

Foreword

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In 1953, a bookbinder at the Government Printing Office, having received a subpoena from the Senate Permanent Subcommittee on Investigations, was in desperate need of an attorney. Senator Joe McCarthy, the subcommittee chair, claimed to be rooting out subversive elements in government service. This bookbinder would become one witness among hundreds hauled to testify before Senator McCarthy, who used his platform to prosecute relentlessly his anticommunist campaign.

My father Stanley Frosh agreed to represent the bookbinder. He knew the course was perilous. Roy Cohn, who would later become infamous as “New York’s most feared lawyer” and the personal attorney and mentor of Donald J. Trump,¹ was Senator McCarthy’s “Red-baiting consigliere.”² Cohn informed my father privately that his client was a Communist in a lot of trouble. He advised my father to abandon his client—or face the consequences. My father refused to heed that threat, counseling his client instead to invoke the Fifth Amendment before Senator McCarthy’s committee. When the man did so, he was fired from his job and run out of town. For a time, my father did not fare much better. Struggling to gain footing as a young lawyer, he was ostracized by his peers in the local bar association.

For several years, Senator McCarthy and his followers sowed fear and trampled on the constitutional rights of loyal Americans. Though my father lost the battle for his client, more Americans began to stand up to Senator McCarthy’s demagoguery, and the senator was exposed, disgraced, and ultimately censured by the U.S. Senate.

Many forces came together to make this happen. Defeating the scourge of McCarthyism required courage in the halls of Congress, leadership in the

* Attorney General of Maryland. Fulfilling a pledge to serve as the people’s lawyer, Attorney General Frosh is working to ensure fairness, equality, and justice for all Marylanders and is focused on keeping communities safe. Under Attorney General Frosh’s leadership, Maryland became the first state in the nation to issue guidance prohibiting discriminatory profiling by law enforcement. The Attorney General’s guidance declares definitively that race, ethnicity, national origin, gender, gender identity, sexual orientation, disability, and religion cannot be factors in routine police activity. Attorney General Frosh is focused on safeguarding vulnerable populations, including nursing home residents, people with disabilities, victims of lead-paint poisoning, low-wage earners, and members of minority groups, who can be subjects of abuse.

As the chief legal officer for the State of Maryland, the Attorney General provides thoughtful counsel to the executive, legislative, and judicial branches of government in all legal matters. Prior to being elected as the 46th Attorney General of Maryland, he served in the Maryland General Assembly for twenty-eight years. Attorney General Frosh was raised in Montgomery County and now lives in Somerset with his wife Marcy Masters Frosh. They have two daughters.

¹ Jonathan Mahler & Matt Flegenheimer, *What Donald Trump Learned From Joseph McCarthy’s Right-Hand Man*, N.Y. TIMES (June 20, 2016), https://www.nytimes.com/2016/06/21/us/politics/donald-trump-roy-cohn.html?_r=0 [<https://perma.cc/GPV9-N6P7>].

² *Id.*

executive branch, vigilance by the courts, professionalism in the media, and the education and attention of the public. Through sustained and collective effort, the demise of Senator McCarthy's abuse of power was a triumph of the rule of law.³

Like my father's client and the country in the early 1950s, we find ourselves again in desperate need of the triumph of the rule of law. Within the first months of his presidency, Donald J. Trump demonstrated a willingness to run roughshod over civil liberties and constitutional rights widely cherished as fundamental to our successful self-governance. Time and again, he has reinforced his commitment to policies that benefit a small subset of the people at the expense of others with equal claims to the full protection of our laws and Constitution. He has also exhibited an inclination to flout political traditions and democratic norms, often amid allegations that he has ignored or broken laws in pursuit of his own ends.⁴

Donald Trump's improbable ascension to the country's highest office has highlighted the fundamental importance of the checks and balances the founders embedded in our constitutional system. In addition to the often-invoked separation of powers among the three branches of the federal system, state and local governments are an important check on the abuse of presidential power. Many states and localities, in order to protect their residents and vindicate their interests as sovereign powers, are acting to thwart the Trump administration's attempts to undermine civil rights and liberties, chip away at fundamental environmental and consumer protections, deny people health care, and commit myriad other abuses. For example, my office, working in collaboration with numerous other state attorneys general, has filed suits, intervened in existing litigation, and urged Congress to act to prevent President Trump's unrelenting attempts to unwind critical environmental, consumer protection, and civil rights policies.⁵ In addition, a grow-

³ See generally ALBERT FRIED, *McCARTHYISM, THE GREAT AMERICAN RED SCARE: A DOCUMENTARY HISTORY* (1997) (elaborating upon the rise and downfall of McCarthyism).

