

# The Least Dangerous Branch—And the Last Hope of the Left

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## INTRODUCTION

Although more American voters supported Hillary Clinton and Democratic candidates for the U.S. Senate and House of Representatives than their opponents in the 2016 election,<sup>1</sup> the anti-democratic Electoral College and aggressive Republican redrawing of congressional district lines (known as “gerrymandering”) have denied this majority its ability to elect the president or control Congress, and thus to oppose President Trump’s dangerous policies in a direct, legislative manner. Alexander Hamilton wrote in the *Federalist Papers* that the judiciary, lacking sword or purse, was the “least dangerous” branch of government.<sup>2</sup> But Americans who find themselves in “the resistance” against President Donald Trump hope to prove Hamilton wrong. In the current political environment, where Congress, the White House, and most state legislatures and governors’ offices are firmly in the hands of the Republican Party—a party that has veered in an extreme nationalist, nativist, even racist direction—the courts provide one of the only forums to fight back.

In the American system of government, the courts exercise what is known as “judicial review,” the power to decide whether the actions of the executive or legislative branches violate preexisting law or the Constitution. Although this authority is mentioned nowhere in the Constitution, in 1803, in *Marbury v. Madison*,<sup>3</sup> Chief Justice John Marshall of the United States Supreme Court declared that “[i]t is emphatically the province and duty of the Judicial Department [the judicial branch] to say what the law is.”<sup>4</sup> Since that time, it has gone relatively unchallenged that the courts have the final word on constitutional interpretation as well as statutory readings, absent the rare impeachment, constitutional amendment, or legislative response by Congress.

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\* President of the American Constitution Society (ACS). The opinions expressed in this essay are her own and not necessarily those of ACS.

<sup>1</sup> Aaron Blake, *Democrats Won the Senate Popular Vote! Which is Both True and Terribly Misleading.*, WASH. POST (Nov. 29, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/11/29/the-most-bogus-stat-of-the-2016-election-how-democrats-won-the-senate-popular-vote/?utm\\_term=.90e36687ff35](https://www.washingtonpost.com/news/the-fix/wp/2016/11/29/the-most-bogus-stat-of-the-2016-election-how-democrats-won-the-senate-popular-vote/?utm_term=.90e36687ff35) [https://perma.cc/5GP4-9A7A].

<sup>2</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>3</sup> 5 U.S. 137 (1803).

<sup>4</sup> *Id.* at 177.

## I. HISTORY OF COURTS AS AN INSTITUTIONAL CHECK

Over the past two centuries, the U.S. courts have adjudicated disputes over slavery, the meaning of “freedom of speech,” access to the ballot box, and women’s reproductive rights, among many other burning issues. Already, in 1835, Alexis de Tocqueville observed in *Democracy in America* that “[t]here is almost no political question in the United States that is not resolved sooner or later into a judicial question.”<sup>5</sup> His observation, true in the early nineteenth century, holds even more force today with the increasingly gridlocked Congress, leaving many of these “political questions” to be resolved in the courts or nowhere at all.

The Supreme Court, as the final arbiter of such questions, exercises enormous power, especially in the current context, issuing decisions that have provoked a fair amount of controversy. Over the last forty years, a conservative majority on our highest court has skewed the law to the right. For example, debate continues to rage over the Court’s decision in *Citizens United v. Federal Election Commission*<sup>6</sup> that corporations have a protected free speech right to promote candidates in political contests.<sup>7</sup> Similarly, in *Shelby County v. Holder*,<sup>8</sup> the Court found unconstitutional the most potent provision of the Voting Rights Act,<sup>9</sup> a statute passed in 1965 to protect the rights of minorities to vote.<sup>10</sup> According to the Court, such protections were no longer necessary because, the Court’s majority argued, we had overcome racial prejudice. Chief Justice Roberts, elucidating a new doctrine of “equal sovereignty of the states,” rejected the Voting Rights Act’s burden on states with a history of voting rights violations, finding that:

[L]argely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African Americans attained political office in record numbers. And yet the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.<sup>11</sup>

Where has Chief Justice Roberts been, readers might ask, as states have made it more and more difficult for minority voters to access the ballot box,

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<sup>5</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 257 (Harvey C. Mansfield & Delba Winthrop trans., Univ. of Chi. Press 2000) (1840).

<sup>6</sup> 558 U.S. 310 (2010).

<sup>7</sup> See, e.g., Gabrielle Levey, *How Citizens United Has Changed Politics in 5 Years*, U.S. NEWS & WORLD REP. (Jan. 21, 2015, 12:26 PM), <https://www.usnews.com/news/articles/2015/01/21/5-years-later-citizens-united-has-remade-us-politics> [<https://perma.cc/2UMT-9R4R>].

<sup>8</sup> 133 S. Ct. 2612 (2013).

<sup>9</sup> *Id.* at 2631.

<sup>10</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445, §4(b) (codified at 42 U.S.C. § 1973b (2012)), *invalidated by* *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

<sup>11</sup> *Shelby*, 133 S. Ct. at 2628–29.

requiring photo IDs and limiting early voting, adding new registration requirements and purging voter rolls? As *Shelby* emphatically demonstrates, the courts, and the Supreme Court particularly, cannot be counted on to be friendly terrain for the Left.

## II. LITIGATION TODAY AND GOING FORWARD

Nonetheless, despite its checkered history in recent years, the federal judiciary—the Supreme Court, the appellate courts, and the trial courts—is the branch of government to which Americans can turn with the best chance of success for protection of critical civil and human rights. For those who oppose the policies of President Trump and congressional Republicans, the courts have already become a central arena for the battle. Litigation serves as both a strategy and a tactic. As a strategy, legal victories void pernicious, unconstitutional laws and raise questions about the competence and honesty of the president and his administration by showing their reckless disregard for constitutionality, which is useful information for voters as they decide how to vote in the next election. As a tactic, litigation slows implementation of policies that would harm vulnerable populations, abolish environmental regulations, and undercut banking rules and other regulations. This virtuous circle of victories over and delays of Trump policies reinforces the will to keep fighting.

### A. *Muslim Ban*

Donald Trump’s “Muslim ban” offers an early and good example of the resistance in the courts. During the presidential campaign, candidate Trump promised a “complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.”<sup>12</sup> To prove to America that he would be able to mold Washington to his will, the president issued an executive order within days of his inauguration to ban admission of citizens of seven predominantly Muslim countries, suspend refugee admissions, and bar Syrian refugees altogether.<sup>13</sup> The order led to immediate chaos as people arrived at airports with valid visas, some of them longtime American residents, only to be detained and even returned to their countries of origin.<sup>14</sup> But as quickly as it was issued, the president’s order met fierce opposition. My organization, the American Constitution Society (ACS), joined many others in raising objections, issuing a statement that:

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<sup>12</sup> Christine Wang, *Trump Website Takes Down Muslim Ban Statement After Reporter Grills Spicer in Briefing*, CNBC (May 8, 2017, 3:13 PM), <https://www.cnbc.com/2017/05/08/trump-website-takes-down-muslim-ban-statement-after-reporter-grills-spicer-in-briefing.html> [<https://perma.cc/53WR-8WPE>].

<sup>13</sup> See Steve Almasy & Darran Simon, *A Timeline of President Trump’s Travel Bans*, CNN (Mar. 30, 2017, 4:01 AM), <http://www.cnn.com/2017/02/10/us/trump-travel-ban-timeline/index.html> [<https://perma.cc/3QBC-VUHN>].

<sup>14</sup> See *id.*

President Trump's reckless Executive Order is a dangerous assault on real people, their families and our Constitution. The order violates the law by targeting people on the basis of their religion and causes irreparable harm to rights of refugees and legal immigrants. We stand with all who have been detained in our nation's airports and the lawyers and others who have come together to protect and defend them. It is so vital for our democracy that we have an independent judiciary to ensure rule of law and access to justice—may it remain so.<sup>15</sup>

Across the United States, thousands of Americans flocked to airports to give support and legal help to those affected by the ban.<sup>16</sup> Seemingly spontaneous protests erupted and were widely reported by national media, which catalogued the harm to spouses, employers, and sponsors of the foreign visa holders by what seemed to be a purely callous (or completely incompetent) action by the White House.<sup>17</sup> And almost immediately, lawyers filed lawsuits against the Executive Order, representing individuals who had been barred from entering the country as well as several state governments.<sup>18</sup> Fifty cases were filed, but the most significant case that helped derail the president's plan was brought by several state attorneys general (AGs).<sup>19</sup> The AGs argued that the order violated the Constitution's ban on discrimination based on religion, as well as federal law, and that the ban harmed their states in numerous ways from breaking up families to harming business interests that depend on immigrant workers or foreign visitors for tourism.

On February 3, 2017, a federal district court judge in the state of Washington issued a nationwide temporary restraining order (TRO), which was upheld shortly thereafter by a court of appeals.<sup>20</sup> The court's action forced the Trump administration to halt enforcement immediately, including treating as valid the visas that had previously been granted.<sup>21</sup>

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<sup>15</sup> Press Release, Am. Const. Soc'y, ACS President Statement on Pres. Trump's Exec. Order & Detention of Muslims in Airports (Jan. 29, 2017), <https://www.acslaw.org/news/press-releases/acs-president-statement-on-pres-trump%E2%80%99s-executive-order-and-detention-of-muslims> [<https://perma.cc/99FE-XNBW>].

<sup>16</sup> See Ralph Ellis, *Protesters Mass at Airports to Decry Trump's Immigration Policies*, CNN (Jan. 28, 2018 10:01 PM), <http://www.cnn.com/2017/01/28/politics/us-immigration-protests/index.html> [<https://perma.cc/M7JM-J7XT>].

<sup>17</sup> See, e.g., *id.*

<sup>18</sup> See Alexander Burns, *Legal Challenges Mount Against Trump's Travel Ban*, N.Y. TIMES (Jan. 30, 2017), <https://nyti.ms/2jP5zAa> [<https://perma.cc/H99X-28GV>].

