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Thank you very much. Thank you very much. It's a real honor for me to be here tonight and to join with all of you. I appreciate you all being here. And it's particularly an honor for me to -- to join all the very distinguished lawyers in this room.

Gene [Meyer] thank you for that introduction but I'm the 85th Attorney General.¹ And Chinese has come in very handy because I find that...when you read congressional enactments from right to left they make a lot more sense than when you read them from left to right.

It's an honor to be here this evening and to deliver the 19th Annual Barbara K. Olson Memorial Lecture.



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I've had the privilege of being friends with Ted [Olson] since we first met in the Reagan Administration, and Ted was head of the Office of Legal Counsel. And I had the privilege of -- of knowing Barbara and had great affection for her, and I miss her brilliance and ebullience. And it's a real privilege for me to participate in this lecture as a way of honoring Barbara.

The...I was trying to figure out what would be an appropriate speech to give here at the Federalist Society, and I was having difficulty. And I thought the Notre Dame speech had done so well I was just going to deliver it again.

But recognizing that this year's annual convention is "Originalism," -- the theme of it -- which is a fitting choice, though -- though, I -- I dare I say, it's...somewhat *unoriginal* for the Federalist Society. I say that because we all know that the Federalist Society has played a historic role in advancing the principles of Originalism. And while other organizations have contributed over the years, certainly the Federalist Society has been in the vanguard.

A watershed for the cause was the decision of the American people to send Ronald Reagan to the White House, accompanied by his close advisor Ed Meese and a cadre of others who were firmly committed to an original -- originalist approach to the law. I was honored to work with Ed and Ken Cribb in...the White House -- in the Reagan White House. And I was also honored to be there several weeks ago in the Oval Office when President Trump presented Ed Meese with the Presidential Medal of Freedom. As President Trump aptly noted, over the course of his career, Ed Meese has been among the nation's "most eloquent champions for following the Constitution as written."²

And I'm also proud to serve as the Attorney General for President Trump, who has taken up that torch in his judicial appointments. That is true of his two outstanding appointments to the Supreme Court, Supreme Court Justices Neil Gorsuch and Brett Kavanaugh; and -- and of the many superb appeals and district court judges he has appointed, many of whom are here this week; and of the many outstanding judicial nominees to come, many of whom are also here this week.



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I wanted to choose a topic this after -- for this afternoon's lecture that had an Originalist angle. And it will likely come as little surprise to this group that I've chosen to speak about the Constitution's approach to Executive power.

I deeply admire the American Presidency as a political and constitutional institution. I believe it is one of the great and remarkable innovations in our Constitution, and has been one of the most successful features of the Constitution in protecting the liberties of the American people. More than any other branch, it has fulfilled the expectations of the Framers.

Unfortunately, over the past several decades, we have seen the steady encroachment on Executive authority by the other branches of government. This process, I think, has substantially weakened the function of the Presidency to the detriment of the nation. And this afternoon, I would like to expand a bit on these themes.

First, let me say a little about the -- what the Framers had in mind in establishing an independent Executive in Article II of the Constitution.

The grammar school civics class version of our Revolution is that it was a rebellion against monarchical tyranny, and that, in framing our Constitution, one of the preoccupations -- the main preoccupation of the Founders was to keep the Executive weak. This is misguided. By the time of the Glorious Revolution of 1688[8], monarchical power was effectively neutered and had begun its steady decline. Parliamentary power was well on its way to supremacy and was effectively in the driver's seat. By the time of the American Revolution, the patriots well understood that their prime antagonist was an overweening Parliament. Indeed, British thinkers came to conceive of Parliament as the seat of Sovereignty.

During the Revolutionary era, American thinkers who initially considered inaugurating a republican form of government tended to think of the Executive component as essentially an errand boy of a supreme Legislative Branch. Often the Executive (sometimes constituted as a multi-member council) was conceived as a creature of the Legislature, dependent on and subservient to that body, whose sole function was carrying out the Legislative will.



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Under the Articles of Confederation, for example, there was no Executive independent of the Legislative power.

Things changed by the Constitutional Convention of 1787. To my mind, the real "miracle" in Philadelphia that summer was the creation of a strong Executive, independent of, and coequal with, the other branches of government.