⁴ Even before President Trump took office, his campaign faced numerous allegations that it had colluded with Russia to alter the outcome of the presidential election. See, e.g., Philip Ewing, *Trump Denies Allegations Of Secret Ties, Collusion Between Campaign And Russia*, NPR: TWO-WAY (Jan. 10, 2017, 8:41 PM), <https://www.npr.org/sections/thetwo-way/2017/01/10/509223836/trump-denies-allegations-of-secret-ties-collusion-between-campaign-and-russia> [<https://perma.cc/KC69-8MFR>]; Nicholas Kristof, Opinion, *Donald Trump: Kremlin Employee of the Month?*, N.Y. TIMES (Jan. 14, 2017), <https://www.nytimes.com/2017/01/14/opinion/sunday/donald-trump-kremlin-employee-of-the-month.html> [<https://perma.cc/P6YJ-SKFR>]. In May of 2017, President Trump fired FBI Director James Comey who was overseeing the investigation, fueling concerns that he was attempting to conceal his misdeeds. See Stephen Collinson et al., *Trump Fires FBI Director James Comey*, CNN (May 10, 2017, 9:44 AM), <http://www.cnn.com/2017/05/09/politics/james-comey-fbi-trump-white-out/index.html> [<https://perma.cc/X376-KHKB>]. Two months later, emails surfaced confirming that President Trump's son, Donald Trump Jr., along with several other campaign officials who later became advisors to the president, met with a Russian attorney during the campaign for the purpose of obtaining information damaging to Hillary Clinton. See Jo Becker et al., *Russian Dirt on Clinton? 'I Love It,' Donald Trump Jr. Said*, N.Y. TIMES (July 11, 2017), <https://www.nytimes.com/2017/07/11/us/politics/trump-russia-email-clinton.html> [<https://perma.cc/L9A7-U4DQ>]. The investigation is ongoing.

⁵ See *infra* notes 47–50.

ing number of grassroots, media, and political organizations are developing strategies to avert the devastating consequences of President Trump's actions and to strengthen protections for minorities and other historically disadvantaged populations.⁶

The essays assembled in this issue of the *Harvard Law & Policy Review*, *Controlling the Pendulum: Progressive Checks in the Trump Era*, explore the formal and informal checks on presidential power employed by the press, the judiciary, the administrative state, and state and local law enforcement. These acts of resistance—reminiscent of the courage, commitment, and vigilance of those who defied and ultimately defeated Joe McCarthy—embody the best of our democracy and may ultimately create the lines in the sand that save it.

I. THE USE AND ABUSE OF PRESIDENTIAL AUTHORITY

One year into this administration, examples of President Trump's abuse of power abound. With eerie reverberations of his old friend and consigliere, Roy Cohn, the president's aggressive deployment of his executive power already threatens to roll back the country's progress on civil liberties, social justice, and equal rights. He has issued multiple executive orders depriving targeted minorities of fundamental due process and other constitutional protections.⁷ He has made innumerable assertions that are demonstrably false.⁸ He has directed executive agencies to ignore scientific evidence that demonstrates the dangers and irrationality of his environmental agenda.⁹ He often declines to speak to the press, which he calls "Fake News Media,"¹⁰ preferring instead to share his thoughts and policy directives in short impulsive

⁶ See, e.g., Charlotte Alter, *What's Next in the Grassroots Fight Against President Trump*, TIME (Feb. 24, 2017), <http://time.com/4678832/president-trump-protests-town-halls/> [<https://perma.cc/Z4W2-UYRJ>].

⁷ See, e.g., Casey Harden, *How 3 of Donald Trump's Executive Orders Target Communities of Color*, TIME (Feb. 27, 2017), <http://time.com/4679727/donald-trump-executive-orders-police/> [<https://perma.cc/793R-Y3LJ>].

⁸ See, e.g., Lori Robertson & Robert Farley, *Fact Check: The Controversy Over Trump's Inauguration Crowd Size*, USA TODAY (Jan. 24, 2017, 12:55 PM), <https://www.usatoday.com/story/news/politics/2017/01/24/fact-check-inauguration-crowd-size/96984496/> [<http://perma.cc/9CXD-5D3J>] (disputing the Trump administration's claims regarding the size of the audience attending the Trump inauguration).

⁹ See, e.g., Eric Lipton, *Why Has the E.P.A. Shifted on Toxic Chemicals? An Industry Insider Helps Call the Shots*, N.Y. TIMES (Oct. 21, 2017), https://www.nytimes.com/2017/10/21/us/trump-epa-chemicals-regulations.html?_r=0 [<https://perma.cc/G8RR-VLA7>]; Dan Charles, *EPA Decides Not To Ban A Pesticide, Despite Its Own Evidence Of Risk*, NPR (Mar. 29, 2017, 4:02 PM), <http://www.npr.org/sections/thesalt/2017/03/29/521898976/will-the-epa-reject-a-pesticide-or-its-own-scientific-evidence> [<http://perma.cc/HQ78-HQW3>].

