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Michael Millemann

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CHECKS AND BALANCES IN THE AGE OF TRUMP

Michael Millemann*

Our Constitution was designed to survive an autocratic President who would threaten the Rule of Law, basic rights, and democracy itself. The Electoral College, the founders hoped, would help to screen out those who had “[t]alents for low intrigue, and the little arts of popularity,”¹ and help to guarantee that only candidates who to “an eminent degree [were] endowed with the requisite qualifications” would be elected President.² That hope has not been realized.

The Separation of Powers doctrine and the Bill of Rights remain the major checks on Executive power. Certainly, the concentration of power in one party in the three branches of the federal government and in state governments threatens to undermine the checks and balances. James Madison said, in justifying the three-branch federal government: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”³ Have we reached a point where, in fact, “all powers” are “in the same hands”? The numbers suggest that we are close to a one-party nation. Republicans can control the Senate (52-48)⁴ and House (237-193),⁵ and deeply affect the Supreme Court. Governors are two-to-one Republican and Republicans have the majorities in 32 state senates and 33 state houses of representative.⁶ There are 26 Republican state

* Michael Millemann worked as a law student in the 1960s Civil Rights Movement in Louisiana, was a successful legal aid and civil rights lawyer, has been a classroom and clinical law professor at the University of Maryland-Carey School of Law since 1974, and in the early 1980s was Chief of the Civil Division and Chief General Counsel at the Maryland Office of Attorney General.

¹ THE FEDERALIST NO. 68 (Alexander Hamilton).

² *Id.*

³ THE FEDERALIST NO. 47 (James Madison).

⁴ *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> (last visited Apr. 19, 2017).

⁵ *Party Breakdown*, U.S. HOUSE OF REPRESENTATIVES PRESS GALLERY, <https://pressgallery.house.gov/member-data/party-breakdown> (last updated Mar. 1, 2017).

⁶ 2017 STATE AND LEGISLATIVE PARTISAN COMPOSITION, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/portals/1/documents/elections/Legis_Control_2017_March_1_9%20am.pdf (last updated Mar. 1, 2017, 9:00 AM).

attorneys general, 20 Democratic, and four either nonpartisan or independent.⁷

As President Trump's election demonstrated, however, the Republican Party is not monolithic. The very recent, fragmented initial Republican response to Speaker Paul Ryan's health plan (the offered replacement for Obamacare) seems to show this⁸, as does the willingness of some Republican leaders—Senators Lindsey Graham and John McCain, for example—to challenge the President.⁹ There also are a number of examples of Justices who disappointed their Presidential sponsors, for example Earl Warren and William Brennan,¹⁰ David Souter,¹¹ and Anthony Kennedy.¹² And recall that it was the “Nixon Court” that in an 8-0 opinion that ordered President Nixon to turn over the Watergate Tapes to the special prosecutor while impeaching proceedings were pending, at least hastening Nixon's resignation.¹³

In response to this Administration's apparent overreaching, two approaches point the way forward: (1) the groundswell of public

⁷ *Attorney General (State Executive Office)*, BALLOTPEDIA, [https://ballotpedia.org/Attorney_General_\(state_executive_office\)](https://ballotpedia.org/Attorney_General_(state_executive_office)) (last visited Apr. 19, 2017) (including a table with count current as of Apr. 2017).

⁸ Tom LoBianco, *GOP Senators Air Grievances with Health Care Plan, Timeline*, CNN (Mar. 9, 2017, 6:23 PM), <http://www.cnn.com/2017/03/09/politics/gop-health-care-plan-steve-king-tom-cotton-cnntv>.

⁹ Mallory Shelbourne, *McCain, Graham: Trump Order May Become “Self-Inflicted Wound” in Terrorism Fight*, THE HILL (Jan. 29, 2017, 1:49 PM), <http://thehill.com/business-a-lobbying/316762-mccain-graham-trump-order-may-become-self-inflicted-wound-in-terrorism>.

¹⁰ President Dwight Eisenhower appointed both Justices Warren and Brennan, which he reputedly called his “biggest mistakes.” Kim Eisler, Letter to the Editor, *Eisenhower's “Mistakes”*, N.Y. TIMES (Jul. 28, 1997), <http://www.nytimes.com/1997/07/28/opinion/1-eisenhower-s-mistakes-336475.html>.

¹¹ Appointed by President George H. W. Bush. *David H. Souter*, OYEZ, https://www.oyez.org/justices/david_h_souter (last visited Apr. 19, 2017).