<sup>19</sup> See Debbie Lord, *Trump Travel Ban: Supreme Court Allows Key Parts to go Into Effect*, ATLANTA J.-CONST. (June 26, 2017, 10:01 AM), <http://www.ajc.com/news/national/trump-travel-ban-supreme-court-allows-key-parts-into-effect/YGLwA8jnp3E4xrpgPuXEkI/> [<https://perma.cc/8548-97D3>].

<sup>20</sup> See Jim Brunner et al., *Judge in Seattle Halts Trump's Immigration Order Nationwide; White House Vows Fight*, SEATTLE TIMES (last updated Feb. 4, 2017, 8:11 AM), <http://www.seattletimes.com/seattle-news/politics/federal-judge-in-seattle-halts-trumps-immigration-order/> [<https://perma.cc/8PHJ-7BBR>].

<sup>21</sup> See *id.*

The administration went back to the drawing board, issuing a revised executive order on March 6.<sup>22</sup> The second order dropped Iraq from the list of countries, in part because of the widespread disbelief and anger in the military that the United States would ban those Iraqis who had helped the American forces as translators and in other capacities.<sup>23</sup> The order continued to exclude citizens of six Muslim-majority countries but allowed current visa holders to enter the country.<sup>24</sup> Designed to avoid the huge protests that brought unflattering attention to the administration's lack of competence, the new ban nonetheless drew legal challenges. Once again, the state AGs and other litigants argued that the ban discriminated on the basis of religion in violation of federal law and the Constitution and harmed their states' economies.<sup>25</sup>

On March 15 and 16, two other courts weighed in. In both Hawaii and Maryland, federal district court judges issued injunctions, staying the implementation of the ban.<sup>26</sup> The Maryland court took issue with section 2(c), a section excluding U.S. travel for citizens of Iran, Libya, Somalia, Sudan, Syria, and Yemen for a period of ninety days, while the Hawaii judge struck section 2(c) as well as section 6, a provision to block the consideration of refugee applications for 120 days and decrease the number of refugees who could enter the country from 110,000 to 50,000.<sup>27</sup> This second Muslim ban had a limited impact, as the injunctions prevented several provisions from taking effect.

The Trump administration looked to the Supreme Court to support the order, having added Justice Neil Gorsuch to the Court and hoping that his presence would swing the decision in its favor. In that hope, the White House was partially vindicated as the Court granted a partial stay as well as certiorari on June 26, 2017, in *Trump v. Hawaii* and *Trump v. International Refugee Assistance Project*, combining the different challenges to the ban.<sup>28</sup> The partial stay laid out the following particulars: the Court allowed the administration to ban citizens of the six named countries and refugees within seventy-two hours of the ruling who could not demonstrate a "bona fide

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<sup>22</sup> Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

<sup>23</sup> See Ron Nixon & Maggie Haberman, *Trump Expected to Issue New Travel Ban Excluding Iraq on Monday*, N.Y. TIMES (Mar. 5, 2017), <https://nyti.ms/2n437Hd> [<https://perma.cc/HCW2-BGCX>].

<sup>24</sup> See Glenn Thrush, *Trump's New Travel Ban Blocks Migrants From Six Nations, Sparing Iraq*, N.Y. TIMES (Mar. 6, 2017), <https://nyti.ms/2mwtau6> [<https://perma.cc/2MCA-RVJJ>].

<sup>25</sup> See Phil Helsel, *17 Attorneys General Say Trump Travel Ban Harms Universities, Medical Institutions, Tourism*, NBC NEWS (Apr. 19, 2017, 7:19 PM), <https://www.nbcnews.com/news/us-news/17-attorneys-general-say-trump-travel-ban-harms-universities-medical-n748596> [<https://perma.cc/S2MT-5EJ5>].

<sup>26</sup> See Alexander Burns, *2 Federal Judges Rule Against Trump's Latest Travel Ban*, N.Y. TIMES (Mar. 15, 2017), <https://nyti.ms/2mJEIb1> [<https://perma.cc/C4VV-WMLX>].

<sup>27</sup> See *id.*

<sup>28</sup> 137 S. Ct. 2080, 2082–83 (2017); see also Amy Howe, *Justices Agree to Weigh in on Travel Ban, Allow Parts of it to go Into Effect*, SCOTUSBLOG (June 26, 2017, 11:51 AM), <http://www.scotusblog.com/2017/06/justices-agree-weigh-travel-ban-allow-parts-go-effect/> [<https://perma.cc/9VET-AETL>].

relationship to a person or entity.”<sup>29</sup> Jumping into action, the State Department announced that it would implement the travel ban at 8:00 p.m. EST on June 29, 2017. Just before implementation was to begin, the Trump administration put out guidance on how to interpret the Court’s finding that people with a “bona fide relationship” could enter.<sup>30</sup> Not surprisingly, the administration gave a stingy interpretation to the phrase, applying the language to a limited number of family members.<sup>31</sup> And, also not surprisingly, the parties to the litigation challenged this understanding of “bona fide relationship” in the Hawaii District Court and Ninth Circuit Court of Appeals.<sup>32</sup>

The Hawaii court quickly ruled that the definition was too narrow and held on July 13, 2017 that grandparents as well as some other family members would have to be admitted.<sup>33</sup> The court said:

In sum, the Government’s definition of “*close familial relationship*” is not only not compelled by the Supreme Court’s June 26 decision, but contradicts it. Equally problematic, the Government’s definition represents the antithesis of common sense. Common sense, for instance, dictates that close family members be defined to include grandparents. Indeed, grandparents are the *epitome* of close family members. The Government’s definition excludes them. That simply cannot be.<sup>34</sup>

Turning to the refugees, the court also found that the bona fide relationship included “formal assurance” by a refugee resettlement agency, allowing such refugees to meet the test set forth by the Supreme Court on June 26.<sup>35</sup>

Going back to the drawing board, on July 18, the State Department put out a somewhat broader definition of “close familial relationship,”<sup>36</sup> and the Justice Department made another request to the Supreme Court to review the Hawaii decision.<sup>37</sup> In short order, on July 19, the Supreme Court upheld the

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<sup>29</sup> *Int’l Refugee Assistance Project*, 137 S. Ct. at 2088; see also Jonathan Blitzer, *What The Supreme Court’s Travel-Ban Ruling Means In Practice*, NEW YORKER: NEWS DESK (June 26, 2017), <https://www.newyorker.com/news/news-desk/what-the-supreme-courts-travel-ban-ruling-means-in-practice> [https://perma.cc/T99Y-3QKT].

<sup>30</sup> See Gardiner Harris & Ron Nixon, *Stepsister, Yes; Grandma, No: U.S. Sets Guidelines for Revised Travel Ban*, N.Y. TIMES (June 28, 2017), <https://nyti.ms/2uk1M2w> [https://perma.cc/S5AC-Y9JR].

<sup>31</sup> See *id.*

<sup>32</sup> See Barbara Campbell et al., *U.S. Challenges Hawaii Judge’s Expansion of Relatives Exempt From Travel Ban*, NPR (July 14, 2017, 2:11 AM), <https://www.npr.org/sections/the-two-way/2017/07/14/537159288/hawaii-judge-exempts-grandparents-and-other-relatives-from-trump-travel-ban> [https://perma.cc/TFM7-MXHM].

<sup>33</sup> See *id.*

<sup>34</sup> *State v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 2989048, at \*6 (D. Haw. July 13, 2017), *aff’d*, 871 F.3d 646 (9th Cir. 2017).

<sup>35</sup> *Id.* at \*6–7.

<sup>36</sup> *Court Order on Presidential Proclamation on Visas*, U.S. DEP’T OF STATE: BUREAU OF CONSULAR AFFAIRS (Oct. 17, 2017), <https://travel.state.gov/content/travel/en/news/important-announcement.html> [https://perma.cc/92X7-MXE9].

<sup>37</sup> Reply in Supp. of Mot. for Clarification of June 26, 2017, Stay Ruling and Application for Temporary Admin. Stay of Modified Inj., *Trump v. Hawaii*, No. 16-1540 (U.S. July, 2017).

Hawaii court's approach and denied the administration's motion, allowing Judge Watson's more expansive reading of "close familial relationship" to stand.<sup>38</sup> But, in the Trump administration's favor, the Court also stayed Judge Watson's decision with respect to refugees until the Ninth Circuit had a chance to consider the government's appeal, effectively denying refugees entrance to the United States absent a family or related connection.<sup>39</sup> The AGs who had brought the first case in Washington stayed in the travel ban case, and sixteen of them filed a new amicus brief in the Hawaii litigation, opposing the government's appeal to the circuit court.<sup>40</sup>

"The courts have made clear to the Trump administration: grandparents are family," said New York Attorney General Eric Schneiderman.<sup>41</sup> "Since January, Attorneys General have been on the front lines fighting this unconstitutional, unlawful, and un-American ban—and we'll continue to act to protect our communities and ensure families are not torn apart."<sup>42</sup> Massachusetts Attorney General Maura Healey echoed this sentiment, adding, "Only the Trump administration would argue in federal court that 'close family' excludes grandparents. We filed this amicus brief in defense of common sense and families in our state."<sup>43</sup> Following the expiration of the second Muslim ban, the Supreme Court removed the previously-scheduled oral argument from the calendar and requested new briefs from all parties.<sup>44</sup> The Court dismissed two challenges to the ban,<sup>45</sup> *Trump v. International Refugee Assistance Project*,<sup>46</sup> and later the appeal of a case involving refugee limits, *Trump v. Hawaii*.<sup>47</sup> On September 24, the Trump administration released a Proclamation, a third Muslim ban,<sup>48</sup> which federal judges in Hawaii and Maryland blocked hours before the policy was to take effect.<sup>49</sup>

<sup>38</sup> Order Den. Mot. for Clarification, *Trump v. Hawaii*, No. 16-1540 (U.S. July 19, 2017).

