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America's Conscience: The Rise of Civil Society Groups Under President Trump

Matthew R. Segal

ABSTRACT

Civil society groups have grown under the presidency of Donald Trump, and their new strength carries both opportunity and risk. The Trump administration has fueled these groups; its harsh and discriminatory policies have diminished the government's integrity and constrained government lawyers to defend cruelty in court. Civil society groups have filled this integrity void by repeatedly suing to halt the Trump administration's cruelty, and they have transformed themselves from America's critics to America's conscience. In that role, civil society groups can more powerfully battle the Trump administration's injustices, preserve the legal profession's integrity, and advance the nation's values. But they must also guard against the risk of overlooking injustices that do not involve President Trump, the urge to sharpen tactics against the administration's lawyers, and the temptation to forget that the country will be better off when, once more, the work of civil society groups is not so urgently needed.

AUTHOR

Legal Director, ACLU of Massachusetts. Thanks to Anastasia Doherty for her assistance with this Article. The views expressed are mine alone.



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INTRODUCTION

On the night of January 28, 2017, when I arrived at Boston's federal courthouse to seek an injunction against President Donald Trump's original travel ban, it felt like a lot was at stake. The ban, issued the day before, excluded people from seven Muslim-majority countries, and it had already caused Muslims to be detained at Boston's Logan Airport and other airports around the country.¹ Thousands of people had protested at airports, and lawyers had begun filing lawsuits.²

So, before heading inside the courthouse to help argue the case, I paused to take a picture of what I saw outside: an American flag, waving against the darkness.³

After entering the courthouse, I saw what the flag should represent. Two judges had agreed to hear the case on a Saturday night.⁴ Lawyers had arrived from the airport and from evenings out. An Assistant U.S. Attorney, wearing a sweater, had left a party to represent the government in court.⁵ Each of these late-night courthouse guests was escorted to the courtroom by U.S. Marshalls. And shortly after 2 a.m., a clerk printed out the judges' ruling: a temporary restraining order halting the ban. Everyone did their job.

That momentous but cordial beginning has now evolved into a pattern: The Trump administration does something awful, and then nonprofit groups and private law firms bring lawsuits on behalf of the people whom the Trump administration has put in harm's way. As a result, civil society groups that are typically thought of as critics are arguably becoming something else: America's conscience.

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1. James Doubek, *PHOTOS: Thousands Protest at Airports Nationwide Against Trump's Immigration Order*, NPR (Jan. 29, 2017, 5:30 AM), <http://www.npr.org/sections/thetwo-way/2017/01/29/512250469/photos-thousands-protest-at-airports-nationwide-against-trumps-immigration-order>.
 2. *See, e.g., Darweesh v. Trump*, 17 Civ. 480 (AMD), 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017) (granting nationwide temporary injunction).
 3. Matthew Segal (@segalmr), TWITTER (Jan. 28, 2017, 10:08 PM), <http://twitter.com/segalmr/status/825541106620313601> [<http://perma.cc/Q92R-YVAG>].
 4. *See* Transcript of Hearing Regarding Temporary Restraining Order at 3–4, *Louhghalam v. Trump*, 230 F. Supp. 3d 26 (D. Mass. 2017) (No. 17-10154), https://www.aclum.org/sites/default/files/wp-content/uploads/2017/01/17-10154.tn_hrg_01-28.29-17.pdf [<https://perma.cc/EC4E-N2PS>].
 5. *Id.* at 31.

This new strength of civil society groups carries enormous value, but also certain risks. Part I of this Article addresses how the Trump administration is undermining the integrity of the federal government's litigation. Part II describes how civil society groups and private attorneys are filling that integrity gap. And Part III addresses the contributions that civil society groups can make, and the risks they face, in this new role.

I. THE FEDERAL GOVERNMENT AS LITIGANT-VILLAIN

When the government functions properly, its policymakers pursue their vision of the public interest, and its lawyers represent the very best of the profession. The Solicitor General's informal nickname—the Tenth Justice—reflects the reputation that the Solicitor General's Office has earned, across presidential administrations, for scrupulous advocacy.⁶ But under the Trump administration, things have changed. The administration has put the government in the service of harming people, which jeopardizes the government's capacity to litigate responsibly.

A. President Trump's Effect on Federal Litigation

The integrity problem starts with President Trump. After more than seventy-two years on this earth, he seems to have accrued few fixed beliefs beyond certitude that whiteness and maleness are proportionate to merit. His racist and misogynistic actions as a private citizen have been well documented,⁷ and becoming president has not reformed him.

To the contrary, President Trump has banned people from several Muslim-majority countries;⁸ banned transgender people from the U.S.

6. See David A. Strauss, *The Solicitor General and the Interests of the United States*, 61 LAW & CONTEMP. PROBS. 165, 172 (1998).

