

## State Attorneys General, the Rule of Law, and Collaborative Problem Solving

It is a great honor to join the NYU Law community for the 25<sup>th</sup> annual Robert Abrams Lecture. I want to begin with a familiar Yiddish expression, which is appropriate for my talk—“let me say a few words before I speak.” These words, of course, are about Bob Abrams, for whom this lecture series is named and for NYU Law, which launched my journey into public service.

Bob Abrams, for those who don’t know him personally, is first and foremost a mensch. As New York’s Attorney General from 1979-1993, Bob transformed the position. As former New York Governor David Patterson acknowledged, “He fought fiercely for the people of this state, protecting consumer and civil rights and launching groundbreaking efforts in the areas of environmental protection and criminal prosecution. He has left an indelible mark on New York’s history.”<sup>1</sup> And as Bob put it in an interview with me earlier this year, his “goal was always to help make a difference, driven by a conviction that public service should be an inspired goal for all of us.”<sup>2</sup>

When I think about my own life, I can credit NYU Law for launching my career in public service. As a 1L, I organized, with friends, a reading group on public issues, and professors like Vicki Been joined us for engaging conversations. As a member of the Law Review, I developed friendship and debated important topics of legal scholarship. I also benefited from the impressive range of speakers who regularly came to NYU Law, including Justice Ruth Bader Ginsburg, who delivered her Madison Lecture while I was a student.<sup>3</sup> And I thoroughly enjoyed the Root Tilden lecture series and the strong support for my interest in public service, which included working for NYU Law alum Al Gerhardstein during the summer after my 1L year. Finally, I cannot thank my mentors here enough—including Professors Chris Eisgruber, Vicki Been, Ricky Revesz, and Bill Nelson—for encouraging me to clerk for Judge David Ebel in Colorado after graduation.

For all of the students here, I encourage you to be self-reflective about how you can serve the community with your degree. As you do so, I suggest that you think creatively about your path, recognizing that there are a range of opportunities to serve the public, including working in State Attorneys General Offices. (Commercial announcement—our department has a fellowship program for recent law school graduates. I encourage you to check it out.<sup>4</sup>) As Ralph Waldo Emerson said, “do not go where the path may lead, go instead where there is no path and leave a trail.”

As I think about my remarks today, I am guided by Bob’s wisdom. As he said to me in our interview:

In the course of my lifetime, I met able, honest people—Republicans and Democrats alike—working in government to implement the vision of our founders. I discovered if in

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<sup>1</sup> *Colorado AG Phil Weiser '94 interviews former New York AG Robert Abrams '63 about his new memoir*, N.Y.U. L. News (March 16, 2021), <https://www.law.nyu.edu/news/robert-abrams-memoir-phil-weiser-alumni>.

<sup>2</sup> *Id.*

<sup>3</sup> Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185 (1992).

<sup>4</sup> *Become a Fellow with the Office of the Attorney General*, Colo. Att’y General, <https://coag.gov/careers/fellowships/> (last visited July 29, 2021).

all interactions and decision making, there was respect shown to others and a listening ear welcoming all points of view, most times a worthwhile common ground could be achieved.

I want to discuss this critical commitment to listening, dialogue, and learning. But before I do so, let me reflect a bit on the role of the modern State Attorney General, a position shaped by Bob Abrams' leadership.

## **I. The Role of the Modern State Attorney General**

Our Constitution brilliantly developed and implemented the concept of separation of powers. James Madison's renowned concept—"ambition shall counteract ambition"<sup>5</sup>—is mostly discussed in terms of how the three branches of the federal government can check and balance one another. This concept, however, applies equally to the role of state governments as a check on executive branch overreach.

