancing state power to create conflicting—rather than complementary—policy.

Legal Challenges

In other instances, federal deputization of certain state AGs can lead to the commencement of litigation by other state AGs or scrutiny from members of Congress unhappy with the new status quo. Litigation can have wide-ranging impacts on all federal agency efforts to deputize state AGs.

One poignant example occurred when the EPA waived preemption under the CAA to allow California to set its own vehicle emissions standards, as discussed above. When that happened, 17 state AGs petitioned the D.C. Circuit for review of the EPA's decision, claiming the EPA violated the states' equal sovereignty under the U.S. Constitution.[61]

While this lawsuit deals particularly with EPA's actions under the CAA, the effect of the case's resolution will not necessarily be so limited. The case demonstrates that even if the federal government intends to let states exceed federal standards by waiving otherwise applicable preemption, other states that disagree with those standards can push back and may ultimately have a say in whether the federal government may constitutionally do so.

Federal agencies, litigants, and the courts will inevitably look to the D.C. Circuit's decision in the case (to say nothing of any subsequent Supreme Court review) for guidance on future preemption waivers under other statutory and regulatory schemes. A decision unfavorable to EPA could, therefore, hamstring other federal agencies' efforts to empower state AGs by waiving federal preemption of various state laws.

Another example is congressional scrutiny of the CFPB's explanation of state AGs' authority to enforce consumer financial protection laws, also discussed above. In exercising their oversight authority, several members of Congress raised significant questions about the CFPB's legal authority under the Consumer Financial Protection Act to "collude" for the purpose of "recruit[ing] a state AG that is not otherwise investigating a company, to pursue enforcement as a means of intimidation."[62]

Like the litigation example above, this congressional scrutiny could eventually lead to legislative changes that expressly limit the CFPB's authority to deputize state AGs, as well as similar such fixes under other regulatory statutes. It also could provide potential defenses to or at least negatively shade allegedly "collusive" enforcement actions between state and federal regulators.

How Federal Agencies Will Likely Use State AGs in the Future

Federal agencies undeniably have a powerful force at their disposal in state AGs to further federal regulatory and policy goals. And despite legal challenges, legislative scrutiny, and other difficulties, federal agencies have yet to show any meaningful signs of slowing down efforts to deputize state AGs, presumably because the benefits to federal agencies are so bountiful, whereas the negative consequences are comparatively few. Consequently, federal agencies will very likely use state AGs with increasing frequency in the years ahead and in novel and multifaceted ways.

Practically speaking, future presidential administrations, federal agency leadership, and state AGs will have different policy preferences and priorities than those today, which will likely drive increases in deputization in some areas, decreases in others, and even deputization in completely new subject areas. Moreover, legal challenges and legislative oversight may inevitably foreclose some existing methods of deputization, while affirming others and potentially even revealing new ones.

Nevertheless, if federal agencies continue their trend of conscription initiatives, the federal–state regulatory landscape could be significantly altered in the years to come. The influence of federal agencies over the states will continue to expand, whether through funding initiatives; delegation of federal enforcement authority; opportunistic waiver of federal preemption; or novel, as-yet-unseen deputization vehicles. These developments could inevitably shift more and more of the balance of power under the country's federalist system to federal agencies.

For all of these reasons, deputization of state AGs is a critical form of federal agency action that must be monitored in the years ahead, just like notice-and-comment rulemaking, adjudication, and investigations are regularly monitored today. Given the multiple shapes it has taken in recent years, deputization is no less important than the other three traditionally recognized forms of agency action—and, indeed, may be even more important to regulated parties and the development of administrative law in practical terms, given the extremely broad effect initiatives can have.

Stated differently, deputization initiatives can foreshadow, if not outright dictate, major changes to regulatory regimes and enforcement priorities, exactly as intended by their federal agency proponents. Observers of federal agencies would, therefore, be particularly wise to carefully monitor deputization initiatives just like any other form of agency action—and to treat it accordingly.

Notes

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52. 87 Fed. Reg. 14,332 (Mar. 14, 2022).

53. *Id.* at 14,333-35.

54. Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 Tex. L. Rev. 15, 56 (2010) ("It is all too easy for agencies to point fingers at each other with no one ultimately held accountable.").

55. *Cf. id.* at 43.

56. *Id.* at 56.

57. *Id.*

58. Lemos, *supra* note 13, at 717.

59. Lemos, *supra* note 13, at 719.

60. Lemos, *supra* note 13, at 737-38.

61. Zack Budyrk, Seventeen States Sue EPA for Letting California Set Vehicle Standards, The Hill (May 13, 2022), https://thehill.com/policy/energy-environment/3487755-seventeen-states-sue-epa-for-letting-california-set-vehicle-standards/.

62. Letter from Patrick McHenry, Blaine Luetkemeyer, and Tom Emmer to Rohit Chopra, Director, Consumer Financial Protection Bureau (July 28, 2022), https://republicans-financialservices.house.gov/uploadedfiles/2022-07-28_cfpb_letter_to_chopra_re_state_ag.pdf.