7. See, e.g., Michael Barbaro & Megan Twohey, *Crossing the Line: How Donald Trump Behaved With Women in Private*, N.Y. TIMES (May 14, 2016), <http://www.nytimes.com/2016/05/15/us/politics/donald-trump-women.html> (recounting sexist behavior by Trump); Ta-Nehisi Coates, *The First White President*, ATLANTIC (Oct. 2017), <http://www.theatlantic.com/magazine/archive/2017/10/the-first-white-president-ta-nehisi-coates/537909> [<https://perma.cc/6RSN-P8EQ>] (documenting and analyzing misogynistic and racist behavior and statements made by President Trump).

8. See Exec. Order No. 13,769, *Protecting the Nation From Foreign Terrorist Entry Into the United States*, 82 Fed. Reg. 8,977 (Jan. 27, 2017) (initiating the first travel ban as to immigrants and visa holders from Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen); Exec. Order No. 13,780, *Protecting the Nation From Foreign Terrorist Entry Into the United States*, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (revising the travel ban to, among other things, eliminate the ban on people from Iraq); Presidential Proclamation 9,645,

military;⁹ authorized employers to disfavor health care coverage that conflicts with their religious or moral views, but only if the religious or moral views target care customarily received by women;¹⁰ rescinded Temporary Protected Status protections for certain immigrants from countries that President Trump reportedly regards as “shithole[s]”;¹¹ and taken children hostage to advance his anti-immigration policies.¹²

This is government by bigotry. Although its most significant effect is obviously the harm it inflicts on people in the United States and around the world, it also inevitably shapes the government’s behavior in court. When

Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (indefinitely banning some or all people from Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen).

9. Donald J. Trump, *Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security Regarding Military Service by Transgender Individuals*, WHITE HOUSE (Mar. 23, 2018), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security-regarding-military-service-transgender-individuals> [https://perma.cc/4HKS-ZD8F] (adopting policy that “transgender persons with a history or diagnosis of gender dysphoria . . . are disqualified from military service except under certain limited circumstances”); Presidential Memorandum, *Military Service by Transgender Individuals*, 82 Fed. Reg. 41,319 (Aug. 25, 2017) (formally rescinding the Obama Administration’s policy that had allowed transgender individuals to serve openly in the military); see also Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), <http://twitter.com/realdonaldtrump/status/890193981585444864> [https://perma.cc/33GQ-ZRR3].
10. See *Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 82 Fed. Reg. 47,792 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54 (2018), 29 C.F.R. pt. 2590 (2018), and 45 C.F.R. pt. 147 (2018)) (permitting employers, universities, and other insurers to advance religious objections to providing contraceptive coverage under the Affordable Care Act (ACA)); *Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 82 Fed. Reg. 47,838 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54 (2018), 29 C.F.R. pt. 2590 (2018), and 45 C.F.R. pt. 147 (2018)) (permitting any nonprofit or for-profit entity, except publically traded companies, to advance moral objections to providing contraceptive coverage under the ACA).
11. See Josh Dawsey, *Trump Derides Protections for Immigrants From ‘Shithole’ Countries*, WASH. POST (Jan. 12, 2018), http://wapo.st/2AQVXfR?tid=ss_tw-bottom&utm_term=.b67c63325a54 [https://perma.cc/4FHN-MNCD]; Press Release, Dep’t of Homeland Sec., Office of the Press Sec’y, Acting Secretary Elaine Duke Announcement on Temporary Protected Status for Haiti (Nov. 20, 2017), <http://www.dhs.gov/news/2017/11/20/acting-secretary-elaine-duke-announcement-temporary-protected-status-haiti> [https://perma.cc/L9PV-WQPE]; cf. Miriam Jordan, *Trump Administration Ends Protected Status for Thousands of Hondurans*, N.Y. TIMES (May 4, 2018), <http://www.nytimes.com/2018/05/04/us/honduras-temporary-protected-status.html>.
12. See Emma Stefansky, *The Trump Administration Is Taking Migrant Children as Political Hostages*, VANITY FAIR (June 16, 2018 4:29 PM), <https://www.vanityfair.com/news/2018/06/the-trump-administration-is-taking-migrant-children-as-political-hostages> [https://perma.cc/7PEA-JZUE].

the Trump administration is sued, the federal government is constrained to appear in court and defend actions that Trump appears to have taken because he dislikes people who are not white, male, cisgender, or Christian.

This is a recipe for reducing the respect and deference that the federal government traditionally receives—and in fairness deserves—when it appears in court. If the federal government is now going to behave just like a landlord who won't rent to Black people, then it will command precisely the same level of respect.¹³

B. The Dilemma for Government Attorneys

The Trump administration's integrity deficit necessarily influences which issues the federal government must litigate. But it also may bear on how those issues are litigated.