In recent years, State Attorneys General stepped up to defend the rule of law and pursue justice on multiple fronts. It was a most unfortunate feature of the Trump Administration that the United States Department of Justice adopted positions at odds with federal constitutional and statutory law, including its decision to challenge the Affordable Care Act,<sup>6</sup> to undermine the census,<sup>7</sup> and to end the DACA program without a reasoned basis,<sup>8</sup> just to name a few. In each of these cases, and many more, State Attorneys General defended the people of their states as well as the rule of law. In each of these cases, we prevailed. Our role is fundamentally about defending the rule of law and the principles that ground our nation's system of constitutional governance. We will continue to do so vigilantly, regardless of what party controls the White House.

To develop the concept of defending state authority and protecting constitutional and statutory rights in the face of illegal federal action, let me discuss two significant examples: Colorado's challenge to the Trump Administration's Byrne JAG rules and our challenge to the rollback of the clean car rules. In the case of the Byrne JAG rules, the relevant issue was whether the Department of Justice could attach brand-new requirements to state and local law enforcement agencies' continuing eligibility for longstanding federal law enforcement grants, namely, requirements that state and local law enforcement agencies begin enforcing federal immigration law as a condition of federal financial support. These conditions, however, found no support in the federal statute that established the grant program and they offended our Constitution's protection of state sovereignty from federal encroachment.

The Trump Administration's effort to roll back the clean car rules involved an effort to take away the authority long granted to states under the Clean Air Act. In 1977, Congress authorized California and any state opting to join the California standard to set more restrictive (and thus more environmentally friendly) than those required by the federal standards.<sup>9</sup>

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<sup>5</sup> The Federalist No. 5, at 33 (James Madison) (Clinton Rossiter ed., 1961).

<sup>6</sup> *California v. Texas*, 141 S. Ct. 2104 (2021).

<sup>7</sup> See *Trump v. New York*, 141 S. Ct. 530 (2020).

<sup>8</sup> See *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020)

<sup>9</sup> 42 U.S.C. § 7507 (1977).

Since then, several states (including Colorado) adopted the standards established by California.<sup>10</sup> But in 2019, the Trump administration attempted to restrict the authority previously granted to the states by Congress, undercutting the discretion provided to states by Congress since 1977. In response, Colorado joined a multi-state lawsuit challenging the Trump administration's decision. In the wake of the Biden administration's decision to reverse the Trump's administration's stance, this case is now stayed.

The commitment of State Attorneys General to defend the rule of law and state authority means that whoever is President will know that there will be State Attorneys General ready and willing to challenge unlawful federal executive actions. And that threat need not be partisan in nature. After all, I have long stated that my standard for challenging the federal government—where the federal action violates the rule of law and hurts Colorado—applies whoever is in the White House. Following that standard, we are now challenging the decision of the Biden Administration to limit the role of states in granting certifications for development projects under Section 401 of the Clean Water Act.<sup>11</sup>

As Colorado's Attorney General, I have often spoken about the importance of the rule of law. This principle means that we treat people equally under law and how we treat others is not dependent on what party is in office or what individual or group is targeted for favored or disfavored treatment. As Pennsylvania Attorney General Josh Shapiro emphasized in his Abrams Lecture in 2019, it is important that:

the rule of law applies to everyone, no matter what they look like or where they come from or who they love or who they pray to or choose not to pray to. The rule of law must apply to everyone. And when we create others in our system, when we separate people out, when we apply the laws unfairly we erode our democracy, we erode the rule of law, and we make everyone less safe. We make everyone weaker.<sup>12</sup>

## **II. Learning from Justices Ginsburg and Scalia: The Listening, Dialogue, and Lifelong Learning**

I recognize that some observers of State Attorney General litigation against the federal government might think that most of our work is political and partisan in nature. To be sure, the recent attack on the Affordable Care Act came from Republican Attorneys General and that law was primarily defended by Democratic Attorneys General. But two brave Republican Attorneys General defended the law, recognizing that the legal arguments (let alone the policy impact) of the

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<sup>10</sup> *Zero Emission Vehicle Mandate Proposal*, Colo. Dep't of Health and Hum. Services, <https://cdphe.colorado.gov/zero-emission-vehicle-mandate-proposal> (last visited July 29, 2021).