<sup>39</sup> *See id.*

<sup>40</sup> *See* Press Release, Att'y Gen. Maura Healey, AG Healey Joins Coalition of 16 Attorneys General Supporting Hawaii's Travel Ban Litigation, (July 18, 2017), <http://www.mass.gov/ago/news-and-updates/press-releases/2017/2017-07-18-travel-ban-amicus.html> [<https://perma.cc/88PF-SJF9>] [hereinafter Healey Press Release].

<sup>41</sup> Press Release, Att'y Gen. Eric Schneiderman, A.G. Schneiderman Leads New Brief In Travel Ban Case (Aug. 4, 2017), <https://ag.ny.gov/press-release/ag-schneiderman-leads-new-brief-travel-ban-case-0> [<https://perma.cc/A7UT-SRBC>].

<sup>42</sup> *Id.*

<sup>43</sup> Healey Press Release, *supra* note 40.

<sup>44</sup> Josh Gerstein, *Supreme Court Cancels Oral Arguments on Trump Travel Ban*, POLITICO (Sept. 25, 2017, 2:23 PM), <https://www.politico.com/story/2017/09/25/supreme-court-cancels-oral-arguments-on-trump-travel-ban-243106> [<https://perma.cc/3T44-P9A5>].

<sup>45</sup> *See* Adam Liptak, *Supreme Court Wipes Out Travel Ban Appeal*, N.Y. TIMES (Oct. 24, 2017), <https://nyti.ms/2zAfa5c> [<https://perma.cc/LVT2-DNR2>].

<sup>46</sup> No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017).

<sup>47</sup> No. 16-1540, 2017 WL 4782860 (U.S. Oct. 24, 2017).

<sup>48</sup> *See Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, WHITE HOUSE (Sept. 24, 2017), <https://www.whitehouse.gov/the-press-office/2017/09/24/enhancing-vetting-capabilities-and-processes-detecting-attempted-entry> [<https://perma.cc/74FA-SH5H>].

<sup>49</sup> *See* Richard Pérez-Peña, *2nd Federal Judge Strikes Down Trump's New Travel Ban*, N.Y. TIMES (Oct. 18, 2017), <https://nyti.ms/2zjC80r> [<https://perma.cc/2E79-MJBM>].

Regardless of the success of litigation, it is worth highlighting that not only did the lawsuits significantly slow the process of implementation of the executive orders, but they also resulted in a less offensive—if still objectionable—policy. Becca Heller, founder of the International Refugee Assistance Project and winner of the 2017 ACS David Carliner Public Interest Award, summed it up: “[A]t the end of the day, that moment worked because people showed up. Not just lawyers showed up—non-lawyers showed up and protested. The movement came, and, let’s face it, it’s really unusual for the lawyers to go first and then the movement to follow.”<sup>50</sup> Moreover, these cases have helped forge a coalition among AGs and progressive groups for future battles. But perhaps most importantly, the success in the lawsuits and the exposure of the Trump administration’s reckless internal policymaking gave succor to the resistance.

After the Women’s March and the airport protests, the courts suddenly became the main arena for protest, and in a truly extraordinary turn, the Ninth Circuit decided to live-stream the arguments on the TRO, and hundreds of thousands of people watched them.<sup>51</sup> When the Ninth Circuit subsequently upheld the district court’s TRO, people around the country cheered. The AGs, at least the twenty-one who are Democrats, have continued to throw sand in the wheels of the Trump administration—an approach they learned from the Republican AGs who challenged President Obama with a seemingly constant stream of lawsuits, attacking the Affordable Care Act (ACA),<sup>52</sup> Labor Department rules increasing wages,<sup>53</sup> and environmental protections.<sup>54</sup> Hopefully, the Democrats’ efforts will be as successful.

### B. *Emoluments Clause*

The courts will factor in numerous other battles, but the most important area for the resistance will likely be fights to ensure our government does not become a subsidiary of Trump, Inc. These efforts will seek to expose and challenge conflicts of interest, self-dealing, and outright corruption by the administration, and they perfectly encapsulate the strategy and tactics aspect of litigation by the resistance. Certainly, the groups and individuals behind

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<sup>50</sup> *Presentation of the 2017 ACS David Carliner Public Interest Award to Becca Heller by Jacob Remes*, AM. CONST. SOC’Y (June 8, 2017), <https://www.acslaw.org/news/video/presentation-of-the-2017-acs-david-carliner-public-interest-award-to-becca-heller-by> [<https://perma.cc/P2P8-CDQ3>] (making these statements at 12:38 to 12:51).

<sup>51</sup> Matt Pearce, *Appellate Hearing Over Trump’s Travel Ban Gets Massive Online and TV Audience*, L.A. TIMES (Feb. 7, 2017, 4:36 PM) <http://www.latimes.com/politics/la-live-updates-9th-circuit-arguments-appellate-hearing-over-trump-s-travel-1486513547-htmlstory.html> [<https://perma.cc/L7KQ-BV66>].

<sup>52</sup> See U.S. House of Representatives v. Burwell, 130 F.Supp.3d 53 (D.D.C. 2015).

<sup>53</sup> See Patrick Svitek, *Texas Sues Obama Administration Over New Overtime Rule*, TEX. TRIBUNE (Sept. 20, 2016, 12:00 PM), [https://www.texastribune.org/2016/09/20/texas-sues-obama-administration-over-new-overtime-/](https://www.texastribune.org/2016/09/20/texas-sues-obama-administration-over-new-overtime/) [<https://perma.cc/VQZ8-Y9KD>].

<sup>54</sup> See Timothy Cama, *Two Dozen States Sue Obama Over Coal Plant Emissions Rule*, HILL (Oct. 23, 2015, 8:51 AM), <http://thehill.com/policy/energy-environment/257856-24-states-coal-company-sue-obama-over-climate-rule> [<https://perma.cc/2GZS-VH84>].



these lawsuits are eager to see President Trump fail, with the lawsuits serving to outline his many misdeeds. Indeed, for many involved in these suits, the stated goal is to provide fodder for a congressional impeachment effort by unmasking the extreme corruption of President Trump and his cronies. President Trump's refusal to set up a blind trust to ensure that his decisions are not meant to enrich himself is unprecedented and shocking for many Americans.<sup>55</sup> One of the first lawsuits filed challenged President Trump's failure to divest himself of his vast holdings, arguing that his companies' entanglements with foreign interests will inevitably violate the Emoluments Clause of the United States Constitution.<sup>56</sup> This clause, of which most Americans, including many lawyers, had not heard before Mr. Trump's candidacy, forbids any title of nobility and provides that "[n]o Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."<sup>57</sup>

One of the lawyers behind the lawsuit, Law Professor and former George W. Bush White House Ethics Advisor Richard Painter, explained the reasoning behind the Founding Fathers' decision to include the Emoluments Clause in the Constitution: "We weren't going to fight the revolution, have a Constitution and next thing you know members of Congress and the president are getting stipends from the British Crown or from the French . . . We're not going to allow that type of foreign corruption to get into our country."<sup>58</sup> As Alexander Hamilton said in *The Federalist Papers*, "One of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption."<sup>59</sup>

While this section of the Constitution has been mostly a curiosity in the past, Hamilton and his colleagues must be given credit for great foresight. Painter and his fellow litigants, who include constitutional law professors Erwin Chemerinsky, Dean of the University of California, Berkeley School of Law, and Laurence Tribe of Harvard Law School, attempted to persuade the U.S. Attorney for the Southern District of New York to bring an Emoluments Clause case as well, arguing that the Trump Organization is being enriched by foreign governments interested in currying favor with the president. In a letter to the former U.S. Attorney for the Southern District of New York, Preet Bharara (famously dismissed by President Trump after he report-

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<sup>55</sup> See, e.g., Gemma Acton, *US Ethics Chief Slams Trump 'Halfway Blind' Trust as Failing to Meet Acceptable Standard*, CNBC: WHITE HOUSE (Jan. 12, 2017, 5:35 PM), <https://www.cnbc.com/2017/01/12/us-ethics-chief-slams-trump-halfway-blind-trust-as-failing-to-meet-acceptable-standard.html> [https://perma.cc/XFR8-D4SL].

<sup>56</sup> See Compl. at 1, 3, *Citizens for Responsibility & Ethics in Wash. v. Trump*, No. 1:17-cv-00458 (S.D.N.Y. Jan. 23, 2017).

<sup>57</sup> U.S. CONST. art I, § 9, cl. 8.

<sup>58</sup> Paul Blumenthal, *What Is The Emoluments Clause And How Does It Apply To Donald Trump?*, HUFFPOST: POL. (Dec. 1, 2016, 7:39 PM), [http://www.huffingtonpost.com/entry/donald-trump-emoluments\\_us\\_58409e01e4b017f37fe3c0ca](http://www.huffingtonpost.com/entry/donald-trump-emoluments_us_58409e01e4b017f37fe3c0ca) [https://perma.cc/X4DL-TCV9].

<sup>59</sup> THE FEDERALIST NO. 22 (Alexander Hamilton).

edly asked Mr. Bharara to stay on),<sup>60</sup> Painter and his colleagues stated that “there is no question” President Trump is violating the clause because of the many business relationships between the company and foreign governments.<sup>61</sup> The letter explains that Trump Tower, which the president owns in part, houses such tenants as the Industrial Bank of China, a Chinese government-owned business, and the Abu Dhabi Tourism & Culture Authority.<sup>62</sup> In their letter, they mention that, not coincidentally, Trump’s company has sought to build numerous hotels in China for which it will need permission from the Chinese government.<sup>63</sup> This effort to enlist the help of New York’s U.S. Attorney was sidelined when President Trump fired Mr. Bharara.