For example, in June 2018 the Department of Justice (DOJ) filed an unusual brief in *Texas v. United States*, a lawsuit in which Texas and other states challenge the constitutionality of the Affordable Care Act (ACA).¹⁴ The DOJ normally defends federal laws, but this DOJ brief argued that the individual mandate is unconstitutional. The brief began by reasoning that, because in 2012 the U.S. Supreme Court had held that the tax penalty enforcing the mandate was key to its constitutionality, and because in 2017 U.S. Congress eliminated that penalty, the sole justification for the mandate had evaporated.¹⁵ Then, remarkably, the brief argued that if the individual mandate falls, two other crucial ACA provisions—which require insurers to cover people with preexisting conditions at reasonable rates—must be struck down under the doctrine of “severability.”¹⁶

But this argument cannot be right. Severability hinges on whether Congress would have wanted other statutory provisions to be struck down if one provision is struck down.¹⁷ With the ACA, though, congressional intent is

13. Cf. Jonathan Mahler & Steve Eder, 'No Vacancies' for Blacks: How Donald Trump Got His Start, and Was First Accused of Bias, N.Y. TIMES (Aug. 27, 2016), <http://www.nytimes.com/2016/08/28/us/politics/donald-trump-housing-race.html>.

14. Federal Defendants' Memorandum in Response to Plaintiffs' Application for Preliminary Injunction, *Texas v. United States*, No. 4:18-cv-00167 (N.D. Tex. June 7, 2018), https://www.justsecurity.org/wp-content/uploads/2018/06/ACA.Azar_filing.pdf [<https://perma.cc/S5FF-RQQM>].

15. *Id.* at 9–11.

16. *Id.* at 12–16.

17. See Ian Samuel & Leah Litman, *The Establishing Shots of a Heist: The Trump DOJ Meets the Affordable Care Act*, TAKE CARE (June 7, 2018), <https://takecareblog.com/blog/the->

clear because Congress itself (according to the DOJ) eliminated the penalty for the individual mandate in 2017. And when it did so, it did not also repeal protections for preexisting conditions, which means that Congress intended those protections to survive. The DOJ's contrary argument is wrong and, unsurprisingly, has been called "beyond the pale."¹⁸

The DOJ's audacious brief may have been too much for some of its lawyers to bear. Three career DOJ lawyers withdrew from the case before the brief was filed.¹⁹ And one resigned from the DOJ the next morning.²⁰

This same dynamic may exist in cases that involve not only hot-button political issues but also President Trump's bigotry.²¹ When his administration implements a policy that disparately harms a group that he disfavors, government attorneys may be unable to discount the possibility—or perhaps the likelihood—that the administration acted because of animus rather than some legitimate interest. For example, even assuming that a hypothetical president could have permissibly undertaken a policy resembling the travel ban, President Trump has left no doubt that he did so due to his personal feelings about Muslims.²² And even assuming that a hypothetical presidential

establishing-shots-of-a-heist-the-trump-doj-meets-the-affordable-care-act
[<https://perma.cc/5R6T-ZYDS>].

18. Jonathan H. Adler & Abbe R. Gluck, Opinion, *An Obamacare Case So Wrong It Has Provoked a Bipartisan Outcry*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/opinion/an-obamacare-case-so-wrong-it-has-provoked-a-bipartisan-outcry.html>; see also Leah Litman, *How Trump Corrupts the Rule of Law*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/18/opinion/trump-zero-tolerance-border.html> (calling the DOJ brief "outlandish").
19. Devlin Barrett & Matt Zapotosky, *Senior Justice Dept. Lawyer Resigns After Shift on Obamacare*, WASH. POST (June 12, 2018), https://www.washingtonpost.com/world/national-security/senior-justice-dept-lawyer-resigns-after-shift-on-obamacare/2018/06/12/b3001d7c-6e55-11e8-afd5-778aca903bbe_story.html?noredirect=on&utm_term=.4622560f061c [<https://perma.cc/L29Q-FP2Y>].
20. *Id.*
21. See, e.g., Litman, *supra* note 18 (arguing that the Trump administration's litigation concerning its separation of families at the border, like its litigation involving the ACA, undermines the rule of law).
22. See Press Briefing, Sarah Sanders, Press Sec'y, White House (Apr. 25, 2018), <http://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-042518> [<https://perma.cc/4N5Z-P423>] (press secretary declining an invitation to disavow President Trump's campaign pledge to impose a Muslim ban); Elizabeth Landers & James Masters, *Trump Retweets Anti-Muslim Videos*, CNN: POLITICS (Nov. 30, 2017, 3:48 AM), <http://www.cnn.com/2017/11/29/politics/donald-trump-retweet-jayda-fransen/index.html> [<https://perma.cc/3YPZ-X5PM>] (discussing President Trump's retweet of anti-Muslim propaganda); Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2017, 3:29 AM), <http://twitter.com/realDonaldTrump/status/871675245043888128> [<https://perma.cc/DE7S-AGJR>] (asserting that the Department of Justice had submitted a "watered down, politically correct" version of the ban for U.S. Supreme Court review).