<sup>11</sup> *Twenty-One State AGs Challenge EPA Rule Curtailing States' Rights Under the Clean Water Act*, N.Y.U. L. News (July 21, 2020), <https://www.law.nyu.edu/centers/state-impact/press-publications/press-releases/cwa-sec-401-lawsuit>.

<sup>12</sup> *Pennsylvania AG Josh Shapiro emphasizes the rule of law at annual Abrams Lecture*, N.Y.U. L. News (Oct. 17, 2019), <https://www.law.nyu.edu/news/robert-abrams-public-service-lecture-josh-shapiro>.

case made by many Republican Attorneys General was fatally flawed.<sup>13</sup> And while it was the Republican Attorney General of Texas, supported by many of his Republican colleagues, who brought the case to the Supreme Court to overturn the results of the Electoral College this year,<sup>14</sup> Idaho Attorney General Lawrence Wasden stood out as a profile in courage for his opposition to that action. His response to this suit eloquently summed up the true north for State Attorneys General: “As is sometimes the case, the legally correct decision may not be the politically convenient decision. But my responsibility is to the State of Idaho and the rule of law.”<sup>15</sup>

Not only are there Attorneys General who place principle over party, but there are many issues addressed by Attorneys General that transcend party. On the litigation against pharmaceutical companies related to actions that fueled the opioid epidemic, for example, Democratic Attorneys General worked arm-in-arm with Republican Attorneys General. In the case that Colorado led against McKinsey and Company, for example, a coalition of Attorneys General from 47 states, the District of Columbia and five U.S. territories joined together in that action (and settlement).<sup>16</sup> And when it comes to consumer protection, Democrats and Republicans work together regularly, as is evident by the bipartisan nature of the antitrust litigation against Facebook and Google.<sup>17</sup> Finally, when it came to the attack on the U.S. Capitol on January 6, 2021, State Attorneys General were aligned there, too, with 47 out of 51 State AGs joining a letter condemning those who attacked the Capitol and calling for accountability.<sup>18</sup>

The nature of State Attorney General collaboration reflects, at least in part, the rigor and discipline of our legal training. With a legal system that emphasizes what can be proved in court, as opposed to what sound bite gets traction on Twitter, there is more opportunity to engage in dialogue and collaborative problem solving. This tradition is one I treasure. It is also what I observed working with Justice Ginsburg, who was known for her respectful relationship with Justice Scalia. As she

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<sup>13</sup> Brief for the States of Maryland, Maine, New Hampshire, New Mexico, Pennsylvania, and Wisconsin as Amici Curiae in Support of Petitioners, *California v. Texas*, 141 S. Ct. 2104 (2021) (No. 19-840); Brief of Amici Curiae States of Ohio and Montana in Support of Neither Party, *California v. Texas*, 141 S. Ct. 2104 (2021) (Nos. 19-840 and 19-1019) (arguing that the judiciary lacked the power to strike down the entirety of the Affordable Care Act regardless of its decision on the constitutionality of the individual mandate).

<sup>14</sup> Motion for Leave to File Bill of Complaint, *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (No. 155); Brief of State of Missouri and 16 Other States as Amici Curiae in Support of Plaintiff’s Motion for Leave to File Bill of Complaint, *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (No. 155).

<sup>15</sup> *Wasden Issues Statement on Texas Election Case*, Idaho Off. of the Att’y General (Dec. 10, 2020), <https://www.ag.idaho.gov/newsroom/wasden-issues-statement-on-texas-election-case/>; see also Phil Weiser and Cynthia Coffman, *Weiser and Coffman: Texas’ attempt to undermine our Constitution was rebuked by those who uphold the rule of law*, Denver Post (Dec. 15, 2020), <https://www.denverpost.com/2020/12/15/phil-weiser-cynthia-coffman-texas-lawsuit-electoral-college-constitution-trump/>.