The consensus for a strong, independent Executive arose from the Framers' experience in the Revolution and under the Articles of Confederation. They had seen that the [Revolutionary] War was almost lost and was a bumbling enterprise because of the lack of strong Executive leadership. Under the Articles of Confederation, they had been mortified by the inability of the States to protect themselves against foreign impositions or to be taken seriously in the international arena. They had also seen that, after the Revolution, too many States had adopted constitutions with weak Executives overly subordinate to the Legislatures. And where this had been the case, State governments had proven incompetent and tyrannical.

From these practical experiences, the Framers had come to appreciate that, to be successful, a republican government required the capacity to act with energy, consistency, and decisiveness. They had come to agree that those attributes could best be provided by making the Executive power independent of the divided counsels of the Legislative Branch and vesting the Executive power in the hands of a solitary individual, regularly elected for a limited term by the nation as a whole. As Jefferson put it, '[F]or the prompt, clear, & consistent action so necessary in an executive, unity of person is [necessary]...."³

While there have been some differences among the Framers as to the precise scope of Executive power in particular areas, there was general agreement about its nature. Just as the great separation-of-powers theorists, such as Polybius, Montesquieu, Locke, had, -- just as they had, the Framers thought -- thought of Executive power as a distinct specie of governmental power. To be sure, Executive power includes the responsibility for carrying into effect, executing, the laws passed by the Legislature -- that is, applying the general rules to particular situations.



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But the Framers understood that Executive power meant more than this. It also entailed the power to handle essential sovereign functions -- such as the conduct of foreign relations and the prosecution of war -- which by their very nature cannot be directed by a pre-existing legal regime but rather demand speed, secrecy, unity of purpose, and prudent judgment to meet contingency. They agreed that -- due to the very nature of the activities involved, and the kinds of decision-making that are required -- the Constitution generally vested authority over these spheres in the Executive. For example, Jefferson, our -- our first Secretary of State, described the conduct of foreign relations as "Executive altogether," subject only to the explicit exceptions defined in the Constitution, such as the Senate's power to ratify Treaties.

A related, and -- and third aspect of Executive power is the power to address exigent circumstances that demand quick action to protect the well-being of the nation but on which the law is either silent or inadequate -- such as dealing with natural disasters or plagues. This residual power to meet contingency is essentially the federative power discussed by Locke in his Second Treatise.⁴

And, finally, there are the Executive powers necessary for internal management of the Executive [branch]. These are the powers necessary for the President to superintend and control the Executive functions, including the powers necessary to protect the independence of the Executive Branch and the confidentiality of its internal deliberations. Some of these powers are express in the Constitution, such as the power of Appointment; and others are implied -- implicit in the Constitution, for example, the the Removal power.

One of the more amusing aspects of modern progressive polemic is their breathless attacks on the "unitary executive theory."

They portray this as some new-fangled "theory" to justify Executive power of -- of sweeping and unfettered scope. I think some of you may have seen that horrible movie Vice about Vice President Dick Cheney, and there's this scene where the young Dick Cheney -- he was young, I think he may have been 36 and he was Chief of Staff at the White House -- he goes in to meet the young "Nino" Scalia over at the Office of Legal Counsel and they talk about this new,



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nefarious theory that will allow them to just take over the world -- and it's called the "unitary executive theory."⁵

And some of you may recall when I was up for confirmation all these democratic senators saying how concerned they were about my adherence to the unitary executive theory.

In reality, the -- the idea of the unitary executive does not go so much to the breadth of Presidential power. It -- Rather, the idea is that, whatever the Executive power may be, those powers must be exercised under the President's supervision. This is not "new," and it's not a "theory." It is a description of what the Framers did in Article II.

Now, after you decide to establish an Executive function that's independent of the Legislature, naturally the next question is, "Who's going to perform that function?" The Framers had two potential models. They could insinuate "checks and balances" into the Executive Branch by conferring power on multiple individuals -- such as a council -- and thus dividing the power within the Executive.