administration could permissibly enforce 8 U.S.C. § 1325, which makes it a misdemeanor to enter the United States illegally, the Trump administration's "zero tolerance" approach to § 1325—resulting in the separation of thousands of families—seeks to stem what President Trump has called an "infest[ation]" from Central and South America.²³

So what should a well-meaning government lawyer do? Stay, and you may be asked to litigate a case in which the Trump administration is motivated by legally impermissible animus. Leave—or steer clear of those cases—and you may be replaced by someone who is less troubled by President Trump's actions and animus.

This predicament may tend to push well-meaning government attorneys out of their jobs, or at least away from litigation involving the Trump administration's most controversial measures.²⁴ And no matter what government lawyers choose to do, President Trump's animus may tend to increase not only the volume of cases in which the federal government behaves dishonorably, but also the aggressiveness of the defense of such behavior in court.

II. THE PRIVATE BAR AS LITIGANT-PROTECTOR

Just as Trump administration policies tend to hamstring the government's lawyers, those policies also tend to empower the government's adversaries. When bigotry runs amok in government, civil society groups and private practitioners can become its watchdogs.²⁵

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23. Donald J. Trump (@realDonaldTrump), TWITTER (June 19, 2018, 6:52 AM), <https://twitter.com/realDonaldTrump/status/1009071403918864385> [<https://perma.cc/X5X9-4TDM>]; see Tal Kopan, *Exclusive: Trump Admin Thought Family Separations Would Deter Immigrants. They Haven't.*, CNN: POLITICS (June 18, 2018, 12:15 PM), <https://www.cnn.com/2018/06/18/politics/family-separation-deterrence-dhs/index.html> [<https://perma.cc/77T6-FAPN>].
 24. See *supra* notes 19–20; see generally W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L.J. 275 (2017) (discussing the pressure that government lawyers now face under the Trump administration to approve unlawful policies and actions).
 25. State attorneys general have certainly played this role as well, as several of them have repeatedly sued the Trump administration over its unconstitutional actions. See, e.g., *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 301 F. Supp. 3d 248 (D. Mass. 2018) (granting summary judgment, on standing grounds, against Massachusetts's challenge to the Trump administration's rollback of the Affordable Care Act's contraceptive coverage mandate). But the dynamics between the federal government and state attorneys general are beyond the limited scope of this Article.

A. The Rise of Civil Society Groups

After the November 2016 election, the American Civil Liberties Union (ACLU) pledged: “If Donald Trump Implements His Proposed Policies, We’ll See Him in Court.”²⁶ He did, and the ACLU and other nonprofits have sued. Together with pro bono lawyers, nonprofits have sued President Trump over the travel ban,²⁷ the transgender troops ban,²⁸ the scale-back of national monuments,²⁹ the lack of government transparency,³⁰ and the separation of families at the southern border.³¹

Although not all of these suits have been successful, each has highlighted the Trump administration’s disgraceful behavior and the role that civil society groups are playing in confronting that behavior. The enforcement of constitutional norms is increasingly something that private actors do—not the federal government. And the suits have tended to build the strength and popularity of the organizations and attorneys who bring them.

The numbers are staggering. The ACLU, which has existed for roughly 100 years, saw its membership almost quadruple in just the first four months of Trump’s presidency, going “from about 425,000 to 1.6 million.”³² Likewise, within five months of Trump’s election, Planned Parenthood gained over

26. Anthony D. Romero, *If Donald Trump Implements His Proposed Policies, We’ll See Him in Court*, ACLU (Nov. 9, 2016, 11:15 AM), <http://www.aclu.org/blog/if-donald-trump-implements-his-proposed-policies-well-see-him-court> [<https://perma.cc/V5EP-XQNR>].

27. See generally *Civil Rights Challenges to Trump Refugee/Visa Order*, C.R. LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/results.php?searchSpecialCollection=44> [<https://perma.cc/T8YR-KCP5>] (collecting and discussing cases challenging Trump’s executive orders regarding the travel ban).

28. See, e.g., Second Amended Complaint for Declaratory and Injunctive Relief, *Doe v. Trump*, No. 17-1597 (D.D.C. Apr. 6, 2018), 2018 WL 1919837.

29. *Conservation Groups File Lawsuit After President Trump Illegally Axed Dinosaur Treasure Grand Staircase-Escalante National Monument*, WILDERNESS SOC’Y (Dec. 4, 2017), <http://wilderness.org/press-release/conservation-groups-file-lawsuit-after-president-trump-illegally-axed-dinosaur-treasure-grand> [<https://perma.cc/G2E6-8RWU>].