¹² Appointed by President Ronald Reagan. *Anthony M. Kennedy*, OYEZ, https://www.oyez.org/justices/anthony_m_kennedy (last visited Apr. 19, 2017). See Todd S. Purdum, *Presidents, Picking Justices, Can Have Backfires*, N.Y. TIMES (July 5, 2005), http://www.nytimes.com/2005/07/05/politics/politicsspecial1/presidents-picking-justices-can-have-backfires.html?_r=0 (explaining that justices occasionally do not follow the ideology of the presidents who nominate them).

¹³ *United States v. Nixon*, 418 U.S. 683, 702 (1974).

outrage in large demonstrations and at “town-hall” meetings; and (2) the leadership state attorneys general are providing in protecting the rights of their residents. Before I discuss these developments, I emphasize two other important current roles for lawyers: to protect the rights of a free press and to challenge restrictions on voting. The Fourth Estate will continue to expose what often can only be called Administration propaganda, and if kept open, the voting process will provide the ultimate corrections.

The people are reclaiming democracy, as one commentator noted soon after President Trump’s election:

It was a grassroots movement that spurred Trump to an unexpected victory in November, and now it's an organized movement in revolt against him and his policies. There have been daily demonstrations of some kind against Trump in the two weeks since he took office, ranging from the massive Women’s March on Washington the day after his swearing-in to scattered lesbian, gay, bisexual, and transgender rights demonstrations around the country since then. Historians say the pushback is unprecedented for a new president (though noting that modern social media makes such a repudiation far easier to organize and express). Further, the protests against Trump have not been limited to traditional leftist groups: big businesses and professional organizations, especially those connected with the technology industry, have railed against Trump's travel ban on refugees and nationals from seven majority-Muslim countries.¹⁴

Since this commentary, thousands of angry constituents have confronted their elected officials in a series of town-hall meetings across the country.¹⁵

¹⁴ Susan Milligan, *The Mighty Coalition of the Unwilling*, U.S. NEWS & WORLD REPORT (FEB. 3, 2017, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2017-02-03/can-the-anti-trump-protest-movement-last>.

¹⁵ Jonathon Easley, *Republican Lawmakers Facing Rising Anger at Town Halls*, THE HILL (Feb. 2, 2017, 6:00 AM), <http://thehill.com/homenews/campaign/318175-republican-lawmakers-face-rising-anger-at-town-halls>.

In *Engines of Liberty*, David Cole describes the key roles that activists played over the last three decades in driving major reforms, including constitutional changes.¹⁶ These include marriage equality, protection of the right to bear arms, and limits on President George W. Bush's War on Terror.

Will today's demonstrations have a lasting effect? It is too soon to tell, but The Anti-Trump Women's Marches in more than 600 cities around the Country on January 21, 2017 may have included the largest number of one-day demonstrators in the history of the U.S.¹⁷ There also were over 200 international demonstrations on the same day.¹⁸ This suggests public opposition in the streets has strong legs.

The job of lawyers is to assure that the streets remain open to the people, to provide legal support for the demonstrations, and to oppose efforts by state legislatures to chill free-speech rights. Examples of the latter have been including bills to create new felonies and impose severe punishments for offenses during demonstrations, for example blocking traffic, civil disobedience and "obstructing the legal process," (whatever that may mean).¹⁹

State attorneys general have asserted an early leadership role in protecting the rights of their residents. Notably, they have brought cases that resulted in temporary restraining orders and injunctions, against President Trump's Executive Order 13769.²⁰ In *Washington v.*

¹⁶ See generally DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* (2016).

¹⁷ Sarah Frostenson, *The Women's Marches May Have Been the Largest Demonstration in US History*, VOX (Jan. 31, 2017, 11:11 AM), <http://www.vox.com/2017/1/22/14350808/womens-marches-largest-demonstration-us-history-map>.

¹⁸ *Id.*

¹⁹ Spencer Woodman, *Republican Lawmakers in Five States Propose Bills to Criminalize Peaceful Protest*, THE INTERCEPT (Jan. 19, 2017, 8:38 AM), <https://theintercept.com/2017/01/19/republican-lawmakers-in-five-states-propose-bills-to-criminalize-peaceful-protest>.

²⁰ *Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order 13769*, FED. REGISTER, 82 F.R. 8977 (Jan. 27, 2017), <https://www.federalregister.gov/documents/2017/02/01/2017-02281/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states>.