Alternatively, they could vest Executive power in a solitary individual. And the Framers quite explicitly and uniformly chose the latter model because they believed that vesting Executive authority in one person would imbue the Presidency with precisely the attributes necessary for energetic government. And even Jefferson, who's usually seen as less of a hawk than Hamilton on Executive power, was insistent that Executive power be placed in "single hands," and he cited the American's unitary Executive as the signal feature that distinguished America's success from France's failed republican experiment.

The implications of the Framers' decisions -- decision are obvious. If Congress attempts to vest the power to execute the law in someone beyond the control of the President, it contravenes the Framers' clear intent to vest that power in a single person, the President. So much for this supposedly nefarious new theory of the unitary executive.



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Now, we all understand that the Framers expected that the three branches would be jostling and -- and jousting with each other, as each threatened to encroach on the prerogatives of the others. They thought this was not only natural, but salutary, and they provisioned each branch with the wherewithal to fight and to defend itself in these inter-branch struggles for power.

So let me turn now to how the Executive is presently faring in these inter-branch battles. I'm concerned that the deck has become stacked against the Executive, and that since the mid-60s, there's been a steady grinding down of the Executive Branch's authority, that accelerated after Watergate. More and more, the President's ability to act in areas in which he has discretion has become smothered by the encroachments of the other branches.

When these disputes arise, I think there are two aspects of contemporary thought -- sort of conventional wisdom -- that tend to operate to the disadvantage of the Executive.

The first is this notion that politics in a free republic is all about the "People's branch" -- the Legislative Branch, and the Judicial branch protecting liberty by imposing restrictions on the Executive. The premise is that the greatest danger to -- the greatest danger of government becoming oppressive is from the -- is from the Executive and the prospect of Executive excess; so that there's this knee-jerk tendency to see the Legislative and Judicial branches as the good guys protecting the people from a rapacious would-be autocrat. That is the media's general presentation of separation of powers issues.

This prejudice is wrong-headed and atavistic. It comes out of the English Whig view of politics and English constitutional experience, where political evolution was precisely that. You started out with a King having all the cards; he holds all power, including Legislative and Judicial. And political evolution involved a process by which the Legislative power gradually, over hundreds of years, reigned in the King, and extracted and established its own powers, as well as the powers of the Judiciary. And certainly a watershed in this evolution was the Glorious Revolution of 168[8].



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But by 1787, we had the exact opposite model in the United States. The Founders greatly admired how the British constitution had given rise to principles of a balanced government. But they felt that the British constitution had achieved only an imperfect form of this model. They saw themselves as framing a more perfect version of separation of powers and a balanced constitution.

And part of their more perfect construction was a new kind of Executive. They created an office that already was the ideal Whig Executive. It already had built into it the limitations that Whig doctrine had aspired to for centuries. It did not have the power to tax and spend; it was subject to the writ of *habeas corpus*; it was bound by due process in enforcing the laws against members of the body politic; it was elected for a limited term of office; and it was elected by the nation as whole. That is a remarkable democratic institution -- the only figure selected by the nation as a whole. And with the creation of the American Presidency, the Whig's obsessive focus on the dangers of monarchical rule lost relevance.

This fundamental shift in view was reflected in the Convention debates over the new frame of government. Their concerns were very different than those that weighed on the Whigs of the 17th century. It was not that Executive power was of so much concern to them; it was the danger of the Legislative Branch at that time, which they viewed as the most dangerous branch to liberty. As Madison warned, "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."⁶ And indeed, they viewed the Presidency as a check on the Legislative Branch.

The second contemporary way of thinking that I think operates against the Executive is the notion that the Constitution does not sharply allocate powers among the three branches, but rather that the branches, especially the political branches, "share" powers. The idea at work here is that, because two branches both have a role to play in a particular area, we should see them as sharing power in that area and, it is not really such a big deal if one branch expands its role a bit within that sphere.



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Whenever I see a court opinion that uses the word "share" I want to run in the other direction. It reminds me of my -- There's a kid at my grand child's preschool who, as soon as my grandchild is playing with a toy, reaches over and says "share?"

This mushy thinking obscures what it means to say that powers are shared under the Constitution. The Constitution generally assigns broad powers to each of the branches in defined areas. Thus, the Legislative power is granted to the -- in the Constitution. Whatever the power -- the Legislative power -- is in the Constitution is granted to Congress.