At the time of this writing, there are three pending lawsuits alleging that President Trump has violated the Constitution’s Foreign and Domestic Emoluments Clauses, which were intended to prevent government corruption.<sup>64</sup> The plaintiffs include Members of Congress, the Attorneys General of the District of Columbia and Maryland, an advocacy organization that fights for good government—Citizens for Responsibility and Ethics in Washington (CREW)—and several businesses that allege harm to their profits because of Trump companies’ unfair advantage.<sup>65</sup> District of Columbia Attorney General Karl A. Racine and Maryland Attorney General Brian E. Frosh noted that the president’s decision not to divest himself of his business interests “calls into question the rule of law and the integrity of the country’s political system.”<sup>66</sup> The Maryland AG, Brian Frosh, is adamant that the president’s unprecedented behavior harms the people of Maryland, stating that “[c]onstituents must know that a president who orders our sons and daughters into harm’s way is not acting out of concern for his own business. . . . They must know that we will not enter into a treaty with another nation because our president owns a golf course there.”<sup>67</sup>

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<sup>60</sup> See Renae Merle, *Preet Bharara on why He was Fired: ‘Beats the Hell Out of Me.’*, WASH. POST (Apr. 6, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/04/06/preet-bharara-on-why-he-was-fired-beats-the-hell-out-of-me/?utm\\_term=.69e3daa81d40](https://www.washingtonpost.com/news/wonk/wp/2017/04/06/preet-bharara-on-why-he-was-fired-beats-the-hell-out-of-me/?utm_term=.69e3daa81d40) [<https://perma.cc/AP2H-E85Z>].

<sup>61</sup> Letter from Fred Wertheimer, President, Democracy 21, et al. to Preet Bharara, U.S. Attorney, S.D.N.Y. (Mar. 8, 2017), <http://www.democracy21.org/wp-content/uploads/2017/03/Group-letter-to-US-Attorney-calling-for-investigation-Trump-Organization.pdf> [<https://perma.cc/ESM8-R9ZB>].

<sup>62</sup> See *id.*

<sup>63</sup> See *id.*

<sup>64</sup> See Mark Joseph Stern, *Donald Trump Is Now Facing Three Emoluments Lawsuits: Will Any of Them Succeed?*, SLATE (June 14, 2017, 6:48 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/06/trump\\_is\\_facing\\_three\\_emoluments\\_lawsuits\\_will\\_any\\_of\\_them\\_succeed.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/06/trump_is_facing_three_emoluments_lawsuits_will_any_of_them_succeed.html) [<https://perma.cc/6EEN-4GBG>].

<sup>65</sup> See *id.*

<sup>66</sup> Andrew Prokop, *A New Lawsuit is Trying to Force the Disclosure of President Trump’s Tax Returns*, VOX (June 13, 2017, 8:00 AM), <https://www.vox.com/policy-and-politics/2017/6/13/15782218/trump-emoluments-lawsuit-maryland-dc> [<https://perma.cc/L349-T244>].

<sup>67</sup> Aaron C. Davis & Karen Tumulty, *D.C. and Maryland AGs: Trump ‘Flagrantly Violating’ Emoluments Clause*, WASH. POST (June 12, 2017), [https://www.washingtonpost.com/investigations/dc-and-marylands-lawsuit-trump-flagrantly-violating-emoluments-clause/2017/06/12/8a9806a8-4f9b-11e7-be25-3a519335381c\\_story.html?utm\\_term=.6e059b5e96c3](https://www.washingtonpost.com/investigations/dc-and-marylands-lawsuit-trump-flagrantly-violating-emoluments-clause/2017/06/12/8a9806a8-4f9b-11e7-be25-3a519335381c_story.html?utm_term=.6e059b5e96c3) [<https://perma.cc/824Y-SNWU>].

Senator Richard Blumenthal, called the head of the Senate’s “nerd caucus” by the *New Yorker*’s Jeffrey Toobin, is the driver behind the congressional emoluments suit.<sup>68</sup> Blumenthal and his colleagues argue that their lawsuit will survive any standing challenge because Congress itself plays a role in the Emoluments Clause as written. “The clause specifically says that the President needs the consent of Congress to receive this money from foreign countries, so he’s deprived us of the chance to give our consent,” Blumenthal said to Toobin. “I think that’s enough for us to get into court.”<sup>69</sup> All of the lawsuits, assuming that they move into the discovery phase, will most likely be able to get a hold of President Trump’s taxes. That alone might give them extraordinary significance.

Astoundingly, the Department of Justice (DOJ) brief filed in the CREW case denies that the Emoluments Clause applies at all to payments made to President Trump in his “private capacity.”<sup>70</sup> Attorneys at the DOJ have argued that the suit should be dismissed on several grounds, claiming that the Emoluments Clause should not cover any funds provided to Trump companies by foreign governments for services like hotel rooms or events hosted at Trump facilities, rent for office space in a Trump building, or any fees to belong to a Trump resort.<sup>71</sup> According to the DOJ brief, the clause was “not designed” to be applied to fair-market commercial transactions “that a President (or other federal official) may engage in as an ordinary citizen through his business enterprises.”<sup>72</sup> “Neither the text nor the history of the Clauses shows that they were intended to reach benefits arising from a President’s private business pursuits having nothing to do with his office or personal service to a foreign power.”<sup>73</sup>

*Slate*’s Mark Joseph Stern appropriately pours cold water on this cramped and ahistorical interpretation:

[A] wealth of historical evidence suggests the Framers viewed an ‘emolument’ as any good or service of value, not one specific kind of bribery. But even if Trump’s lawyers are right, their brief is still politically deleterious. The DOJ is now defending the chief executive’s constitutional right to rake in as much money as he can from foreign states, so long as the exchange doesn’t involve a demonstrable quid pro quo. Trump and his lawyers are defining corruption downward. First, we were told the president would separate himself from his businesses. Now we have learned that he won’t,

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<sup>68</sup> See Jeffrey Toobin, *Behind the Democrats’ Emoluments Lawsuit Against Trump*, NEW YORKER: DAILY COMMENT (June 20, 2017), <http://www.newyorker.com/news/daily-comment/behind-the-democrats-emoluments-lawsuit-against-trump> [https://perma.cc/3TFS-67WW].

<sup>69</sup> *Id.*

<sup>70</sup> Mem. of Law in Supp. of Def.’s Mot. to Dismiss at 26, *Citizens for Responsibility and Ethics in Wash. v. Trump*, No. 1:17-cv-00458-RA (S.D.N.Y. June 9, 2017).

<sup>71</sup> See *id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 36.

but he promises not to take any outright bribes. As far as presidential ethics go, only Richard Nixon set a lower bar.<sup>74</sup>

Normally, inquiries into a president's purported illegal or unconstitutional actions would be done by Congress through its oversight function. Such questions—about whether members of the President's family are enriching themselves or whether other members of the administration are engaging in unethical behavior—are the bread and butter of congressional oversight. Certainly, President Clinton, who faced a Congress held for most of his presidency by the Republican Party, faced a blizzard of subpoenas issued by congressional committees and an onslaught of investigations into campaign finance issues, inappropriate business dealings, and, of course, his relationship with Monica Lewinsky that resulted in his impeachment by the House of Representatives.<sup>75</sup>

The firing of former FBI Director James Comey and his charged testimony before Congress have begun to build pressure on Hill Republicans to sharpen the oversight.<sup>76</sup> Democrats on the House Judiciary Committee have tried to pressure Representative Bob Goodlatte (R-Va.), the chairman of the Judiciary Committee, to hold hearings to scrutinize Trump's firing of former FBI Director James Comey and the Justice Department's ongoing investigation of potential collusion by Trump allies with the Russian government's hacking of the 2016 election.<sup>77</sup> The sixteen Judiciary Committee Democrats implored Goodlatte to do something, writing in their letter to the chairman that "[t]he House Committee on the Judiciary has a responsibility to step in and do its job."<sup>78</sup> However, the committee process has not moved with alacrity despite the alarming nature of the allegations and the threat to our democracy posed by a foreign power's interference—acknowledged by U.S. intelligence agencies<sup>79</sup>—in the last election. Many Republicans seem to lack the appetite to shine a spotlight on President Trump's firing of Mr. Comey or on Attorney General Jeff Sessions's seemingly deliberately misleading statements to Congress about election-year meetings with Russian officials.

Absent control of both chambers of Congress, those opposed to the Trump administration and who fear for rule of law have only the courts and the court of public opinion to raise these claims. Nonetheless, the fight

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<sup>74</sup> See Stern, *supra* note 64.

<sup>75</sup> See, e.g., *Clinton Served Subpoena in Lewinsky Inquiry*, CNN (July 26, 1998), <http://www.cnn.com/ALLPOLITICS/1998/07/26/clinton.subpoena/> [<https://perma.cc/LCE4-TUF9>].

<sup>76</sup> See *Comey Testimony: Highlights of the Hearing*, N.Y. TIMES (June 8, 2017), <https://nyti.ms/2rYoNtZ> [<https://perma.cc/9LY5-SM8J>].

<sup>77</sup> See Letter from House Judiciary Comm. Democrats to Bob Goodlatte, House Judiciary Comm. Chairman, H.R. (June 21, 2017), <https://democrats-judiciary.house.gov/sites/democrats-judiciary.house.gov/files/documents/Letter%20to%20Chairman%20Goodlatte%20%286.21.17%29.pdf> [<https://perma.cc/L3YC-9N36>].

<sup>78</sup> *Id.*

<sup>79</sup> Amber Phillips, *8 Times U.S. Intelligence Chiefs Have Unequivocally said Russia Meddled in the U.S. Election*, WASH. POST (July 6, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/07/06/8-times-u-s-intelligence-chiefs-have-unequivocally-said-russia-meddled-in-the-u-s-election/?utm\\_term=.f1bb9ac00ea9](https://www.washingtonpost.com/news/the-fix/wp/2017/07/06/8-times-u-s-intelligence-chiefs-have-unequivocally-said-russia-meddled-in-the-u-s-election/?utm_term=.f1bb9ac00ea9) [<https://perma.cc/7KDU-KB9E>].

seems worth it to many. As the *New York Times* noted in an editorial, while these suits may not be successful:

[T]hey are worth pursuing because they keep the pressure on Mr. Trump to divest his businesses. Litigation could force him to provide more information about his businesses and finances, including his tax returns. These campaigns could also shame members of Congress into taking seriously their duty to serve as a check on a president with untold commercial conflicts.<sup>80</sup>

Whether the lawsuits prevail in court, the constant stream of complaints and letters about conflicts of interest and corruption serve both to tie up administration lawyers and to build a public narrative about the sleaziness of the current leadership and lay the groundwork for a political response. With congressional elections in 2018, the response may come soon—although for many, not soon enough. If progressives can prove corruption by President Trump in a court of law, it would put the Republican Congress in the agonizing position of explaining why it would fail to impeach and convict him.