¹⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 1, 2017, 6:55 AM), <https://twitter.com/realdonaldtrump/status/892383242535481344?lang=en> [<https://perma.cc/4ZVB-5EAR>].

bursts on Twitter.¹¹ He has openly attacked the legitimacy and integrity of the courts and judges themselves when he disagrees with their decisions.¹² With rare exception, he uses divisive and inflammatory rhetoric to advance policies that endanger racial minorities and other vulnerable populations.¹³ He has failed to promptly or adequately condemn neo-Nazis and other groups that use violence and fear to promote white supremacist ideologies.¹⁴

Those concerned that President Trump will succeed in advancing this destructive agenda have not been able to rely on Congress for assistance. Although some elected officials have begun to distance themselves from the president, most Republican leaders have not.¹⁵ Even in the face of President Trump's tendency to announce major policy shifts without seeking input from party leadership, the Republican-led Congress has allowed most of his actions to go unchecked.¹⁶

¹¹ See Catherine Lucey, *President Donald Trump Says He Won't Stay Off Social Media*, DENV. POST (Aug. 1, 2017, 9:37 AM), <http://www.denverpost.com/2017/08/01/trump-wont-stay-off-social-media/> [<http://perma.cc/AP77-Q2BK>].

¹² See John Dean, *President Trump's Unseemly Attacks on the Federal Judiciary*, JUSTIA VERDICT (Apr. 28, 2017), <https://verdict.justia.com/2017/04/28/president-trumps-unseemly-attacks-federal-judiciary> [<http://perma.cc/4QMF-KC8A>].

¹³ See, e.g., Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?utm_term=.53ad6fb3d6bc [<http://perma.cc/65U9-KQ5P>]. President Trump's claim that Mexican immigrants are "rapists" and criminals is not supported by data. See Richard Pérez Peña, *Contrary to Trump's Claims, Immigrants Are Less Likely to Commit Crimes*, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/us/trump-illegal-immigrants-crime.html> [<https://perma.cc/KD9N-A36L>]; see also Tal Kopan, *What Donald Trump has Said About Mexico and Vice Versa*, CNN (Aug. 31, 2016, 6:20 PM), <http://www.cnn.com/2016/08/31/politics/donald-trump-mexico-statements/index.html> [<https://perma.cc/B8QL-QTYL>].

¹⁴ On at least two occasions, President Trump has failed to or delayed denouncement of white supremacist groups. See Lauren Holter, *Trump Finally Called Charlottesville Violence Racist, But It Was Too Little Too Late*, REFINERY 29 (Aug. 14, 2017, 2:25 PM), <http://www.refinery29.com/2017/08/16/7972/trump-condemns-white-nationalism-charlottesville-too-late> [<http://perma.cc/26T4-J584>].

¹⁵ See e.g., *Republican Leaders Dance Around Trump Remarks*, CBS NEWS (Aug. 17, 2017, 7:48 AM), <https://www.cbsnews.com/news/republican-leaders-dance-around-trump-remarks/> [<https://perma.cc/4UH6-W55Z>]. However, this trend may be changing. In early August 2017, two bipartisan bills were introduced to prevent President Trump from firing special counsel Robert Mueller, hired to investigate Russian interference with the 2016 presidential election, without cause. A Republican-led Senate also put in place measures to prevent the president from replacing Attorney General Jeff Sessions, whose office is overseeing the investigation. See Doreen McCallister, *Senators Introduce 2 Bills To Try To Keep Trump From Firing Mueller*, NPR: TWO-WAY (Aug. 4, 2017, 3:56 AM), <http://www.npr.org/sections/thetwo-way/2017/08/04/541523326/senators-introduce-2-bills-to-try-to-keep-trump-from-firing-mueller> [<http://perma.cc/9TRG-L4H9>]; see also Peter Grier, *Why Congress is Ignoring Trump*, CHRISTIAN SCI. MONITOR (Aug. 2, 2017), <https://www.csmonitor.com/USA/Politics/2017/0802/Why-Congress-is-ignoring-Trump> [<http://perma.cc/7VLH-2RUJ>] (demonstrating Congress and senior officials in the administration are increasingly ignoring or contradicting the President's policy statements).

¹⁶ See, e.g., John T. Bennett, *Republican Senators Mostly Silent After Trump's North Korea Threat*, ROLL CALL (Sept. 20, 2017, 5:04 AM), <https://www.rollcall.com/news/politics/republican-senators-mostly-silent-trumps-north-korea-threat> [<http://perma.cc/E5GW-BBRD>].