At the same time, the Constitution gives the Executive a specific power in the Legislative arena: the veto power. Thus, the Executive "shares" Legislative power but only to the extent of that specific grant of the veto power. The Executive does not get to interfere in the Legislative power in a broader sense than that that was -- the Legislative power that was assigned to Congress.

Now, in recent years, both the Legislative and Judicial branches, I think, have been responsible for encroaching on the -- the President's constitutional authority, so let me first say something about the Legislature. As I've said, the Framers fully expected intense pulling and -- and hauling between the Congress and the Executive. Unfortunately, just in the past few years, we have seen this -- these conflicts take on an entirely new character.

Immediately after President Trump won election, opponents inaugurated what they called "The Resistance," and they rallied around an explicit strategy of using every tool and maneuver to sabotage the functioning of the Executive Branch and his Administration. Now, "resistance" is the language used to describe insurgency against rule imposed by an occupying military power. It obviously connotes -- It obviously connotes that the government is not legitimate. This is a very dangerous -- and indeed incendiary -- notion to import into the politics of a democratic republic. What it means is that, instead of viewing themselves as the "loyal opposition," as opposing parties have done in this country for over 200 years, they essentially see themselves as engaged in a war to cripple, by any means necessary, a duly elected government.



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A prime example of this is the Senate's unprecedented abuse of the advice-and-consent process. The Senate is of course free to exercise that power to reject what it deems to be unqualified nominees, but that power was never intended to allow the Senate to systematically oppose and draw out the approval process for every appointee so as to prevent the President from building a functional branch of government.

Yet that is precisely what the Senate minority has done from President Trump's very first day in office. As of September of this year, the Senate had been forced to invoke cloture on 236 Trump nominees -- each of those representing its own massive consumption of legislative time meant only to delay the inevitable confirmation. How many times was cloture invoked on nominees during President Obama's Administration? 17 over eight years. How about the Second President Bush's first term? Four times. It is reasonable to wonder whether a future President will actually be able to form a functioning Administration if his or her party does not hold the Senate.

Now, Congress in recent years has largely abdicated its core function of legislating on the most pressing issues facing the nation. They either decline to legislate on major questions or, if they do, they punt the most difficult and critical issues by making broad delegations to a modern administrative state that they increasingly seek to insulate from Presidential control. This phenomenon first arose, as we all know, in the wake of the -- the Great Depression, as Congress created a number of so-called "independent agencies" and housed them, at least nominally, in the Executive Branch. More recently, the Dodd-Frank Act's creation of the CFPB [Consumer Financial Protection Bureau], a single-headed independent agency that functions like a -- a junior varsity President for economic regulation, is just one of many examples.

Of course, Congress's effective withdrawal from the business of legislating leaves it with a lot of time on its hands. And in the pursuit of this choice of how to pursue -- what to do with all this time, they have decided -- especially the opposition party -- to drown the Executive Branch with oversight demands for testimony and documents.



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Now, I don't deny that Congress has some implied authority to conduct oversight as an...incident to its Legislative power. But the sheer volume of what we see today -- the pursuit of scores of parallel "investigations" through an avalanche of subpoenas -- is plainly designed to incapacitate the Executive Branch, and indeed is touted as such.

The costs of this constant harassment are real. For example, we all understand that confidential communications and private -- and the private, internal deliberative process are essential to all of our branches of government to properly function. Congress and the Judiciary know this well, as both have taken great pains to shield their own internal communications from public inspection. There is no FOI -- What is it? -- FOIA [Freedom of Information Act] for Congress and the Courts. Yet Congress has happily created a regime that allows the public to seek whatever documents it wants from the Executive Branch at the same time that individual congressional committees spend their days trying to publicize the -- the Executive's internal deliberations. That process cannot function properly if it is public; nor is it productive to have our government devoting enormous resources to squabbling about what becomes public and when, rather than doing the work of the people.