30. Kate Kelly & Julie Hirschfeld Davis, *Lawsuit Challenges Secrecy of White House Advisers on Infrastructure*, N.Y. TIMES (July 25, 2017), <http://www.nytimes.com/2017/07/25/us/politics/lawsuit-infrastructure-trump.html>.

31. See Amended Complaint for Declaratory & Injunctive Relief With Class Action Allegations, *Ms. L. v. U.S. Immigration & Customs Enft*, No. 18-cv-00428 (S.D. Cal. Mar. 9, 2018).

32. Joseph P. Williams, *The Trump Bump*, U.S. NEWS (June 16, 2017, 6:00 AM), <http://www.usnews.com/news/the-report/articles/2017-06-16/trumps-presidency-gives-liberal-groups-a-fundraising-boost> [<https://perma.cc/52V4-ECVB>].

600,000 new donors and more than 36,000 new volunteers.³³ Other groups, including the League of Conservation Voters, GLBTQ Legal Advocates and Defenders (GLAD), MoveOn.org, and Common Cause, have likewise reported increased contributions and membership.³⁴

These resources also take the form of goodwill. The national ACLU now has over 1.5 million Twitter followers, and several of its attorneys have followers that can be measured in five digits.³⁵ Sherrilyn Ifill, the Director of the NAACP Legal Defense and Education Fund, has over 85,000 Twitter followers.³⁶ Neal Katyal, the former acting Solicitor General who has represented Hawaii in its challenge to the travel ban, has over 60,000 followers.³⁷ These platforms, among others, enable lawyers who sue the president to communicate directly and effectively with the public.³⁸

The lesson here is not just that lawyers are becoming celebrities. Rather, it is that the Trump administration has opened an integrity void, and concerned institutions, lawyers, and citizens are attempting to fill it. In doing so, they have built significant vehicles for communicating to courts and the public about civil rights and civil liberties.

B. Case Studies: From the Travel Ban to “Shithole” Countries

The cases pitting the Trump administration against civil society groups and private attorneys are, of course, too numerous to discuss here. This Article briefly highlights three, two of which present some evidence—though not necessarily proof—that government litigation tactics may have sharpened in cases involving the Trump administration's most controversial policies.

33. Sam Sanders, *'The Resistance' Faces a New Question: What to Do With All That Money*, NPR (Mar. 26, 2017, 8:00 AM), <http://www.npr.org/2017/03/26/520854771/the-resistance-faces-a-new-question-what-to-do-with-all-that-money>.

34. Williams, *supra* note 32.

35. ACLU (@ACLU), TWITTER, <http://twitter.com/ACLU> [<https://perma.cc/ZHV6-PLHJ>]; see, e.g., Dale Ho (@dale_e_ho), TWITTER, https://twitter.com/dale_e_ho [<https://perma.cc/4HH9-73EV>]; Cecilia Wang (@WangCecilia), TWITTER, <http://twitter.com/WangCecilia> [<https://perma.cc/9HAL-9E2E>].

36. Sherrilyn Ifill (@Sifill_LDF), TWITTER, http://twitter.com/sifill_ldf [<https://perma.cc/A89H-8E79>].

37. Neal Katyal (@neal_katyal), TWITTER, http://twitter.com/neal_katyal [<https://perma.cc/VQB2-63D7>].

38. See Full Frontal With Samantha Bee, *Full Frontal Has a Heart-On: Lee Gelernt Edition*, YOUTUBE (Feb. 1, 2017), <http://www.youtube.com/watch?v=prDkd60WzmU> (segment involving ACLU immigrants' rights lawyer Lee Gelernt).

1. The Travel Ban

The travel ban litigation has perhaps accounted for the greatest increases in the popularity and resources of civil society organizations. The weekend after the ban was imposed, roughly 350,000 people donated to the ACLU.³⁹ Nevertheless, the travel ban litigation may also provide an example of litigation tactics being sharpened under the Trump administration.

The temporary restraining order (TRO) that immigrants' rights attorneys and the ACLU of Massachusetts won on January 29, 2017, was, of course, designed to protect immigrants from being banned from the United States.⁴⁰ Among other things, the TRO ordered the government not to detain or remove anyone pursuant to the travel ban.⁴¹ And, crucially, it ordered U.S. Customs and Border Protection (CBP) to notify airlines about the existence of the TRO, and to tell the airlines that individuals on flights arriving at Boston's Logan Airport "will not be detained or returned" due to the travel ban.⁴²

Yet, after the TRO was issued, the CBP acted to prevent travelers from getting to Boston. According to a report by the Department of Homeland Security's Inspector General, the CBP responded to the TRO by improperly continuing to instruct airlines not to board passengers targeted by the travel ban.⁴³ Notwithstanding the court order requiring the CBP to communicate that passengers targeted by the ban would neither be detained nor removed, these "no board" instructions reportedly told airlines that such passengers "will likely be deemed inadmissible upon arrival at a U.S. airport or preclearance location."⁴⁴ The Office of the Inspector General has since concluded "that the issuance of no-board instructions violated the [travel ban] orders" in Boston and Los Angeles.⁴⁵

39. Timothy Sandoval, *In Wake of Travel Ban, Nonprofits See Support Surge*, CHRON. PHILANTHROPY (Jan. 30, 2017), <http://www.philanthropy.com/article/In-Wake-of-Travel-Ban/239046> [<https://perma.cc/663Z-KEM4>].