Unencumbered by congressional challenge, President Trump has taken full advantage of the levers of power at his disposal. Bolstered by Congress's tacit support, he issued ninety executive orders and other proclamations in the first one hundred days of his presidency.¹⁷ While lacking many substantive legislative achievements, he has exerted significant influence on public policy through federal regulations and directives to executive branch agencies.¹⁸ With actions that threaten communities of color and other vulnerable populations particularly, the president has defunded federal programs that improve quality of life for the poor¹⁹; targeted undocumented immigrants with harsh deportation policies²⁰; supported state laws that suppress minority voting rights²¹; undermined efforts to reform police practices²²; exacerbated environmental harm in vulnerable communities²³; rejected application of Title VII's prohibition on sex discrimination to complaints based on sexual orientation²⁴; sought enhanced penalties for nonviolent drug offenses²⁵; and scaled back civil rights investigations in public schools, universities, and government contracting.²⁶ While this list just scratches the surface, it demon-

¹⁷ See Rebecca Harrington, *Trump Signed 90 Executive Actions in his First 100 Days — Here's What Each one Does*, BUS. INSIDER (May 3, 2017 11:07 AM), <http://www.businessinsider.com/trump-executive-orders-memorandum-proclamations-presidential-action-guide-2017-1> [<https://perma.cc/BJ77-PPM3>]. Examples of presidential authority or directives include, inter alia, executive orders, administrative orders, certificates, announcements, proclamations, interpretations, military orders, and regulations. See generally HAROLD RELYEA, CONG. RES. SERV. 98-611, PRESIDENTIAL DIRECTIVES: BACKGROUND AND OVERVIEW (Nov. 26, 2008), <https://fas.org/sgp/crs/misc/98-611.pdf> [<http://perma.cc/A3RS-TDWH>].

¹⁸ See Harrington, *supra* note 17; Michael D. Shear, *Trump Discards Obama Legacy, One Rule at a Time*, N.Y. TIMES (May 1, 2017), <https://www.nytimes.com/2017/05/01/us/politics/trump-overturning-regulations.html> [<https://perma.cc/7UUF-DES7>].

¹⁹ See Julie Hirschfeld Davis, *Trump's Budget Cuts Deeply Into Medicaid and Anti-Poverty Efforts*, N.Y. TIMES (May 22, 2017), <https://www.nytimes.com/2017/05/22/us/politics/trump-budget-cuts.html> [<https://perma.cc/UE2G-MVS2>].

²⁰ See Caitlin Dickerson, *Trump Administration Targets Parents in New Immigration Crackdown*, N.Y. TIMES (July 1, 2017), <https://www.nytimes.com/2017/07/01/us/trump-arrest-undocumented-immigrants.html> [<https://perma.cc/TV4M-ABB7>].

²¹ See Ari Berman, *The Trump Administration Is Planning an Unprecedented Attack on Voting Rights*, NATION (June 30, 2017), <https://www.thenation.com/article/the-trump-administration-is-planning-an-unprecedented-attack-on-voting-rights/> [<https://perma.cc/KAF2-Y5EW>].

²² See Jeffrey Robinson, *Donald Trump's Talk to Police Officers Was Police-State Authoritarianism Distilled to Its Essence*, ACLU: BLOG (July 31, 2017, 10:30 AM), <https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/donald-trumps-talk-police-officers-was-police> [<http://perma.cc/H3N4-DCLA>].

²³ See Eugene Scott & Rene Marsh, *EPA Veteran Quits, Says Trump Admin Isn't Supporting 'Vulnerable Communities'*, CNN: POL. (Mar. 9, 2017, 3:25 PM), <http://www.cnn.com/2017/03/09/politics/epa-official-resigns-environmental-justice/index.html> [<http://perma.cc/TA7K-QXHH>].

²⁴ See Joan Biskupic, *Trump's LGBT Moves Could Crash in Courts*, CNN: POL. (July 27, 2017, 3:23 PM), <http://www.cnn.com/2017/07/27/politics/transgender-military-legal-implications/> [<https://perma.cc/8BXP-4G7Z>].

²⁵ See Rebecca R. Ruiz, *Attorney General Orders Tougher Sentences, Rolling Back Obama Policy*, N.Y. TIMES (May 12, 2017), <https://www.nytimes.com/2017/05/12/us/politics/attorney-general-jeff-sessions-drug-offenses-penalties.html> [<https://perma.cc/B49Q-S4XD>].

²⁶ See Juliet Eilperin et al., *Trump Administration Plans to Minimize Civil Rights Efforts in Agencies*, WASH. POST (May 29, 2017),

strates the president's wholesale rejection of his fundamental obligation to preserve the principles of equality and justice that constitute the cornerstones of American democracy.