<sup>16</sup> *Attorney General Phil Weiser leads states to reach \$573 million national settlement with McKinsey & Company for its role in ‘turbocharging’ the opioid epidemic with Purdue Pharma*, Colo. Att’y General (Feb. 4, 2021), <https://coag.gov/press-releases/2-4-21/>.

<sup>17</sup> Lauren Feiner, *Google hit with its third antitrust lawsuit since October, this time by a bipartisan coalition of states*, CNBC (Dec. 17, 2020), <https://www.cnbc.com/2020/12/17/google-faces-a-third-government-antitrust-lawsuit.html>; see also Diane Bartz, *Facebook under fire as U.S. lawmakers press for new antitrust complaint*, Reuters (July 2, 2021), <https://www.reuters.com/technology/bipartisan-us-lawmakers-urge-ftc-press-with-facebook-lawsuit-2021-07-02/>.

<sup>18</sup> *Attorney General Phil Weiser leads coalition of 50 state and territorial attorneys general in condemning the violent U.S. Capitol riot, calls for president’s impeachment*, Colo. Att’y General (Jan. 13, 2021), <https://coag.gov/press-releases/1-13-21/>.

stated in *Scalia Speaks*: “If our friendship encourages others to appreciate that some very good people have ideas with which we disagree, and that, despite differences, people of goodwill can pull together for the well-being of the institutions we serve and our country, I will be overjoyed, as I am confident Justice Scalia would be.”<sup>19</sup>

At our best, we operate within institutions and norms that encourage listening, dialogue, and collaborative problem solving. As the Attorney General of Colorado, I have the privilege of working in a state where everyone generally works together across party lines to solve problems in an inclusive fashion. I recognize, however, that this is a very different world from our national politics (and indeed some states). At the national level, we are seeing the undermining of our legislative institutional processes—namely, the move away from enacting legislation that emerges from “regular order” where committees work together in a bipartisan basis. At their best, institutions, as Jonathan Rauch explained, “are enemies of tribalism, at least in the context of a liberal society. By definition, they bring people together for joint effort on common projects, which builds community.”<sup>20</sup> To be sure, many of our institutions—particularly our federal legislative institutions—are not currently operating in this fashion.

State Attorneys General are well positioned to celebrate and foster collaborative problem solving. To do just that, as the Chair of the Attorney General Alliance I developed the Ginsburg/Scalia Initiative. This goal of this initiative is to de-escalate the heated rhetoric that is eroding trust, undermining collaborative problem-solving, and even increasing levels of hateful speech and violence in modern society.<sup>21</sup> Our initiative brings together Attorneys General from across the country and facilitates dialogue across party lines around the common goal of improving civil discourse. In so doing, we also aim to build civic education materials that can demonstrate how civil discourse can and must be central to sound constitutional governance.<sup>22</sup>

The goal of our civic education effort is to shift our frame and avoid the temptation to view others with different viewpoints “as alien, immoral, a threat,”<sup>23</sup> overcome the temptation to discount others, and make space for listening. Listening both can provide the listener with new, and valuable, perspectives as well as enable the person talking to feel heard.

As I think about the power of listening to someone, I am reminded of a story Justice Thurgood Marshall told, as recounted by Stephen Carter, a Yale law professor and former law clerk to Justice Marshall:<sup>24</sup>

During Marshall’s time as a judge on the United States Court of Appeals for the Second Circuit, a woman repeatedly filed complaints that were always dismissed. Her complaints included that the government installed electrodes in her brain to

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<sup>19</sup> Ruth Bader Ginsburg, *Foreword to Antonin Scalia, Scalia Speaks* xi (Crown Forum, 2017).

<sup>20</sup> Jonathan Rauch, *Rethinking Polarization*, Nat’l Aff., <https://www.nationalaffairs.com/publications/detail/rethinking-polarization> (last visited July 29, 2021).