40. *See* Temporary Restraining Order, *Louhghalam v. Trump*, 230 F. Supp. 3d 26 (D. Mass. 2017) (No. 17-10154), 2017 WL 386550.

41. *Id.* at 2.

42. *Id.*

43. DHS IMPLEMENTATION OF EXECUTIVE ORDER #13769: "PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES" at 6, 52–53, 66–69, OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC. (Jan. 18, 2018), <http://www.oig.dhs.gov/sites/default/files/assets/2018-01/OIG-18-37-Jan18.pdf> [<https://perma.cc/5M7C-MRQ3>].

44. *Id.* at 67.

45. *Id.* at 80; *see* *Mohammed v. United States*, No. 17-00786, 2017 WL 438750 (C.D. Cal. Jan. 31, 2017) (granting temporary restraining order that, among other things, required U.S. Customs and Border Protection to "inform all relevant airport, airline, and other

More recently, at the conclusion of his oral argument at the Supreme Court concerning the third version of the travel ban, the Solicitor General claimed that President Trump “made crystal clear . . . that he had no intention of imposing the Muslim ban.”⁴⁶ But President Trump has never made any such thing clear, crystal or otherwise.⁴⁷

2. Justice for Jane

The Trump administration's new policy of blocking access to abortion care for young immigrants in detention has also yielded contentious litigation between the government and the ACLU. Applying this new policy, the head of the Trump Administration's Office of Refugee Resettlement has even advocated prohibiting an abortion for a seventeen-year-old woman whose pregnancy resulted from a rape; he asserted that an abortion was “not in her best interest.”⁴⁸

In litigation that has been called Justice for Jane, the ACLU sought and secured emergency relief for a different young woman—Jane Doe—who was targeted by this Trump administration policy.⁴⁹ The Solicitor General then petitioned the Supreme Court not only to vacate the D.C. Circuit's en banc ruling in Jane Doe's favor, but to consider taking “disciplinary action” against her ACLU lawyers for supposedly preventing the government from seeking court intervention before Jane Doe secured abortion care.⁵⁰ Supreme Court litigator Carter Phillips, of Sidley Austin LLP, stepped in as counsel of record on the ACLU's response, calling the government's filing “extraordinary and baseless.”⁵¹ Legal experts have also questioned its wisdom.⁵² In June 2018, the

authorities at Los Angeles International Airport and International Airport in Djibouti that Plaintiffs are permitted to travel to the United States on their valid immigrant visas”).

46. Transcript of Oral Argument at 81, *Trump v. Hawaii*, 138 S. Ct. 923 (Apr. 25, 2018) (No. 17-965), 2018 WL 1948741, at *81.

47. See *supra* note 22.

48. David G. Savage, *Trump Official Sought to Block Abortion for a 17-year-old Rape Victim*, L.A. TIMES (Dec. 21, 2017, 1:20 PM), <http://www.latimes.com/politics/la-na-pol-abortion-trump-migrant-20171221-story.html> [<http://perma.cc/JN2U-C5P8>].

49. See *After a Month of Obstruction by the Trump Administration, Jane Doe Gets Her Abortion*, ACLU, (Oct. 25, 2017), <http://www.aclu.org/news/after-month-obstruction-trump-administration-jane-doe-gets-her-abortion> [<https://perma.cc/ZRU7-KJPV>].

50. Petition for Writ of Certiorari at 26, *Garza v. Hargan*, 874 F.3d 735 (D.D.C. 2017) (No. 17-654), 2017 WL 5127296, at *26 (en banc) (per curiam), cert. granted, vacated as moot *sub nom.* *Azar v. Garza*, 138 S. Ct. 1790 (2018) (per curiam).