II. FIGHTING POWER WITH POWER: STATE AND LOCAL EFFORTS TO CHALLENGE THE TRUMP ADMINISTRATION'S ABUSES

In the immediate aftermath of the election, I was among those state officeholders who did not support Mr. Trump's candidacy and found themselves shell-shocked in the wake of his victory. In varying states of disbelief and even denial, many of us were unsure what to expect or how best to react. Maybe our worst fears would prove overblown: the long-awaited pivot would finally materialize; the venerable trappings of the presidency would inspire Mr. Trump's better angels; a latent pragmatism would emerge, allowing him to expand beyond his base to govern as president of all Americans. State-level efforts to join forces against the president's agenda did begin to percolate, with state attorneys general and other local officials and civic leaders examining how they might thwart the worst excesses of the administration.²⁷ Yet most refrained initially from full-throated, coordinated opposition.

Then came the galvanizing weekend of the Muslim travel ban. As its rollout wrought havoc in airports across the country and left scores of travelers and their families in legal limbo,²⁸ reaction was swift and decisive. Massachusetts, New York, Virginia, and Washington quickly filed suits challenging the constitutionality of President Trump's Executive Order.²⁹ Within hours, several courts issued emergency orders enjoining the ban, which forced the administration to issue a second executive order seeking to accomplish the same aims.³⁰ Washington—joined by Maryland and a coalition of other states—continued to press its case, and Hawaii brought its own lawsuit, which many other states joined as parties and amici curiae.³¹

ministration-plans-to-minimize-civil-rights-efforts-in-agencies/2017/05/29/922fc1b2-39a7-11e7-a058-dbb23c75d82_story.html?utm_term=.039082d0600e [http://perma.cc/4226-JLEW].

²⁷ See Vivian Yee, *To Combat Trump, Democrats Ready a G.O.P. Tactic: Lawsuits*, N.Y. TIMES (Dec. 14, 2016), <https://www.nytimes.com/2016/12/14/nyregion/donald-trump-democrats-lawsuits.html> [https://perma.cc/B6LZ-RSAH].

²⁸ See, e.g., Jessica Lussenhop, *Trump travel ban: US residents trapped in legal limbo at airport*, BBC NEWS (Jan. 29, 2017), <http://www.bbc.com/news/world-38788664> [https://perma.cc/N2QE-YLSJ].

²⁹ See Mark Berman, *States are joining the legal battle over Trump's immigration order*, WASH. POST (Jan. 31, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/01/31/states-are-joining-the-legal-battle-over-trumps-immigration-order/?utm_term=.718be8839604 [http://perma.cc/D9A4-F4F4].

³⁰ See Meridith McGraw et al., *A Timeline of Trump's Immigration Executive Order and Legal Challenges*, ABC NEWS (June 29, 2017, 12:22 PM), <http://abcnews.go.com/Politics/timeline-president-trumps-immigration-executive-order-legal-challenges/story?id=45332741> [http://perma.cc/LV2M-NYT2].

³¹ See *Documents in State of Hawaii et al v. Trump—A Challenge to President Trump's March 6, 2017 Travel Ban*, HOGAN LOVELLS (Mar. 7, 2017), <http://hoganlovells.com/en/publi->

So began a state and local resistance to President Trump's relentless dismantling of civil liberties, environmental and consumer safeguards, health care coverage, and many other constitutional, legal, and regulatory protections. Despite the significant impact of presidential action on public policy, state and local governments also wield considerable power and influence over a broad range of issues, including education, the environment, land use, housing, and voting rights.³² As explicated in *Federalism Bound*, the foreword to Volume 10.2 of the *Harvard Law & Policy Review*, this division of power among state and national actors constitutes "good federalism."³³ This doctrine appreciates the value of community and a skepticism of national government, "but appeals to our natural impulses to improve both"³⁴ by using "state and local government, and the communities they govern, to learn about and better solve real problems."³⁵ Historically, this demarcation of powers has served more often the important goal of authorizing federal intervention when state action contravenes constitutional norms in order to ensure socially desirable outcomes like racial equality and economic justice.³⁶ Where states fail to protect vulnerable populations, the federal government can intercede.³⁷ Yet the reverse is also true. The balance of power under "good federalism" ensures that states' rights, while traditionally a core tenet of conservative ideologies and a tool for the subjugation of minorities, may also be used to advance progressive goals and protect diverse populations.

As chief legal officers of the sovereign states and representatives of the public interest, state attorneys general are well positioned to provide a check on the Trump administration's dangerous agenda. Most attorneys general enjoy common-law authority to "represent, defend and enforce the legal interests of state government and the public."³⁸ As the legal advisors to the executive, legislative—and, in many cases, judicial—branches, attorneys general are uniquely knowledgeable about how government functions and

cations/documents-in-state-of-hawaii-et-al-v-trump-a-challenge-to-president-trumps-march-6-2017-travel-ban [http://perma.cc/79MT-D5T6].

