



The Martin Act Gives New York Politicians Way Too Much National Power

Jeff Patch

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On Thursday, a few thousand Democrats in New York will elect their party's nominee for the next national regulator of every publicly-traded company in America: the state's attorney general. In almost every respect, New York's top lawyer has greater prosecutorial authority than any other state attorney general—or even the Securities and Exchange Commission—to investigate potential corporate fraud.

The office's unique authority is derived from a century-old law called the Martin Act. It gives the attorney general total discretion to sue or seek indictments of companies without even having to prove intent to defraud.

Democrats vying for the nomination include Fordham law school professor Zephyr Teachout, Rep. Sean Patrick Maloney, D-N.Y., and New York City public advocate Letitia James. Gov. Andrew Cuomo appointed Barbara Underwood acting attorney general in May after then-Attorney General Eric Schneiderman resigned amid domestic abuse allegations. She is not seeking election to the post.

Republicans tapped corporate lawyer Keith Wofford as their nominee. He faces tough odds in a state that hasn't elected a Republican as attorney general in more than two decades. Wofford says that past Democratic attorneys general have too often ignored political corruption while pursuing flimsy cases that foster an anti-business climate.

"You have an environment of hostility to business," he told a local newspaper Friday. "The concrete example is settlement after settlement after settlement, fine after fine... the power of the state is sort of a machine gun spraying everywhere."

Democrats calculate that victory largely rests on their ability to cast themselves as the most aggressive standard-bearer of the national resistance to President Trump. Political analysts expect tepid turnout skewed toward the most liberal voters. Just over 661,000 voters, 12.5 percent of Democrats, turned out in the last competitive primary for attorney general in 2010.

A [poll](#) released Monday by Siena College showed Maloney and James virtually tied with about 25 percent and Teachout close behind with nearly one-third of voters still undecided.

“Given the political volatility we’ve seen in elections since 2016, it’s probably safer to bet on roulette than it is to predict a winner in this race,” said Phil Singer, the founder of Marathon Strategies and a former aide to Cuomo and Hillary Clinton.

Teachout is supported by socialist superstar Alexandria Ocasio-Cortez and is endorsed by the New York Times. She unsuccessfully sued Maloney last week for shifting \$1.4 million from his congressional campaign to his state campaign fund. Teachout lost a primary to Cuomo in 2014, and she has vowed to investigate his administration for corruption (two of his top aides were convicted earlier this year on fraud and bribery charges that didn't implicate Cuomo). James has the backing of the state’s Democratic Party and organized labor.

Most in New York’s financial services industry are resigned to dealing with an overzealous attorney general. But Teachout, a veteran of Occupy Wall Street trenches, has white collar lawyers and financiers concerned that an activist law professor who was only admitted to the New York bar last month might be the next “Sheriff of Wall Street.”

“The powers of the [Martin Act] are such that it makes sense for businesses to offer large concessions, beyond anything the law requires, rather than risk being caught up in investigations,” said Walter Olson, a senior fellow at the libertarian Cato Institute.

For example, then-Attorney General Eliot Spitzer started an investigation of Merrill Lynch in 2001. Spitzer obtained a subpoena to interview one of the firm’s analysts and review every email he sent since 1997. He then alleged that the entire firm misled investors. After settlement talks failed, Spitzer publicized the investigation. Within a week, Merrill Lynch lost \$5 billion in market value. The company settled for \$100 million less than a month later.

“I have no quarrel with sending criminals to prison,” said Robert McTamane, counsel at New York law firm Carter Ledyard & Milburn LLP. “I do object strenuously to extorting billions in penalties from financial firms, insurance companies, banks, brokers and individuals using a law that does not require any proof that anyone intended to do anything wrong—or even caused any injury to anyone.”

The decision whether to conduct an investigation is left entirely to the discretion of the attorney general and is not reviewable by a judge. The most prominent active Martin Act investigation is New York’s probe of Exxon Mobil Corp. Underwood has continued to investigate the company nearly three years after Schneiderman, who coordinated his efforts with environmental groups critical of Exxon, subpoenaed company records dating back to 1977. The state alleges that the company misled investors about the impact of climate change and coordinated its advocacy with conservative think tanks.

“The last several attorneys general have used the act to go after established companies over accepted business practices that they seek to change; over advocacy on what they consider the wrong side of issues; and to supplant federal schemes of regulation when they are dissatisfied with the results,” said Olson, the editor of overlawyer.com.

New York Justice Barry Ostrager, after noting that Exxon had already turned over more than three million documents, all but ordered prosecutors to end the probe this year at a hearing in late

August. The SEC ended an inquiry of the company's accounting practices regarding climate change last month.

A recent decision by the New York Court of Appeals, the state's highest court, limited the statute of limitations to three years for Martin Act violations. The decision could end New York's \$11 billion lawsuit against Credit Suisse for allegedly misleading investors about mortgage-backed securities in 2006 and 2007.

Judge Brett Kavanaugh, who is expected to be confirmed to the Supreme Court later this month, could join the court's other conservatives to invalidate the Martin Act—if a case ever reached the court. Practitioners of corporate law and business groups are also urging Congress to reform the Martin Act after giving up on a fix in the New York legislature or judiciary.

A bill introduced in Feb. by Rep. Tom MacArthur (R-NJ) would preempt the law. A House Financial Services subcommittee held a hearing in June, but its prospects for passage are uncertain. Congress will have a short window to pass legislation in the lame duck period after the midterm elections. Neither the White House or Republican leaders have expended political capital on the issue, but President Trump's transition team developed a plan to "neuter" the Martin Act. The law's detractors hope it can be added to an appropriations or other must-pass bill, especially if Democrats win control of the House or the Senate.