In recent years, we have seen substantial encroachment by Congress in the area of Executive privilege. The Executive Branch and the Supreme Court have long recognized that the need for -- the need for confidentiality in the Executive Branch necessarily means that some communications must -- must remain private. There was a time when Congress respected this important principle as well. But today, Congress is increasingly quick to dismiss good-faith attempts to protect Executive Branch equities, labeling such efforts "obstruction of Congress" and holding Cabinet Secretaries in contempt, even the Attorney General, in contempt.

One of the ironies of today is that those who oppose this President constantly accuse this Administration of "shredding" constitutional norms and waging a war on the rule of law. Of course, there is no substance to these claims. When I ask my friends on the other side, what exactly are you referring to? I usually get vacuous stares and sputtering about the Travel Ban or some such thing.



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The fact is that, yes, while the President has certainly thrown out the traditional Beltway playbook and punctilio...he was upfront about what he was going to do and the people decided they wanted him to serve as President.

But what I'm talking about today are fundamental constitutional precepts. And the fact is that this Administration's policy actions and its policy initiatives, including the Travel Ban, have transgressed neither constitutional, nor traditional, norms, and have been amply supported by the law and patiently litigated through the courts to vindication. Indeed, measures undertaken by this Administration seem a bit tame when compared to some of the unprecedented steps taken by the Obama Administration's aggressive exercise of Executive power.⁷ And I say that as someone who admires a muscular Executive.

The fact of the matter is that, in waging a scorched earth, no-holds-barred war of "Resistance" against this Administration, it is the Left that is engaged in the systematic shredding of norms and undermining the rule of law. This highlights a basic disadvantage that conservatives have had in contesting the political issues of the day. It goes back to the beginning of the Republic. It was adverted to by that old, curmudgeonly Federalist, Fisher Ames, in several of his essays during the early Republic. And...I paraphrase:

In any age, the so-called progressives treat politics as a religion. Their holy mission is to use the coercive power of the State to remake man and society in their own image, according to an abstract ideal of perfection. Whatever means they use are therefore justified because, by definition, they are a virtuous people pursuing a deific end. They are willing to use any means necessary to gain momentary advantage in achieving their end, regardless of the collateral consequences and the systemic implications. They never ask whether the action they take could be justified as a general rule of conduct, equally applicable to all sides. What would we think if the shoe were on the other foot? Again, we hear them irresponsibly tabling proposals to do away with the electoral college or to "pack" the courts. Who's shredding constitutional norms?



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Conservatives, on the other hand, do not seek an earthly paradise. We are interested in preserving over the long run the proper balance of freedom and order necessary for the healthy development of natural civil society and individual human flourishing. And this means that we naturally test the propriety and wisdom of action under a "rule of law" standard. The essence of that standard is to ask what the overall impact on society over the long -- What will be the...impact on society over the long run if the action we are taking, or the principle we are applying, in a given circumstance was universalized? That is, would it be good for society as a whole over the long run if this was done in all like circumstances? That's what rule of law is about and that is inherent in the conservative project.

******For these reasons, conservatives tend to have more scruples over their political tactics and rarely feel that the ends justify the means. And this is as it should be, but there is no getting around the fact that this puts conservatives at a disadvantage when facing progressive holy [w]ar, especially when doing so under the weight of a hyper-partisan media.] ****s**

Let me turn now to what I believe has been the prime source of the erosion of separation-of-powers principles generally, and the Executive Branch's authority specifically. And I am speaking of the Judicial Branch.

In recent years the Judiciary has been steadily encroaching on Executive responsibilities in a way that has substantially undercut the functioning of the Presidency. And the Courts have done this in essentially two ways: First, the Judiciary has appointed itself the ultimate arbiter of separation of powers disputes between Congress and the Executive, thus preempting the political process, which the Framers conceived of as the primary check on inter-branch rivalry. And second, the Judiciary has usurped Presidential authority for itself, either [a] by, under the rubric of "review," substituting its judgment for the Executive[']s in areas committed to the President's discretion, or [b] by assuming direct control over realms of decision-making that heretofore have been considered at the core of Presidential power.



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The Framers did not envision that the Courts would play the role of arbiter of turf disputes between the political branches. As Madison explained in Federalist 51, “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. Ambition [must] be made to counteract ambition”⁹ And by giving each the Congress and the Presidency the tools to fend off the encroachments of the others, the Framers believed this would force compromise and political accommodation.