³² See Joel Rogers, *Foreword: Federalism Unbound*, 10 HARV. L. & POL'Y REV. 281, 281–82 (2016).

³³ *Id.* at 283.

³⁴ *Id.*

³⁵ *Id.* at 287.

³⁶ See Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1764–65 (2006).

³⁷ See *id.* at 1766.

³⁸ NAT'L ASS'N OF ATTORNEYS GEN., STATE ATTORNEYS GENERAL POWER AND RESPONSIBILITIES 27 (Emily Myers ed., 3d ed. 2013). Of course, this common law power may be limited by a state constitution, statute, or judicial decision. Indeed, nine state attorneys general lack common law powers: Arizona, Connecticut, Indiana, Iowa, Louisiana, Maryland, New Mexico, Washington, and Wisconsin. See *id.* at 44. In February 2017, in response to the actions of the Trump administration, the Maryland legislature expanded the authority of the Attorney General to sue the federal government for illegal or unconstitutional actions. See Jt. Res. No. 1, 2017 Leg., 437th Sess. (Md. 2017); see also H.B. 913, 2017 Leg., 437th Sess. (Md. 2017).

how it can affect the residents of their states.³⁹ Thus, even as attorneys general face shrinking budgets and limited resources, they are increasingly called upon to take on new responsibilities and challenge actions that threaten the quality of life for their constituents.⁴⁰ Their strategies in responding to these increased demands include using “traditional causes of action to address new issues.”⁴¹

Thus, as Congress has continued its failure to check President Trump’s abuse of executive authority, state attorneys general have also moved quickly to challenge President Trump’s actions outside the immigration context.⁴² For example, District of Columbia Attorney General Karl Racine and I filed suit to enforce our nation’s original anti-corruption legislation, the foreign and domestic Emoluments Clauses of the U.S. Constitution.⁴³ As explained in the complaint, “President Trump’s myriad international and domestic business entanglements make him vulnerable to corrupt influence and deprive the American people of trust in their chief executive’s undivided loyalty.”⁴⁴ Of course, those entanglements and their effects cause harm to *all* Americans, and Maryland and the District are not alone in their compelling interests in ensuring that the Emoluments Clauses “protect their residents as designed.”⁴⁵ But because President Trump is using his hotel on Pennsylvania Avenue as a magnet for those seeking access to and influence over the nation’s chief executive, Maryland and the District have also suffered—and continue to suffer—direct, proprietary financial harm.

Coalitions of attorneys general have also brought numerous actions to prevent President Trump’s rollback of environmental regulations. These include a challenge to the U.S. Environmental Protection Agency’s (EPA’s)

³⁹ See NAT’L ASS’N OF ATTORNEYS GEN., *supra* note 38, at 45–47.

⁴⁰ See *id.* at 45–46.

⁴¹ *Id.*

⁴² See, e.g., Andrew Rice, *Eric Schneiderman on Keeping Trump in Check and Maybe, Maybe, Investigating the Russian Ties*, N.Y. MAG.: DAILY INTELLIGENCER (May 14, 2017, 9:00 PM), <http://nymag.com/daily/intelligencer/2017/05/eric-schneiderman-on-keeping-trump-in-check.html> [<https://perma.cc/M8YM-WQFA>].

⁴³ See Complaint, District of Columbia v. Trump, No. 17-cv-01596-PJM, 2017 WL 2559732 (D. Md. June 12, 2017). The Emoluments Clauses seek to prevent foreign and domestic government entities from influencing federal officials—including the President—by bestowing money or other things of value. Essentially, they ensure that the President is working in the nation’s interest, not for his own financial benefit. See U.S. CONST. art. I, § 9, cl. 8; U.S. CONST. art. II, § 1, cl. 7. There also have been Emolument Clauses cases brought by government watchdog group Citizens for Responsibility and Ethics in Washington, members of Congress, and a local restaurant in D.C. See Complaint, Citizens for Responsibility and Ethics in Washington v. Trump, No. 1:17-CV-00458, 2017 WL 277603 (S.D.N.Y. Jan. 23, 2017); Complaint, Blumenthal v. Trump, No. 1:17-cv-01154, 2017 WL 2561946 (D.D.C. June 14, 2017); Complaint, K&D, LLC v. Trump Old Post Office, LLC, No. 1:2017CV00731 (D.D.C. Apr. 19, 2017), <http://www.endtrumphotelunfaircompetition.com/the-complaint/> [<https://perma.cc/RZL6-JTD9>]. These parallel lawsuits underscore that although executive abuses affect stakeholders differently, there are actions that both elected officials and non-governmental actors can take to prevent such abuses.