51. Brief in Opposition at 23, *Garza*, 874 F.3d 735 (No. 17-654), 2017 WL 6034215, at *23.

52. See Marty Lederman, *The SG's Remarkable Cert. Petition in Hargan v. Garza, the "Jane Doe" Abortion Case*, BALKINIZATION (Nov. 8, 2017), <http://balkin.blogspot.com/2017/11/the-sgs-remarkable-cert-petition-in.html> [<https://perma.cc/MT2H-AAZC>]; David Luban,

Supreme Court vacated the D.C. Circuit's en banc order as moot and declined to "delve into the factual issues" concerning the Solicitor General's suggestion that the ACLU's conduct was sanctionable.⁵³

3. Temporary Protected Status

It remains to be seen whether the government's litigation tactics in the travel ban and Justice for Jane cases are part of a pattern. But new litigation concerning immigrants who have received Temporary Protected Status (TPS) may provide a test case.

The federal government made TPS available to Haitians in 2010 following a destructive 7.0 earthquake—which was then exacerbated by a cholera outbreak later in 2010, and by a hurricane in October 2016.⁵⁴ But in November 2017 the Department of Homeland Security announced a decision to rescind TPS status for Haitians, which would become effective on July 22, 2019.⁵⁵ President Trump's animus appears to provide some context for that decision. He has reportedly said that Haitians "all have AIDS,"⁵⁶ and in January 2018 he reportedly said, in a discussion with lawmakers about protecting immigrants from Haiti and other countries, "[w]hy are we having all these people from shithole countries come here?"⁵⁷

The "shithole countries" comment triggered a media firestorm and was followed by lawsuits from the NAACP Legal Defense and Education Fund and the Lawyers' Committee for Civil Rights and Economic Justice, which allege that the decision to rescind TPS status for Haitians reflected unconstitutional discrimination based on race or ethnicity.⁵⁸ The Lawyers' Committee lawsuit,

Opinion, *DOJ's Stance on Illegal Immigrant Abortion Case Is Clear Jab at ACLU*, HILL (Nov. 9, 2017, 12:40 PM), <http://thehill.com/opinion/healthcare/359617-doj-stance-on-illegal-immigrant-abortion-case-is-clear-jab-at-aclu> [<https://perma.cc/V2VY-U8PZ>].

53. *Azar*, 138 S. Ct. at 1793.

54. See Extension of the Designation of Haiti for Temporary Protected Status, U.S.C.I.S., Fed. Reg. 11,808 (Mar. 3, 2014); Francisco J. Luquero et al., *Mortality Rates during Cholera Epidemic, Haiti, 2010–2011*, 22 CDC 410 (2016), https://wwwnc.cdc.gov/eid/article/22/3/14-1970_article [<https://perma.cc/WXD5-G2A2>].

55. See Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2,648 (Jan. 18, 2018).

56. Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. TIMES (Dec. 23, 2017), <http://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html>.

57. Dawsey, *supra* note 11.

58. Complaint at 1, *NAACP v. U.S. Dep't of Homeland Sec.*, No. 18-239, (D. Md. Jan. 24, 2018), 2018 WL 550254; First Amended Complaint at 1, *Centro Presente v. U.S. Dep't of Homeland Sec.*, No. 18-10340 (D. Mass. May 9, 2018), <https://www.clearinghouse.net/chDocs/public/IM-MA-0014-0002.pdf> [<https://perma.cc/3VSN-K5X6>].

which also challenges the termination of TPS for immigrants from El Salvador and Honduras, has survived a motion to dismiss.⁵⁹ But no matter who prevails, these lawsuits reaffirm that President Trump's actions are casting the government as the villain, and its litigation adversaries as people of conscience.

III. THE POWER AND PITFALLS OF SERVING AS THE COUNTRY'S CONSCIENCE

The increased strength of civil society groups can be a powerful check on the Trump administration's injustices. And because I am an ACLU attorney, it would be easy for me to say that this new strength is uniformly good. But it would also be wrong. In at least three respects, the virtues of powerful civil society groups also carry risks.

A. Battling Injustice

The new popularity of civil society groups and pro bono lawyers carries with it substantial resources for confronting injustice by the Trump administration. When President Trump takes actions that appear to be grounded in bigotry, or otherwise inimical to the U.S. Constitution, those actions will almost certainly be met with swift, skillful, and well-resourced litigation. Nonprofit groups have more capacity than they did before President Trump took office,⁶⁰ and private lawyers have demonstrated a willingness to devote countless pro bono hours to checking the Trump administration.⁶¹

But just as popular support can fuel advocacy that seeks to check President Trump, it may drag against advocacy that does not. For example, civil rights are often mediated, and violated, at the state and local levels. Yet lawsuits focusing on