### C. Labor

Similarly, for workers, the Right has focused resources on undoing many of President Obama's efforts to provide higher wages, better benefits, and protect women and minorities against pay discrimination by government contractors. Republicans on the Hill are pushing legislation to cripple labor unions,<sup>81</sup> which not only give working people bargaining power against companies but also help fund Democrats' campaigns. And President Trump is moving quickly to remake the National Labor Relations Board so it can reverse course on several significant decisions. By filling two vacant seats on the Board and moving it from a Democratic to a Republican majority,<sup>82</sup> President Trump could upend the Board's decisions that made it more likely that an enterprise could be held liable for labor infractions committed by contractors and franchisees; that allowed smaller groups of workers to join a union within a company; and that permitted graduate students at private colleges and universities the right to organize.

This list may sound long and complete, but it is just the beginning. A major decision at risk is one finding that the right to collective action trumps an arbitration agreement—workers cannot, under the Board's prevailing understanding, be forced to sign away their rights under the National Labor

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<sup>80</sup> Editorial, *Sue While the Conflicts are Hot*, N.Y. TIMES (Mar. 10, 2017), <https://nyti.ms/2mvCPQt> [<https://perma.cc/C9Z5-G79U>].

<sup>81</sup> See Dave Jamieson, *Republicans Want To Pass A National Right-To-Work Law*, HUFFPOST: POL. (Feb. 22, 2017), [https://www.huffingtonpost.com/entry/republicans-pursue-national-right-to-work-law-while-they-hold-the-reins-in-washington\\_us\\_5891fb30e4b0522c7d3e354d](https://www.huffingtonpost.com/entry/republicans-pursue-national-right-to-work-law-while-they-hold-the-reins-in-washington_us_5891fb30e4b0522c7d3e354d) [<https://perma.cc/6DY4-TFUN>]

<sup>82</sup> See Noam Scheiber, *Trump Takes Steps to Undo Obama Legacy on Labor*, N.Y. TIMES (June 20, 2017), <https://nyti.ms/2sMsovM> [<https://perma.cc/JHR6-3CHN>].

Relations Act.<sup>83</sup> Labor advocates are rounding up lawyers and preparing to challenge the Trump administration's efforts to deconstruct these important protections.<sup>84</sup>

#### D. Voting

In *United States v. Carolene Products*,<sup>85</sup> Justice Stone elaborated the crucial protective role of the courts in his famous footnote four, writing that the Constitution gives the courts a special duty to protect “discrete and insular minorities” because they do not have access to political power and because prejudice against them “may call for a correspondingly more searching judicial inquiry.”<sup>86</sup> One area of great concern for the Left is just this issue of political power, and the Right's plan to take advantage of its gerrymandered and non-majoritarian dominance of the political branches to consolidate its control of government for the long term. President Trump's allies in the Republican Party are pushing legislation to make voting more difficult for Democratic constituencies—lower income individuals, people of color, and young people.<sup>87</sup> Making it harder to vote, particularly for minority communities who tend to vote Democratic, has been part of the Right's playbook for decades, but legislators have become very clever at dressing up legislation meant to disenfranchise with neutral language about protecting against a “voter fraud” that does not exist.<sup>88</sup> Thus, we see efforts to require photo IDs to vote, despite the lack of evidence that people are committing fraud when they vote in person; to shorten voting periods, which makes it harder for low-wage workers who have less flexible working hours to get to the polls; to impose criminal penalties for helping voters register to vote; and to purge voter rolls for spurious reasons.<sup>89</sup>

Recently, President Trump enshrined these voter suppression efforts in the White House, giving a national platform to the anti-civil rights activist<sup>90</sup>

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<sup>83</sup> See *D.R. Horton, Inc. and Michael Cuda*, 357 N.L.R.B. 2277 (N.L.R.B. Jan. 3, 2012).

<sup>84</sup> See David Scharfenberg, ‘Alt-labor’ reorganizes politics in the age of Trump, *BOSTON GLOBE* (Nov. 27, 2016), <https://www.bostonglobe.com/ideas/2016/11/27/alt-labor-reorganizes-politics-age-trump/U2ai9kANbyGnAaBcqiy4BK/story.html> [<https://perma.cc/C8F7-GZB6>].

<sup>85</sup> 304 U.S. 144 (1938).

<sup>86</sup> *Id.* at 152 n.4.

<sup>87</sup> See Pam Fessler, *State Republicans Push for More Restrictive Voting Laws*, NPR (Mar. 9, 2017, 4:37 PM), <https://www.npr.org/2017/03/09/519500312/state-republicans-push-for-more-restrictive-voting-laws> [<https://perma.cc/3S43-HTDX>].

<sup>88</sup> See Lisa Rab, *Why Republicans Can't Find the Big Voter Fraud Conspiracy*, *POLITICO MAG.* (Apr. 2, 2017), <https://www.politico.com/magazine/story/2017/04/why-republicans-cant-find-the-big-voter-fraud-conspiracy-214972> [<https://perma.cc/7ZB3-9HT5>].

<sup>89</sup> See, e.g., Fessler, *supra* note 87.

<sup>90</sup> See Ari Berman, *The Man Behind Trump's Voter-Fraud Obsession*, *N.Y. TIMES* (June 13, 2017) [https://www.nytimes.com/2017/06/13/magazine/the-man-behind-trumps-voter-fraud-obsession.html?\\_r=0](https://www.nytimes.com/2017/06/13/magazine/the-man-behind-trumps-voter-fraud-obsession.html?_r=0) [<https://perma.cc/L22H-X9TF>] (quoting Kris Kobach describing himself as “the A.C.L.U.’s worst nightmare.”).

Kris Kobach.<sup>91</sup> The now-disbanded Presidential Advisory Commission on Election Integrity, led by Vice President Pence and Kansas Secretary of State Kris Kobach, was nothing but Orwellian in concept.<sup>92</sup> Despite the title, “election integrity” had little to do with the Commission’s mission. Instead, its focus was on limiting the franchise, promoting bogus allegations of voter fraud, encouraging voter purges, and demanding sensitive voter data from the states as a way to intimidate eligible voters from participating in elections.<sup>93</sup> Its efforts to collect this data, however, were quickly met with lawsuits to prevent the Commission from moving forward.<sup>94</sup> Without regard to laws or regulations, the Commission rushed to get its data request to state officials, allowing civil rights organizations to block the early efforts. The American Civil Liberties Union was one of the first organizations that went into court, filing its case against President Donald Trump, Vice President Mike Pence and the Presidential Advisory Commission on Election Integrity, arguing that the Voter Integrity Commission was in violation of the Federal Advisory Committee Act (FACA).<sup>95</sup> Adopted in 1972, FACA requires all advisory committees to have open meetings, chartering, public involvement and report. Moreover, FACA requires some diversity of opinion on such commissions—something the Trump administration does not much favor. The Lawyers’ Committee for Civil Rights Under Law also brought a FACA suit but added an additional claim that Kris Kobach had violated the Hatch Act.<sup>96</sup> The Hatch Act bars federal employees from engaging in election activities,<sup>97</sup> and Kobach, who has already filed to run for governor of Kansas, has stepped far over the line. His campaign website and campaign social media accounts prominently tout his leadership of the Commission and solicit campaign donations, a clear Hatch Act violation.<sup>98</sup>

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<sup>91</sup> See *Presidential Advisory Commission on Election Integrity*, WHITE HOUSE (July 13, 2017, 10:15 AM), <https://www.whitehouse.gov/blog/2017/07/13/presidential-advisory-commission-election-integrity> [https://perma.cc/R57R-PZT7].

<sup>92</sup> See Michael Tackett & Michael Wines, *Trump Disbands Commission on Voter Fraud*, N.Y. TIMES (Jan. 3, 2018), <https://www.nytimes.com/2018/01/03/US/politics/trump-voter-fraud-commission.html> [https://perma.cc/429X-Q8R8].

<sup>93</sup> See Berman, *supra* note 90.

<sup>94</sup> See Scott Neuman, *ACLU Files Suit Against White House Election Fraud Commission*, NPR (July 10, 2017, 5:50 PM), <http://www.npr.org/sections/thetwo-way/2017/07/10/536492885/aclu-files-suit-against-white-house-election-fraud-commission> [https://perma.cc/5HMY-NXGK].

<sup>95</sup> See *id.*; see also Federal Advisory Committee Act of 1972, Pub. L. No. 92-463, 86 Stat. 770 (codified as amended in 5 U.S.C. app. 2 §§ 1–16 (2012)).

<sup>96</sup> See *Lawyers’ Committee for Civil Rights Under Law Files Lawsuit To Halt Commission Hearing for Failure to Comply With Federal Law*, LAW. COMM. FOR C.R. UNDER L. (July 20, 2017), <https://lawyerscommittee.org/press-release/lawyers-committee-civil-rights-law-files-lawsuit-halt-commission-hearing-failure-comply-federal-law/> [https://perma.cc/22CG-UU4M].

<sup>97</sup> See 5 U.S.C. §§ 7321–26 (2012).

<sup>98</sup> See Jessica Brady, *Lawyers’ Committee for Civil Rights Under Law Files Hatch Act Complaint Against Kris Kobach*, LAW. COMM. FOR C.R. UNDER L. (July 3, 2017), <https://lawyerscommittee.org/press-release/lawyers-committee-civil-rights-law-files-hatch-act-complaint-kris-kobach/> [https://perma.cc/5ZFF-FJUJ].