⁴⁴ Complaint at 5, District of Columbia v. Trump, No. 17-cv-01596-PJM, 2017 WL 2559732 (D. Md. June 12, 2017).

⁴⁵ *Id.*

decision to allow continued use of chlorpyrifos on food crops,⁴⁶ a suit against the U.S. Department of Energy for its failure to make final energy efficiency standards legally enforceable,⁴⁷ and intervention in successful emergency action to block the EPA from delaying implementation of limits on greenhouse gas emissions from newly constructed facilities and requirements that oil and gas companies detect and repair methane leaks.⁴⁸ Similarly, in the area of consumer protection, attorneys general have intervened in litigation over regulations designed to protect federal student loan borrowers against misconduct by abusive postsecondary institutions.⁴⁹ In October 2017, Pennsylvania Attorney General Josh Shapiro and I led a coalition of eighteen states in suing the U.S. Department of Education and Secretary Betsy DeVos for refusing to enforce the Gainful Employment Rule, a federal regulation designed to protect students from predatory for-profit schools.⁵⁰ Finally, acting to protect health care coverage for twenty million Americans, we have filed suit opposing the Trump administration's abrupt decision to stop making health care subsidy payments required by the federal Affordable Care Act⁵¹ and we intervened in another case to protect these cost-sharing reduction payments, which are critical to protecting millions of working families from unaffordable health care costs, from a legal attack by House Republicans.⁵²

⁴⁶ Chlorpyrifos is a toxic pesticide shown to harm children's neurological development. See *Chlorpyrifos*, PESTICIDE ACTION NETWORK, <http://www.panna.org/resources/chlorpyrifos-facts> [<https://perma.cc/6VER-MYQY>] (last visited Nov. 29, 2017); see also *States Join Fight Over EPA Chief's Decision Not to Ban Pesticide That Can Harm Children's Brains*, L.A. TIMES (July 6, 2017), <http://www.latimes.com/business/la-fi-epa-dow-pesticide-20170706-story.html> [<https://perma.cc/6QG7-9RCY>].

⁴⁷ See Press Release, Md. Off. of Att'y Gen., Att'y Gen. Frosh: Trump Admin. Violated the Law By Not Publishing Energy Efficiency Standards (June 14, 2017), <http://www.marylandattorneygeneral.gov/press/2017/061417a.pdf> [<https://perma.cc/RT7K-TA62>].

⁴⁸ See *Clean Air Council v. Pruitt*, 862 F.3d 1, 14 (D.C. Cir. 2017).

⁴⁹ See *State Movants' Mot. to Intervene*, Cal. Ass'n of Private Postsecondary Schs. v. Devos, No. 1:17-CV-00999 (D.D.C. June 13, 2017), <http://www.marylandattorneygeneral.gov/News%20Documents/MotionToIntervene.pdf> [<https://perma.cc/5TK9-K2AE>].

⁵⁰ See Press Release, Md. Off. of Att'y Gen., Att'y Gen. Frosh Leads Coalition of State Att'ys Gen. in Suing U.S. Dep't of Educ. for Refusing to Enforce Gainful Emp't Rule (Oct. 17, 2017), <http://www.marylandattorneygeneral.gov/press/2017/101717.pdf> [<https://perma.cc/XNS6-4GQM>]. Joining Maryland and Pennsylvania were the attorneys general of California, Connecticut, the District of Columbia, Delaware, Hawaii, Illinois, Iowa, Massachusetts, Minnesota, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington. *Id.*

⁵¹ See Press Release, Md. Off. of Att'y Gen., Att'y Gen. Frosh Joins Lawsuit to Defend Americans' Health Care (Oct. 13, 2017), <http://www.marylandattorneygeneral.gov/press/2017/101317a.pdf> [<https://perma.cc/5P6Z-4NHA>]. This lawsuit was filed by a coalition of eighteen attorneys general, including those of Connecticut, Delaware, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia. *Id.*

⁵² See Press Release, Md. Off. of Att'y Gen., Att'y Gen. Frosh Takes Action to Protect Affordable Healthcare for Millions of Americans (May 18, 2017), <http://www.marylandattorneygeneral.gov/press/2017/051817.pdf> [<https://perma.cc/9U6L-J86M>]. The motion was led by California Attorney General Xavier Becerra and New York Attorney General Eric Schneiderman and joined by Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maryland,

State attorneys general have also countered the Trump administration outside the courtroom, from urging Congress and federal agencies to reject harmful legislation and regulations to denouncing President Trump's ill-conceived executive orders. For example, nineteen public officials wrote a letter in February 2017 asking Congress to maintain statutory provisions protecting students and taxpayers from fraudulent actors in the for-profit education sector.⁵³ I also joined eleven other attorneys general in expressing opposition to the Regulatory Accountability Act of 2017, a bill that would "waylay regulations that protect Americans from toxic exposure, predatory market practices, dangerous labor conditions, unsafe food and drugs, and other harmful conditions."⁵⁴ In July 2017, Maryland and more than two dozen other states rejected sweeping requests for voter data by President Trump's Advisory Commission on Election Integrity. Our office objected to the request as both prohibited by law and repugnant in that it appeared designed only "to intimidate voters and to indulge President Trump's fantasy that he won the popular vote."⁵⁵ This unyielding opposition from state attorneys general will continue to shine a light upon the harmful actions of the Trump administration, amplifying the efforts of civic organizations, advocates, and every American committed to protecting the core democratic values and constitutional rights upon which we depend.

