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A playbook for state AGs to defeat Trump

Now more than ever, state attorney generals are the last line of defense against the excesses of the President in Washington. This is a welcome development – but the expectations are high and the challenges many.

Just a week ago, state attorney generals' hard-fought battle against the Muslim travel ban both held and lost ground in the Supreme Court, with the case to be heard in full in October.

Two weeks ago, state AGs brought a corruption case against the President alleging that payments by foreign governments to his businesses violate the Constitution. And as the federal government rewrites the Obama administration's plan on global warming, the big fight over the environment is still to come.

I've thought long and hard about what state attorney generals can do to stop what may come. Here's the plan that they need to follow to succeed.

First, above all remember: This is not about politics but the rule of law and facts. Our President shows little to no respect for our democratic institutions when he interferes with the work of the FBI, attacks "terrible" federal judges and describes the press as the "enemies of the people."

When a President disparages the rule of law, attorney generals must stand for that principle above all. Their actions, and the cases they bring, must be legally credible and based on the facts – not politics.

Second, state attorney generals must appreciate the fact that, remarkably, they are becoming the new enforcers of the federal constitution and federal law. State AGs are the new feds. In the heyday of the Justice Department, Robert F. Kennedy and Nicholas Katzenbach stood for the federal Constitution and federal law. Now it will be state AGs.

Consider this: The two cases against the federal government from the last decade in which state AGs have had the most impact were cases in which they were enforcing federal law and the federal Constitution. States successfully sued President George W. Bush's EPA when it ignored the Clean Air Act and failed to address global warming. And state AGs who sued to stop the President's two executive orders on travel succeeded because, according to appeals courts, the Muslim ban violated federal statutes and the federal Constitution.

BE OUR GUEST

BY HARLAN LEVY

Third, state AGs who oppose the President – who are, by and large, Democrats – must learn from what Republican AGs did during the Obama administration, when they sued the federal government with frequency and gusto. Most of those cases failed, but a couple hit: blocking President Obama's signature initiative on global warming and stalling his efforts to protect undocumented parents of lawful U.S. residents from deportation.

In both these instances, Republican AGs argued that Obama, in taking action after failing to get legislation through Congress, had exceeded his statutory power. So when our new President acts through an executive order or his administrative agencies, the successes of the Republican AGs will provide a path forward for challenges to his actions.

Fourth, state AGs must never forget that they represent the people of their states. They are not freelancers. Under the law, they

must articulate a concrete state interest to get a ticket to the courtroom when they sue the federal government.

These interests are not unlimited. They are described by the courts

as sovereign, quasi-sovereign and proprietary. These include cases brought by the AGs under federal law to protect the state environment and the civil rights of their citizens.

In the Muslim ban case, the state interest set forth by the AGs was the impact of the executive orders on state universities – proprietary institutions. State AGs need to meet one of these standards in every instance.

Fifth, this must be a national effort by concerned AGs, not just a handful of states. World-changing cases can be developed and brought from the smallest and unlikeliest locales. The successful effort by Republican AGs to block the Obama global warming initiative was led in significant part by the West Virginia AG.

If they follow these five principles with discipline, state AGs will score successes. Their success will be commensurate with how far the new President goes beyond the rule of law – as well as the energy, care and planning with which the AGs counter the administration's excesses.

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