The “constitutional means” to “resist encroachment” that Madison described take many forms. As Justice Scalia observed, the Constitution gives Congress and the President many “clubs with which to beat” each other.¹⁰ Conspicuously absent from the list is running to the courts to have them resolve the disputes.

And that omission makes sense. When the Judiciary purports to pronounce a conclusive resolution to constitutional disputes between the political branches, it does not act as a co-equal. And, if the political branches believe the courts will resolve their constitutional disputes, they have no incentive to debate their differences through the democratic process -- with input [from] and accountability to the people. And they will not even try to make the hard choices necessary to forge a compromise. The long experience of our country is that the political branches can work out their constitutional differences without resort to the courts.

In any event, the prospect that the courts can meaningfully resolve inter-branch disputes about the meaning of the Constitution is mostly a false promise. How is a court supposed to decide, for example, whether Congress’s power to collect information in pursuit of its legislative function overrides the President’s power to receive confidential advice in the pursuit of his executive function? Nothing in the Constitution provides a manageable standard for resolving such a question.



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And it is thus no surprise that the courts have produced amorphous, unpredictable balancing tests like the Court's holding in *Morrison v. Olson* -- that Congress did not "disrupt the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions."

Apart from...their overzealous role in inter-branch disputes, the courts have increasingly engaged directly in the usurpation of Presidential decision-making. One way courts have effectively done this is by expanding both the scope and the intensity of judicial review.

In recent years, we -- we have lost sight of the fact that many critical decisions in our life are not amenable to the model of judicial decision-making. They cannot be reduced to tidy evidentiary standards and specific quantum of proof in an adversarial process. They require what we used to call *prudential judgment*. And they are decisions that are frequently have [sic] to be made promptly, on incomplete and uncertain information, and necessarily involve weighing a wide range of competing risks and making predictions about the future. Such decisions frequently call into play the so-called "precautionary principle." And this is the principle that when a decision maker is accountable for discharging a certain obligation -- such as protecting the public's security -- it is better, when assessing imperfect information, to be wrong and safe, than wrong and sorry.

It was once well recognized that such matters were largely unreviewable and that the courts should not be substituting their judgments for the prudential judgments reached by the accountable Executive officials. This outlook now seems to have gone by the boards. Courts are now willing, under the banner of judicial review, to substitute their judgment for the President[s] on matters that only a few decades ago would have been unimaginable -- such as matters directly involving national security and foreign affairs.

The Travel Ban case is -- is a good example. There, the President, as you all know, made a decision under an explicit legislative grant of authority -- in black and white that he had the authority -- as well as his long-recognized Constitutional national security role, to temporarily suspend entry to aliens coming from a half dozen countries pending adoption of more effective



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vetting procedures. The common denominator of the initial countries selected was that they were unquestionable hubs of terrorist activity, which lacked functional central governments and responsible law enforcement and intelligence agencies that could assist us in identifying the security risks among their nationals seeking to enter the United States.

But despite the fact there were clearly justifiable security grounds for the measure, the district court in Hawaii and the -- and the Ninth Circuit blocked this public-safety measure for a year and half. The theory was that the President's motive for the order was religious bias against Muslims. This was just the first of many immigration measures based on good and sufficient security grounds that the courts have second guessed since the beginning of the Trump Administration.

The Travel Ban case highlights an especially troubling aspect of -- of the recent tendency to expand judicial review. The Supreme Court has traditionally refused, across a wide variety of contexts, to inquire into the subjective motivation behind government action. To take the classic example, if a police officer has probable cause to initiate a traffic stop, his subjective motivations are irrelevant. And just last term, the Supreme Court appropriately shut the door to claims that otherwise-lawful redistricting can violate the Constitution if the legislators who drew the lines were actually motivated by political partisanship.