Other lawsuits argue that the Commission has violated privacy rules and the Paperwork Reduction Act (PRA).<sup>99</sup> The Electronic Privacy Information Center (EPIC), in its lawsuit,<sup>100</sup> charges that the Commission has failed to comply with the E-Government Act of 2002,<sup>101</sup> a statute that mandates federal agencies set up adequate data protections before gathering sensitive personal information, including disseminating a Privacy Impact Assessment with background on the methods to be used to collect the data, how it will be kept secure, and what rules govern any disclosures to third parties.<sup>102</sup> According to EPIC, the Pence-Kobach Commission proceeded without heed to the law by putting voter data on an unsecure system without privacy protections.<sup>103</sup> The EPIC suit, which sought a restraining order in the D.C. District Court, caused the Commission to stop its collection efforts temporarily. When the judge ruled, however, that EPIC had not suffered a cognizable harm, the work was allowed to continue.<sup>104</sup> United to Protect Democracy and the Brennan Center followed another tack, filing a complaint with the Office of Management and Budget alleging that the Pence-Kobach Commission has failed to comply with the PRA.<sup>105</sup> The PRA requires agencies to follow a specific process when seeking information from more than ten individuals, including its reasons for seeking the data, the costs and benefits of doing so, how it will go about acquiring and protecting the data, and allowing public input.<sup>106</sup> The Commission followed none of these steps.<sup>107</sup> Happily, most state government officials in charge of voter files do not favor providing sensitive voter information to an ideologically-driven commission seeking to undo election protections<sup>108</sup>; in concert, these official and these lawsuits will—we must hope—limit the damage that this misbegotten Commission will be able to inflict on our democracy.

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<sup>99</sup> See Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163 (codified as amended in 44 U.S.C. §§ 3501–19, 3521 (2012 & Supp. II 2014)).

<sup>100</sup> See Hunter Woodall, *Privacy Group Files Lawsuit Challenging Kobach, Trump's Voter Records Request*, KAN. CITY STAR (July 4, 2017, 5:30 PM), <http://www.kansascity.com/news/local/news-columns-blogs/the-buzz/article159612354.html> [https://perma.cc/JDX5-EX3V].

<sup>101</sup> E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (codified in scattered sections of U.S.C.).

<sup>102</sup> See *id.*

<sup>103</sup> See *Epic v. Presidential Election Commission: Challenging the Unlawful Collection of Personal Voter Data*, ELECTRONIC PRIVACY INFORMATION CENTER, <https://epic.org/privacy/litigation/voter/epic-v-commission/> (last visited Nov. 27, 2017) [https://perma.cc/5KAY-35J7].

<sup>104</sup> See Laura Jarrett, *Federal Judge Green-lights Collection of Voter Data*, CNN (July 25, 2017, 4:31 AM), <http://www.cnn.com/2017/07/24/politics/judge-denies-restraining-order-on-voter-data/index.html> [https://perma.cc/M8QY-Z7J9].

<sup>105</sup> See Pema Levy, *There's a New Lawsuit Against Trump's Election Commission*, MOTHER JONES (Sept. 29, 2017, 5:19 PM), <http://www.motherjones.com/politics/2017/09/theres-a-new-lawsuit-against-trumps-election-commission/> [https://perma.cc/XMJ2-C7G3].

<sup>106</sup> See 44 U.S.C. §§ 3501–21 (2012).

<sup>107</sup> See Levy, *supra* note 105.

<sup>108</sup> See Mark Berman & John Wagner, *Almost Every State Resists Trump's Voter Fraud Commission*, CHI. TRIB. (July 5, 2017, 6:22 PM), <http://www.chicagotribune.com/news/nation-world/politics/ct-most-states-resist-voter-fraud-commission-20170705-story.html> [https://perma.cc/3NHG-6X4B].



And now the Trump Justice Department has switched sides in a case challenging Ohio's ruthless voter purging.<sup>109</sup> Ohio wipes the slate clean for any voter who has not voted in three elections, something the Obama administration believed to be an illegal violation of the National Voter Registration Act.<sup>110</sup> Justin Levitt, an expert who served in the Justice Department's Civil Rights Division and has now returned to his position at Loyola Law School, underscored how extraordinary it is for the Solicitor General to jump sides mid-case. "This is not merely a policy change. It is a change by the office that has the role in the courts of deciding what the law says on behalf of the federal government," Levitt said to the *New York Times*.<sup>111</sup> "Every time the office of the solicitor general changes position without an intervening change in the law, it damages its credibility a little bit."<sup>112</sup> And the Division also switched sides in cases alleging that Texas's voter ID law was discriminatory,<sup>113</sup> determined it will no longer bring actions against police departments with histories of civil rights violations,<sup>114</sup> filed a brief in the Seventh Circuit arguing that Title VII does not protect gays and lesbians,<sup>115</sup> and has committed the resources of the Justice Department to ensure that colleges and universities are not engaging in discrimination against white people.<sup>116</sup> Fortunately, there are state attorneys general and civil rights groups to fight the erosion of fundamental rights because the Justice Department has decided to stop protecting them.

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<sup>109</sup> See Mark Joseph Stern, *The Purges Are Coming*, SLATE (Aug. 8, 2017, 5:15 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/08/jeff\\_sessions\\_doj\\_just\\_gave\\_states\\_the\\_green\\_light\\_to\\_purge\\_voter\\_rolls.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/08/jeff_sessions_doj_just_gave_states_the_green_light_to_purge_voter_rolls.html) [https://perma.cc/Y9N9-2J6E].

<sup>110</sup> National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified as amended in 52 U.S.C. §§ 20501–11 (2012)); see Sari Horwitz, *Justice Dept. sides with Ohio's purge of inactive voters in case headed to Supreme Court*, WASH. POST (Aug. 8, 2017), [https://www.washingtonpost.com/world/national-security/justice-department-reverses-position-to-allow-ohio-to-purge-inactive-voters-from-rolls/2017/08/08/e93c5116-7c35-11e7-9d08-b79f191668ed\\_story.html?utm\\_term=.55971298d734](https://www.washingtonpost.com/world/national-security/justice-department-reverses-position-to-allow-ohio-to-purge-inactive-voters-from-rolls/2017/08/08/e93c5116-7c35-11e7-9d08-b79f191668ed_story.html?utm_term=.55971298d734) [https://perma.cc/ES9P-DG6E].

<sup>111</sup> Charlie Savage, *Justice Dept. Backs Ohio's Effort to Purge Infrequent Voters From Rolls*, N.Y. TIMES (Aug. 8, 2017), <https://nyti.ms/2uE5R1i> [https://perma.cc/L3DK-YZZT].

<sup>112</sup> *Id.*

<sup>113</sup> See Vann R. Newkirk II, *The Department of Justice Stands by Texas's Voter ID Law*, ATLANTIC (July 8, 2017), <https://www.theatlantic.com/politics/archive/2017/07/the-department-of-justice-stands-by-texas-voter-id-law/532980/> [https://perma.cc/LAF9-JMZY].

<sup>114</sup> See Pete Williams, *AG Sessions Says DOJ to 'Pull Back' on Police Department Civil Rights Suits*, NBC NEWS (Feb. 28, 2017, 1:52 PM), <http://www.nbcnews.com/news/us-news/ag-sessions-says-trump-administration-pull-back-police-department-civil-n726826> [https://perma.cc/AT23-YEY4].

<sup>115</sup> See Diane Ruggerio & Madison Park, *DOJ Files Amicus Brief That Says Title VII Does not Protect Sexual Orientation*, CNN (July 27, 2017, 12:47 PM), <http://www.cnn.com/2017/07/26/politics/doj-amicus-brief-title-vii-sexual-orientation/index.html> [https://perma.cc/Y5YH-QWXH].

<sup>116</sup> See Charlie Savage, *Justice Dept. to Take On Affirmative Action in College Admissions*, N.Y. TIMES (Aug. 1, 2017), <https://nyti.ms/2hmgRS> [https://perma.cc/43EM-SLC7].

## III. STATE ATTORNEYS GENERAL

For those who fear the impact of Trump policies on vulnerable communities, the courts also play a significant role. Especially for those unable to access the political process—the poor, the incarcerated, children—the judicial branch serves as a last resort. The attorneys general have stepped in here, as well as in the immigration and emoluments suits, to defend people who cannot defend themselves against the government or who no longer benefit from the vigorous enforcement that characterized the previous administration. For example, in the lawsuit brought by the House Republicans challenging subsidies under the ACA, the law was initially defended by the Justice Department.<sup>117</sup> Seeing, however, that their constituents were not going to be protected by the federal government, several attorneys general moved to intervene to fight for the ACA.<sup>118</sup> After the D.C. Circuit granted the attorneys general's motion to join the case,<sup>119</sup> New York's Attorney General Eric Schneiderman praised the ruling, saying that:

The court's decision is good news for the hundreds of thousands of New York families that rely on these subsidies for their health care. . . . It's disturbingly clear that President Trump and his administration are willing to treat them as political pawns; but this coalition of attorneys general stands ready to defend these vital subsidies and the quality, affordable health care they ensure for millions of families across the country.<sup>120</sup>

Joining Schneiderman in the suit were eighteen other attorneys general, with Xavier Becerra from California serving as his lead partner.

A. *Immigration: Deferred Action for Childhood Arrivals (DACA) and Sanctuary Cities*

In a preemptive strike, the AGs also sent a strong signal to the Trump administration that if it abolished the DACA program, they would be back in court. Twenty AGs signed a letter to President Trump urging him to maintain and defend the program. In the letter, the attorneys general explain how

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<sup>117</sup> See U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53 (D.D.C. 2015).