59. See Memorandum & Order, *Centro Presente*, No. 18-10340 (D. Mass. July 23, 2018), 2018 WL 3543535.

60. See *supra* Subpart II.A.

61. See, e.g., Stephanie Ebbs, *Lawyers Around the Country Work to Counter Trump's Immigration Order*, ABC NEWS (Jan. 29, 2017, 5:05 PM), <http://abcnews.go.com/Politics/lawyers-country-work-counter-trumps-immigration-order/story?id=45127871> [<http://perma.cc/TB9L-WYQ9>]; Sam Reisman, *BigLaw Directs Pro Bono Efforts at Trump Admin Policies*, LAW360 (Nov. 6, 2017, 7:09 PM), <http://www.law360.com/articles/981712/biglaw-directs-pro-bono-efforts-at-trump-admin-policies> [<https://perma.cc/RH8G-AFBA>]; Ted Boutrous (@BoutrousTed), TWITTER (Oct. 22, 2016, 10:21 AM), <http://twitter.com/BoutrousTed/status/789879295577587712> [<https://perma.cc/M2J6-AYTK>] (offering pro bono representation to "anyone #Trump sues for exercising their free speech rights").

state or local issues—such as police violence⁶²—may be less interesting to those whose support for civil society groups has been inspired by President Trump. With Trump taking up so much oxygen, civil society groups may find it difficult to maintain support for advocacy that cannot easily be tied to him.

That difficulty may be amplified if the public actors who are threatening civil rights at the state or local levels are also political opponents of President Trump. In that circumstance, civil society groups might have to choose between undertaking important work and losing enthusiastic supporters. In short, sudden popularity may present civil society groups with a new concern: the risk of *losing* popularity.

B. Honoring the Legal Profession

The increased strength of lawyers litigating against the Trump administration may also position them to be the public face of the legal profession. This is partly because of the basic dynamic of Trump-centered litigation, in which the federal government takes an unjust action and the private bar attempts to stop it. But it is also because that litigation has been so collaborative. In case after case, civil society groups have partnered with one another, and with law firms, to challenge the latest indignity of the Trump era.⁶³ Together, thousands of lawyers are participating in a sort of nationwide civics class in which they seek to educate the government, the public, and even one another.

Yet there are perils here, too. Because lawyers confronting the Trump administration may feel that they are doing something righteous, and because the administration's litigation tactics may be sharpening, civil society groups and private attorneys may be tempted to engage in a tit for tat with government attorneys.

They should not do so. Many lawyers have had the experience of getting angry about the other side's just-filed brief and wanting to dash off a combative response. But seasoned lawyers know that, in both individual cases and over

62. Cf. Jelani Cobb, *Donald Trump Is Serious When He "Jokes" About Police Brutality*, *NEW YORKER* (Aug. 1, 2017), <http://www.newyorker.com/news/news-desk/donald-trump-is-serious-when-he-jokes-about-police-brutality> [<https://perma.cc/72X3-EF3D>] (discussing Trump's encouragement of police violence).

63. See, e.g., *supra* Subpart II.B; Amended Class Action Complaint and Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2241, *Jimenez v. Nielsen*, No. 1:18-cv-10225-MLW, 2018 WL 910716 (D. Mass. Apr. 10, 2018) (lawsuit filed by the ACLU of Massachusetts and the law firm WilmerHale concerning the Trump administration's "practice of subjecting noncitizens to detention and removal while they follow the government's own regulations for obtaining lawful immigration status based on their marriages to U.S. citizens").

the long term, it is better to cool off. In Trump-centered litigation, advocates should of course zealously pursue their clients' interests. But it is helpful to bear in mind that government lawyers are in a predicament, and recriminations with them will tend to unduly coarsen the legal profession.

C. Serving as the Country's Conscience

From the weekend of the travel ban through today, civil society groups and volunteer attorneys have done more than simply sue the Trump administration. They have stepped in to protect people who the Trump administration has sought to harm. They have also demonstrated that the Trump administration has not extinguished the values our Constitution represents, and to which our country should aspire.⁶⁴ With the federal government missing in action on the enforcement of constitutional values, civil society groups and private attorneys are safeguarding the country's conscience.

The problem with this work is simply that it should not be necessary. The government should not be banning people from entering the country. It should not be disfavoring people of color, women, LGBTQ people, and Muslims. It should not be locking up the children of migrants seeking a better life in the United States. And so, while it is impressive that civil society groups have risen to the occasion, we will know that the crisis is over when more people regard these groups as vital but occasionally pesky bulwarks against government overreach, rather than the resistance to government by bigotry.

CONCLUSION

From the standpoint of civil rights, President Trump is an enormous threat, and civil society groups are rising to meet it. They are taking on injustice, modeling professional responsibility, and safeguarding the people and values threatened by the federal government. These are all important actions, now more than ever. But they must be performed responsibly, and the country would be better off if they weren't so urgently needed.

64. Cf. Charlie Savage, *Liberal Lawyers Plan Wave of Resistance to Trump Policies*, N.Y. TIMES (Jan. 30, 2017), <http://www.nytimes.com/2017/01/30/us/politics/lawyers-trump-travel-order.html> (discussing varied efforts by attorneys to resist President Trump's immigration ban, including immigration attorneys who assist in resettlements).