This symposium explores formal and informal checks on presidential power from a variety of perspectives. Through a series of historical case studies, constitutional law expert Michael Gerhardt of the University of North Carolina School of Law examines the constitutional principles at stake when U.S. presidents defy the courts. Caroline Fredrickson, President of the American Constitution Society, addresses the role of the federal judiciary in protecting critical civil and human rights. Professor Lisa Heinzerling of the Georgetown University Law Center examines the legal risks posed by President Trump's deregulatory agenda, with a focus on the Trump administration's decision to delay or suspend administrative rules issued by the Obama

Massachusetts, Minnesota, New Mexico, Pennsylvania, Vermont, Washington, and the District of Columbia. See Press Release, N.Y. Off. of Att'y Gen., Att'ys General Schneiderman And Becerra, Governor Cuomo Announce Motion To Intervene In Critical Affordable Care Act Case Pending In D.C. Circuit – Seeking To Protect Millions Of Americans' Access To Affordable Health Insurance (May 18, 2017), <https://ag.ny.gov/press-release/attorneys-general-schneiderman-and-becerra-governor-cuomo-announce-motion-intervene> [https://perma.cc/38NE-E3M9].

⁵³ See Letter from Lisa Madigan, Att'y Gen. of Ill. et al., to Betsy DeVos, Sec'y of Educ. et al. (Feb. 22, 2017), http://www.marylandattorneygeneral.gov/News%20Documents/For_profit_schools_Letter.pdf [https://perma.cc/L8YC-TPHH].

⁵⁴ Letter from Att'y Gen. of N.Y. et al., to Mitch McConnell, Majority Leader, Senate, & Chuck Schumer, Minority Leader, Senate (June 26, 2017), http://www.marylandattorneygeneral.gov/News%20Documents/RAA_letter.pdf [https://perma.cc/W6CR-5TEA].

⁵⁵ Ovetta Wiggins, *Maryland Joins States That Won't Give Data to Trump's Election Commission*, WASH. POST (July 3, 2017), https://www.washingtonpost.com/local/md-politics/maryland-will-not-forward-voter-data-to-trumps-voter-integrity-commission/2017/07/03/737afb2e-5ff4-11e7-a4f7-af34fc1d9d39_story.html?utm_term=.7982f019338b [https://perma.cc/Y5GA-2BYG].

administration. Matthew Segal, Legal Director of the ACLU of Massachusetts, explores the importance of strategic state litigation in safeguarding the civil rights threatened by the Trump administration. Finally, Bruce Brown and Selina MacLaren of the Reporters Committee for Freedom of the Press analyze trends that have affected the ability of the press to function as a check on executive power and consider mechanisms by which the press can respond to these constraints.

While the past two hundred years have proved the Framers of our Constitution wise in that they gave us tools to deploy their carefully-designed system of checks and balances to protect against tyranny and injustice, the Trump administration is testing that system as never before. As this journal goes to print, we do not know how this frightening chapter in the history of American democracy will end. In the earlier unsettling time of the McCarthy era, with echoes of our current peril, my father saw Joe McCarthy finally lose his momentum in that iconic moment when U.S. Army lawyer Jack Welch, defending his young associate against Senator McCarthy's relentless attacks, shot back, "Have you no sense of decency, sir, at long last?"⁵⁶ We cannot predict when a victory in a court, a state capital, a boardroom, or a peaceful protest will replicate that long-ago moment. We know not when our collective sense of decency will prevail, stopping this administration in its tracks. Yet as we celebrate and nurture the efforts—of states, cities, grass-roots advocates, and many others—to challenge President Trump's assault on our civil liberties and fundamental values, I am deeply optimistic that moment will come soon.

⁵⁶ *McCarthy-Welch Exchange*, AM. RHETORIC: TOP 100 SPEECHES, <http://www.americanrhetoric.com/speeches/welch-mccarthy.html> [<https://perma.cc/CC9J-VZ49>] (last visited Oct. 28, 2017) (transcribing the McCarthy-Welch exchange from June 9, 1954, during the Army-McCarthy hearings in Washington, D.C.).