<sup>118</sup> See Timothy Jost, *California, New York Lead Group of States Seeking To Intervene in Litigation Over Cost-Sharing Reduction Payments*, HEALTH AFF.: BLOG (May 18, 2017), <http://www.healthaffairs.org/doi/10.1377/hblog20170518.060200/full/> [https://perma.cc/U8B2-UQYS].

<sup>119</sup> See Timothy Jost, *The Latest Motion in House v. Price Has a Significant Impact on the Future of CSR Payments*, HEALTH AFF.: BLOG (Aug. 2, 2017), <http://healthaffairs.org/blog/2017/08/01/the-latest-motion-in-house-v-price-has-a-significant-impact-on-the-future-of-csr-payments/> [https://perma.cc/K4JW-LEVX].

<sup>120</sup> Rachel Roubein & Brooke Siepel, *Court Rules Allowing Dem States to Defend Obamacare Payments*, HILL (Aug. 1, 2017, 8:55 PM), <http://thehill.com/policy/healthcare/344886-court-rules-allowing-dem-states-to-defend-obamacare-payments> [https://perma.cc/2RL5-GKST].

DACA has benefited their states and the nation as a whole and call on President Trump to fulfill his public commitment to recipients to DACA status, called Dreamers:

The consequences of rescinding DACA would be severe, not just for the hundreds of thousands of young people who rely on the program—and for their employers, schools, universities, and families—but for the country’s economy as a whole. For example, in addition to lost tax revenue, American businesses would face billions in turnover costs, as employers would lose qualified workers whom they have trained and in whom they have invested. And as the chief law officers of our respective states, we strongly believe that DACA has made our communities safer, enabling these young people to report crimes to police without fear of deportation.

You have repeatedly expressed your support for Dreamers. Today, we join together to urge you not to capitulate to the demands Texas and nine other states set forth in their June 29, 2017, letter to Attorney General Jeff Sessions. That letter demands, under threat of litigation, that your Administration end the DACA initiative. The arguments set forth in that letter are wrong as a matter of law and policy.<sup>121</sup>

The DACA stand-off set up another court battle with attorneys general lining up on both sides. On September 5, 2017, President Trump released an official statement ending the Executive Branch’s support of the DACA program and calling on Congress to pass a replacement program.<sup>122</sup> According to the statement, the Department of Homeland Security will no longer accept applications for work permits and permits will begin to expire after six months.<sup>123</sup> The very next day, sixteen state AGs filed suit to stay this order.<sup>124</sup> The AGs argued that President Trump’s decision was motivated by discriminatory reasons, was violative of Due Process due to being “fundamentally unfair,” and that it violated the laws governing the rescission of federal regulations.<sup>125</sup>

AGs are not the only elected lawyers pushing back against the Trump administration on immigration issues. City attorneys, like San Francisco’s Dennis Herrera, have won legal battles to stop the federal government from

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<sup>121</sup> Letter from Xavier Becerra, Cal. Att’y Gen. et al. to Donald J. Trump, President (June 29, 2017), [https://oag.ca.gov/system/files/attachments/press\\_releases/7-21-17%20%20Letter%20from%20State%20AGs%20to%20President%20Trump%20re%20DACA.final\\_.pdf](https://oag.ca.gov/system/files/attachments/press_releases/7-21-17%20%20Letter%20from%20State%20AGs%20to%20President%20Trump%20re%20DACA.final_.pdf) [<https://perma.cc/MB5Y-ESLA>].

<sup>122</sup> See Press Release, Statement from President Donald J. Trump (Sept. 5, 2017), <https://www.whitehouse.gov/the-press-office/2017/09/05/statement-president-donald-j-trump> [<https://perma.cc/HFA7-VZRG>].

<sup>123</sup> See *id.*

<sup>124</sup> See Tal Kopan, *Blue states sue Trump over DACA*, CNN (Sept. 6, 2017 7:07 PM), <http://www.cnn.com/2017/09/06/politics/daca-trump-states-lawsuits/index.html> [<https://perma.cc/3H3R-J597>].

<sup>125</sup> See *id.*

withdrawing funds from localities that refused to let it commandeer local law enforcement officers to help enforce federal immigration law.<sup>126</sup> At least five states and 633 counties have implemented similar limitations on the use of city and local police for immigration crackdowns, according to data from the Immigrant Legal Resource Center.<sup>127</sup> Many police chiefs and sheriffs believe that having their officers participate in immigration roundups harms crime prevention efforts in two ways: first, officers who are doing the federal government's work have less time to deal with crimes in their communities; second, residents who think cops and ICE officers are one and the same will not come forward to report crimes, fearing they will be deported if they do not have the right papers.<sup>128</sup> Herrera won a ruling from the District Court in Northern California that included a nationwide injunction against President Trump's executive order. Partnering with Santa Clara, San Francisco argued that the president's January 25th Executive Order,<sup>129</sup> declaring sanctuary cities ineligible to receive federal grants, was unconstitutional. Judge Orrick agreed, finding the order exceeded the president's powers, writing that "[t]he Constitution vests the spending power in Congress, not the President."<sup>130</sup> President Trump's executive order "cannot constitutionally place new conditions on federal funds."<sup>131</sup>

### B. For-Profit Colleges and Universities

The Trump administration also has begun to dismantle important federal regulations on the for-profit colleges and universities that have defrauded so many Americans. Here too the attorneys general had to step in as the Department of Education (DOE) stepped back. Led by Massachusetts Attorney General Maura Healey, eighteen states and D.C. came together to sue DOE and Secretary Betsy DeVos for jettisoning new protections that were supposed to go into effect on July 1, 2017.<sup>132</sup> The attorneys general

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<sup>126</sup> See Press Release, City Att'y of S.F., *Herrera Wins Nationwide Halt to Enforcement of Trump's Sanctuary City Order* (Apr. 25, 2017), <https://www.sfcityattorney.org/2017/04/25/statement-city-attorney-dennis-herrera-ruling-sf-v-trump-lawsuit/> [https://perma.cc/JD9Q-V3SK].

<sup>127</sup> See Jasmine C. Lee et al., *What Are Sanctuary Cities?*, N.Y. TIMES (Feb. 6, 2017), [https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html?\\_r=0](https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html?_r=0) [https://perma.cc/TL78-N57N].

<sup>128</sup> See, e.g., Priscilla Alvarez, *Will Texas's Crackdown on Sanctuary Cities Hurt Law Enforcement?*, ATLANTIC (June 6, 2017), <https://www.theatlantic.com/politics/archive/2017/06/texas-sb4-immigration-enforcement/529194/> [https://perma.cc/3EQ8-KGC6].

<sup>129</sup> Executive Order: Enhancing Public Safety in the Interior of the United States, THE WHITE HOUSE (Jan. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united> [https://perma.cc/M5UF-Q3QZ].

<sup>130</sup> *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 508 (N.D. Cal. 2017).

<sup>131</sup> *Id.*

<sup>132</sup> See Zack Friedman, *Why 19 Attorneys General Are Suing Betsy DeVos Over These Student Loan Rules*, FORBES (July 7, 2017, 8:02 AM), <https://www.forbes.com/sites/zack-friedman/2017/07/07/student-loans-betsy-devos-2/#71f0c3424137> [https://perma.cc/GQX7-Y9ZH].

alleged that Secretary DeVos and DOE failed to comply with federal law by precipitously revoking the Borrower Defense Rule, a provision that had been developed to rein in the predatory for-profit schools that had scammed students—and ultimately U.S. taxpayers—out of billions of dollars in federal loans.<sup>133</sup> The Obama administration finalized the Borrower Defense Rule in November 2016 after a thorough review process lasting almost two years, spurred by the implosion of Corinthian Colleges, a chain of for-profit institutions.<sup>134</sup> “Since day one, Secretary DeVos has sided with for-profit school executives against students and families drowning in unaffordable student loans,” Attorney General Healey said.<sup>135</sup> “Her decision to cancel vital protections for students and taxpayers is a betrayal of her office’s responsibility and a violation of federal law . . . We call on Secretary DeVos and the U.S. Department of Education to restore these rules immediately.”<sup>136</sup> The allegations of improper financial entanglements between Trump officials and the for-profit colleges underscore the vital importance of legal oversight as this president and his cabinet target the rights of vulnerable people and profit from their positions.

### C. *Environmental Protection Administration*

With the ascendance of Scott Pruitt to the head of the Environmental Protection Administration, the AGs have had to step up to challenge his efforts to dismantle critical federal protections for the environment. On clean air and water, chemical accidents, the clean power plan, energy efficiency for appliances, automobile emissions standards, and other critical policies, the AGs have brought lawsuits to ensure that federal laws are enforced.

For example, in April, Mr. Pruitt put a ninety-day stay on rules from the EPA under the Obama administration that sought to reduce methane leaks.<sup>137</sup> In June, Mr. Pruitt extended the stay to two years.<sup>138</sup> He argued that the oil and gas industry did not have sufficient time to comment before the rules were enacted.<sup>139</sup> The AG of Colorado, the Sierra Club, Clean Air Council,

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<sup>133</sup> See Clare McCann, *The Ins and Outs of the Borrower Defense Rule*, NEW AM. (July 10, 2017), <https://www.newamerica.org/education-policy/edcentral/ins-and-outs-borrower-defense-rule/> [https://perma.cc/AS38-KC3W].

<sup>134</sup> Press Release, Dep’t of Educ., U.S. Dep’t of Educ. Announces Final Regulations to Protect Students & Taxpayers from Predatory Insts. (Oct. 28, 2016), <https://www.ed.gov/news/press-releases/us-department-education-announces-final-regulations-protect-students-and-taxpayers-predatory-institutions> [https://perma.cc/6PER-ZMKT].

<sup>135</sup> Lauren Camera, *18 States Sue Betsy DeVos for Killing Student Loan Protections*, U.S. NEWS & WORLD REP. (July 6, 2017, 11:52 AM), <https://www.usnews.com/news/education-news/articles/2017-07-06/18-states-sue-education-secretary-betsy-devos-for-nixing-student-loan-protections> [https://perma.cc/W9V6-Q72Q].