Trump,²¹ the Ninth Circuit held that states had standing to assert rights of their residents—in this case, teachers and students at state universities—who were denied travel visas under the Executive Order. Some of the excluded nationals “will not enter state universities, some will not join those universities as faculty, some will be prevented from performing research, and some will not be permitted to return if they leave.”²²

The Court rejected the broad claim that “the President has ‘unreviewable authority to suspend the admission of any class of aliens,’ ... even if [this] ... potentially contravene[s] constitutional rights and protections.”²³ It also found that the Government had not established that it was likely to prevail against the states’ due process argument (the right to notice and a chance to be heard prior to deprivation of the right to travel).²⁴ It explained that the states’ Establishment Clause and Equal Protection arguments (that the Order discriminated against Muslims), were “serious allegations and present significant constitutional questions.”²⁵

This opinion is consistent with *Massachusetts v. EPA*, in which the Supreme Court said that “states should be accorded special access to federal court in order to challenge federal agency action” because “‘states have a special role in monitoring and improving’ federal agencies’ implementation of federal law.”²⁶ The case law suggests that state attorneys general can challenge federal actions when (1) federal agencies have failed to regulate or enforce their regulations, (2) federal executive action causes particularized injuries to state citizens, or (3) federal executive action preempts a state law.²⁷

²¹ *Washington v. Trump*, 847 F. 3d 1151, 1161 (9th Cir. 2017) (denying emergency motion for stay and stating, “[w]e therefore conclude that the States have alleged harms to their proprietary interests traceable to the Executive Order.”).

²² *Id.* at 1161.

²³ *Id.*

²⁴ *Id.* at 1164–68.

²⁵ *Id.* at 1167–68.

²⁶ Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 853 (2016) (citing Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 67–68 (2011)).

²⁷ See Robert A. Schapiro, *State Constitutionalism in the 21st Century: Judicial Federalism and the Challenges of State Constitutional Contestation*, 115 PENN. ST. L. REV. 983, 984–85 (2011).

In a recent Op Ed piece, Charles Krauthammer described this “Revolt of the attorneys general,” noting that Republican attorneys general used this “novel form of resistance to executive overreach” successfully against several of President Obama’s executive orders.²⁸ He said, “Democratic-run states will be emboldened to join together in opposing Trump administration measures issuing from both the agency rulings (especially EPA and the Education Department) and presidential executive orders.”²⁹

In Maryland, the General Assembly just passed a Joint Resolution at the request of Brian Frosh, Maryland’s Attorney General, that “directs the Attorney General to investigate, commence, and prosecute or defend any civil or criminal suit or action that is based on the federal government’s action or inaction that threatens the public interest and welfare of residents of the state” as specified.³⁰ The joint resolution sets forth a process by which the Attorney General must provide notice to the Governor.³¹

Charles Krauthammer concluded his Op Ed piece by saying, “[W]e are witnessing a remarkable phenomenon: the organic response of a constitutional system in which the traditional barriers to overreach have atrophied and a new check-and-balance emerges almost ex nihilo.”³² I hope he is right. Maryland has joined in. It joined Washington State and others in a lawsuit opposing the new immigration ban scheduled to go into effect on March 16th.³³ Attorney General Frosh said:

President Trump’s second executive order is still a Muslim Ban. The Administration persists in an effort to implement a

²⁸ Charles Krauthammer, Opinion, *Revolt of the Attorneys General*, WASH. POST (Mar. 2, 2017), https://www.washingtonpost.com/opinions/revolt-of-the-attorneys-general/2017/03/02/13928c82-ff81-11e6-99b4-9e613afeb09f_story.html?utm_term=.7080890a6972.

²⁹ *Id.*

³⁰ S. J. Res. 5, 2017 Gen. Assemb., 5th Sess. (Md. 2017).

³¹ *Id.*

³² Krauthammer, *supra* note 28.

³³ Erin Cox, *Maryland to join lawsuit against Trump travel ban*, BALTIMORESUN.COM, March 10, 2017, <http://www.baltimoresun.com/news/maryland/politics/bs-md-frosh-travel-ban-20170310-story.html>.

policy that is unconstitutional, and also one that makes us less safe, not more safe. It provides propaganda for ISIS and undermines our allies. It makes us less competitive and sends a message to the most talented academics, scientists and engineers around the world that they are not welcome. It will harm Maryland's universities and our economy. It is unwise, illegal and un-American.³⁴

³⁴ George Lettis, AG: MARYLAND WILL JOIN LAWSUIT OPPOSING NEW IMMIGRATION BAN WBAL (2017), <http://www.wbaltv.com/article/ag-maryland-will-join-lawsuit-opposing-new-immigration-ban/9118122> (last visited May 12, 2017).