<sup>21</sup> <https://coag.gov/blog-post/the-ginsburg-scalia-initiative-8-13-21/>

<sup>22</sup> <https://coag.gov/press-releases/9-17-21/>

<sup>23</sup> <https://www.nytimes.com/2021/04/19/us/democracy-gop-democrats-sectarianism.html>

<sup>24</sup> Stephen L. Carter, *What Thurgood Marshall Taught Me*, N.Y. Times (July 14, 2021), <https://www.nytimes.com/2021/07/14/magazine/thurgood-marshall-stories.html>.

steal her ideas for television shows. As Marshall told the story, the chief judge of the circuit, J. Edward Lumbard, scheduled one of the woman's appeals for oral argument. During her argument, the woman spoke incoherently for her allotted 15 minutes. When given his turn, the young US attorney sent to appear uttered the feeble 10 words he was instructed to say: "May it please the court, we rest on our brief."

According to Marshall, Lumbard immediately rose to his feet (a very unusual decision) and loudly admonished the US attorney stating: "Are you trying to tell me, young man, that after this woman, in the exercise of her fundamental constitutional right to petition her government for the redress of grievances, has come into this courtroom to argue her case, her own government will not even do her the dignity of a response? Get up here and argue, sir!" The court ultimately dismissed the appeal without comment, but, critically, the woman never filed another lawsuit.

Marshall saw a clear moral in this story: The woman was listened to and felt heard. She felt respected. I strive to follow that approach. In a talk several years ago at Colorado State University, I had the opportunity to listen to someone who saw things differently than I did—rather than to try to convince them they were wrong—and it had a real impact. In particular, I was speaking with someone who stated his robust support for the Second Amendment and challenged my support for Colorado's red flag law, which provides a mechanism for removing a firearm from someone posing a significant safety risk to himself or herself or others. In response to his criticism of my position, I asked him a question: "what leads you to be more concerned about removing a gun from a lawful owner who poses no risk than to fail to remove a firearm from someone who would take his own life?" His answer, with a spirit of contemplation: "I need to think about it." And I heard from his professor that he kept thinking about it and engaged more seriously in thinking about public policy issues because he was taken seriously. I, too, leave such discussions changed, reflecting on the positions held by others and how I can learn from them. As a public official, I believe it is crucial that I take time to listen to and take seriously all Coloradans and take on board a variety of viewpoints.

All of us as lawyers and leaders can do our part in elevating the state of our politics. We can practice kindness, empathy, and active listening. In so doing, we can advance a vision for our politics suggested by Fred Rogers (as captured by Tom Junod, the journalist portrayed in the movie about him):

Fred was a man with a vision, and his vision was of the public square, a place full of strangers, transformed by love and kindness into something like a neighborhood. That vision depended on civility, on strangers feeling *welcome* in the public square, and so civility couldn't be debatable. It couldn't be subject to politics but rather had to be the very basis of politics, along with everything else worthwhile.<sup>25</sup>

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<sup>25</sup> <https://www.theatlantic.com/magazine/archive/2019/12/what-would-mister-rogers-do/600772/>

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Let me close with a request of you—to listen and lead with empathy,<sup>26</sup> to approach your life with a learning and growth mindset,<sup>27</sup> and to look for win-win solutions (rather than think of the world in zero sum terms).<sup>28</sup> My prediction is that, if you do so, you will find your work more interesting and meaningful. More broadly, this mindset can help us all do our part to form a more perfect union.

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<sup>26</sup> <https://coag.gov/blog-post/prepared-remarks-attorney-general-phil-weiser-discusses-leading-with-empathy-with-the-colorado-bar-association-dec-11-2020/>

<sup>27</sup> <https://fs.blog/2015/03/carol-dweck-mindset/>

<sup>28</sup> <https://www.williamury.com/books/getting-to-yes/>