<sup>136</sup> *Id.*

<sup>137</sup> See Jesse Paul, *Federal Court Rules Against Trump Administration’s Delay of EPA Methane Rules, Siding with Colorado and Conservation Groups*, DENV. POST (July 3, 2017, 4:01 PM), <http://www.denverpost.com/2017/07/03/federal-court-rules-against-trump-administrations-delay-epa-methane-rules/> [https://perma.cc/KF25-2JYT].

<sup>138</sup> See *id.*

<sup>139</sup> See *id.*

and the Environmental Defense Fund brought suit along with more than a dozen other states and cities.<sup>140</sup> On July 3, 2017, the D.C. Circuit Court of Appeals ruled that the Trump administration lacks authority to delay implementation of 2016 methane regulations for the oil and gas industry.<sup>141</sup> The court found that “industry groups had ample opportunity to comment on all . . . issues on which EPA granted reconsideration.”<sup>142</sup> The court referred to the stay as “unreasonable” and “unauthorized.”<sup>143</sup>

The playbook is not new—AGs played a vital role for some time in environmental battles, with Pruitt himself having led the coalition of Republican AGs that challenged President Obama’s rules.<sup>144</sup> However, the early results against the Trump administration have been encouraging for the Left.

#### CONCLUSION: CHALLENGES AND OPPORTUNITIES OF A LITIGATION-FOCUSED STRATEGY

Supporters of voting rights, as well as reproductive rights, fair working conditions, and the environment will be left with litigation as the best—and only—avenue to challenge most of these setbacks. And they will take up the challenge. Just as the executive order banning Muslims from entering the country met with speedy rebuke in the courts, lawyers have already filed or are planning to file litigation in all these areas.

President Trump’s success with judicial nominations looks to decrease the efficacy of these challenges and may undermine rule of law.<sup>145</sup> Courts will continue to be guardians of our most basic rights—if we do not let them become inundated with Trump judges. ACS’s One Justice Matters infographic provides a handy visual aid to understand how one single Supreme Court Justice can make a difference in areas fundamental to democracy and our basic rights<sup>146</sup>—the right to marry in *Obergefell*,<sup>147</sup> choosing a president in *Bush v. Gore*,<sup>148</sup> flooding our campaign system with corporate money in *Citizens United*,<sup>149</sup> and gutting the Voting Rights Act in *Shelby County*.<sup>150</sup> In

<sup>140</sup> See *id.*

<sup>141</sup> See *Clean Air Council v. Pruitt*, 862 F.3d 1, 14 (D.C. Cir. 2017).

<sup>142</sup> *Id.* at 8.

<sup>143</sup> *Id.*

<sup>144</sup> See Dominique Mosbergen, *Scott Pruitt Has Sued The Environmental Protection Agency 13 Times. Now He Wants To Lead It.*, HUFFPOST: POL. (Jan. 17, 2017, 9:44 AM), [http://www.huffingtonpost.com/entry/scott-pruitt-environmental-protection-agency\\_us\\_5878ad15e4b0b3c7a7b0c29c](http://www.huffingtonpost.com/entry/scott-pruitt-environmental-protection-agency_us_5878ad15e4b0b3c7a7b0c29c) [<https://perma.cc/84FJ-SDTJ>].

<sup>145</sup> See Michael H. Fuchs, *An Open Door to Anarchy: President Trump is a threat to America’s rule of law and its national security*, U.S. NEWS (Aug. 31, 2017 7:00 AM), <https://www.usnews.com/opinion/world-report/articles/2017-08-31/donald-trumps-assault-on-rule-of-law-is-our-biggest-threat> [<https://perma.cc/432M-CF29>].

<sup>146</sup> See *One Justice Matters: Justice in the Balance*, AM. CONST. SOC’Y FOR L. & POL’Y, <https://www.acslaw.org/OneJusticeMatters> (last visited Nov. 7, 2017) [<https://perma.cc/ZLA2-8XQR>].

<sup>147</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

<sup>148</sup> 531 U.S. 98 (2000).

<sup>149</sup> *Citizens United v. Fed. Election Comm’n.*, 558 U.S. 310 (2010).

<sup>150</sup> *Shelby County v. Holder*, 133 S.Ct. 2612 (2013).

these decisions that rest on an understanding of the Constitution, the political branches play a limited role—except for the nomination and confirmation of judges.

Unfortunately, despite the near complete chaos of the West Wing,<sup>151</sup> Trump’s judicial nominations operation is chugging out potential judges. With lifetime appointments, these picks could change the legal landscape of our country for a generation. Handpicked by the Federalist Society, President Trump’s list includes names of very young lawyers whose only track record is one of extreme conservatism.<sup>152</sup> His pace is far eclipsing President Obama’s. After six months in office, he had sent the Senate “eighteen people for district judgeship vacancies, . . . fourteen for circuit courts and the Court of Federal Claims,” and twenty-three for U.S. attorney slots.<sup>153</sup> President Obama, by that time in his presidency, had only nominated “four district judges, . . . five appeals-court judges,” and thirteen U.S. attorneys.<sup>154</sup> Trump’s total: fifty-five people; Obama’s total: twenty-two.<sup>155</sup> And in his last two years, Obama faced an extremely obstructionist Republican Senate, which has left a large number of vacancies for Trump to fill—including, of course, the Supreme Court vacancy filled by Neil Gorsuch. Leonard Leo, who has advised the Trump administration and campaign and serves as Executive Vice President of the Federalist Society, has said the goal is to “make the courts unrecognizable.”<sup>156</sup> Among those who will “make the courts unrecognizable” are John K. Bush, who called Justice Kennedy a “judicial prostitute” in his prolific blogging,<sup>157</sup> who will sit on the Sixth Circuit Court of Appeals; and Thomas Farr, a lawyer who defended Jesse Helms against charges of intimidating African American voters and who has spent his career as an anti-voting and anti-worker activist, has been named to the Eastern District of North Carolina.<sup>158</sup> Farr will fill a seat that was held open

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<sup>151</sup> See James Pfiffner, *Why John Kelly can’t tame the White House chaos*, WASH. POST (Aug. 18, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/18/trump-says-theres-no-white-house-chaos-heres-why-john-kelly-will-have-trouble-making-that-so/?utm\\_term=.4c56f6f8bb14](https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/18/trump-says-theres-no-white-house-chaos-heres-why-john-kelly-will-have-trouble-making-that-so/?utm_term=.4c56f6f8bb14) [https://perma.cc/DD7X-W3D3].

<sup>152</sup> See Jeffrey Toobin, *Trump’s Real Personnel Victory: More Conservative Judges*, NEW YORKER: DAILY COMMENT (Aug. 2, 2017), <https://www.newyorker.com/news/daily-comment/trumps-real-personnel-victory-more-conservative-judges> [https://perma.cc/XUX5-BK4W].

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *See id.*

<sup>156</sup> Ryan Lovelace, *Trump Adviser Leonard Leo Details Plans To Overhaul Judiciary*, WASH. EXAM’R (May 12, 2017, 2:00 PM), <http://www.washingtonexaminer.com/trump-adviser-leonard-leo-details-plans-to-overhaul-judiciary/article/2622956> [https://perma.cc/4SUL-H6LR].

<sup>157</sup> Nina Totenberg, *Senators Grill Trump Judicial Nominees On Provocative Blog Posts*, NPR (June 15, 2017, 5:13 AM), <http://www.npr.org/2017/06/15/533014228/senators-grill-trump-judicial-nominees-on-provocative-blog-posts> [https://perma.cc/9XM8-QZMD].

<sup>158</sup> See Alexander Nazaryan, *President Trump is Rewarding a Lawyer who has Fought to Block the Black Vote with a Plum Federal Judgeship*, NEWSWEEK: U.S. (Sept. 21, 2017, 8:00 AM), <http://www.newsweek.com/trump-north-carolina-farr-voter-suppression-668649> [https://perma.cc/LGH5-ZJCD].

for over ten years as Senator Richard Burr refused to cooperate with President Obama to fill it.<sup>159</sup>

Looking forward, thirty-eight percent of judicial seats are expected to become vacant during the Trump presidency.<sup>160</sup> This could allow President Trump to appoint more federal judges than “any first term president in decades.”<sup>161</sup> Decisions from federal judges across the country affect our lives from our right to vote, our immigration and workplace laws, and how the law regards women, racial minorities, the LGBTQ community, and people with disabilities. And yet, despite the high stakes, little attention is paid to the courts. And it is at our peril.

The United States, much like the banks after the Great Recession, faces a stress test—can our Constitution withstand Donald Trump? Can the Founders’ vision of rule of law and separation of powers survive the demagoguery and nativism of the current Republican leaders? Indeed, the entire western community of nations is undergoing a stress test. If the North Atlantic Treaty Organization’s countries continue down the current nationalist path, what will happen to the entire global project of promoting democracy and rule of law—the shared values that have underpinned the close alliance of Western Europe and the U.S. since World War II? We should all be worried by the menace of President Trump and a far-right GOP. We all have a role to play in restoring sanity to the government of the world’s only superpower. Here in the United States, progressives are using the courts as a first step in what will soon be a full-scale political, legal, and cultural offensive to take back our country from the Trump agenda. So long as the Trump agenda does not take over the courts.

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<sup>159</sup> See Will Doran, *Sen. Richard Burr Claims Responsibility for Longest Judicial Vacancy in US History*, POLITIFACT: N.C. (Nov. 3, 2016, 3:12 PM), <http://www.politifact.com/north-carolina/statements/2016/nov/03/richard-burr/sen-richard-burr-claims-responsibility-longest-jud/> [<https://perma.cc/ZSM8-TC7X>].

<sup>160</sup> See Josh Katz, *Older Judges and Vacant Seats Give Trump Huge Power to Shape American Courts*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/interactive/2017/02/14/upshot/trump-poised-to-transform-american-courts.html> [<https://perma.cc/R9Q8-HWZ3>].

<sup>161</sup> *Id.*