What is true of police officers and gerrymanderers is equally true of the President and senior Executive officials. With -- With very few exceptions, neither the Constitution nor the Administrative Procedure Act, or any other relevant statute, calls for judicial review of Executive motives. They apply only to Executive action. Attempts by courts to act like amateur psychiatrists attempting to discern an Executive official's "real motive" -- often after ordering invasive discovery into the Executive Branch's privileged decision-making process -- have no more foundation in law than a subpoena to a court to try to determine a judge's real motive in issuing a decision. The courts' indulgence of such claims, even if they are ultimately rejected, represents a serious intrusion on the President's constitutional prerogatives.



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The impact of these judicial intrusions on the Executive responsibility have been hugely magnified by another judicial innovation: the nationwide injunction. First used in 1963,¹¹ and sparsely since then until recently, these court orders enjoin enforcement of a policy not just [against] the parties before the Court, but nationwide -- against everybody. Now, since President Trump has taken office, district courts have issued over 40 nationwide injunctions against the government. By -- By comparison, during President Obama's first two years, district courts had issued two nationwide injunctions, both of which [were] immediately vacated by the Ninth Circuit.

It is no exaggeration to say that virtually every major policy of the Trump Administration has been subjected to immediate freezing by the lower courts. No other President has been subjected to such sustained efforts to -- to debilitate his agenda.

The legal flaws underlying nationwide injunctions are myriad. And just to summarize briefly, they have no foundation in the Article III jurisdiction or traditional equitable powers of the courts; they radically inflate the role of district court judges, allowing any one of well over 600 individuals to single-handedly freeze a policy nationwide, a power that no single appellate judge or Justice can accomplish; they foreclose percolation and reasoned debate among lower courts, often -- often requiring the Supreme Court to decide complex and consequential legal issues in an emergency posture with limited briefing; and they enable transparent forum shopping, which saps public confidence in the integrity of the judiciary; and they displace the settled mechanisms of aggregate litigation of genuinely nationwide claims, such as Rule 23 class actions.

Now, of particular relevance to my topic tonight, nationwide injunctions also disrupt the political process. There is no better example than the courts' handling of the rescission of DACA [Deferred Action for Childhood Arrivals]. As you recall, DACA was a discretionary policy of enforcement forbearance adopted by the Obama Administration. And the Fifth Circuit concluded that the closely related DAPA [Deferred Action for Parents of Americans] policy, along with an expansion of the DACA policy, was unlawful.



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And the Supreme Court affirmed that decision by an equally divided vote. Given that DACA was discretionary, premised on exercise of Executive discretion, and that four Justices apparently thought a legally indistinguishable policy was unlawful, President Trump's Administration understandably decided to rescind DACA.

Importantly, however, the President coupled that rescission with negotiations over legislation that would create a lawful and better alternative as part of a broader immigration compromise. And in the middle of those negotiations -- indeed, on the very same day the President invited the cameras into the Cabinet Room to broadcast his negotiations with the bipartisan leadership of Congress -- a district judge in the Northern District of California enjoined the rescission of DACA nationwide. Unsurprisingly, the negotiations over immigration legislation collapsed after one side achieved its preferred outcome through this judicial means. And just this week, the Supreme Court finally heard arguments on the legality of the DACA rescission. The Court will not likely decide the case until next summer, meaning that the -- President Trump will have spent almost his entire first term enforcing President Obama's signature immigration policy, even though that policy was entirely discretionary and half the Supreme Court had concluded that it was legally indistinguishable -- a legally indistinguishable policy was unlawful. That's not the democratic system should work.

Now, to my mind the most blatant and consequential usurpation of Executive power in our history was played out during the Administration of George W. Bush, when the Supreme Court, in a series of cases, set itself up as the ultimate arbiter and superintendent of military decisions inherent in prosecuting a military conflict -- decisions that lie at the very core of the President's discretion as Commander in Chief.

This usurpation climaxed with the Court's 2008 decision in *Boumediene v. Bush*. There, the Supreme Court overturned hundreds of years of American, and earlier British, law and practice, which had always considered decisions as to whether to detain foreign combatants to be purely military judgments which civilian judges had no power to review.



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For the first time, the Court ruled that foreign persons who have no connection with the United States other than being confronted by our military forces on the battlefield had “due process” rights and thus have the right to *habeas corpus* to obtain judicial review of whether the military has sufficient evidentiary basis for holding them as prisoners.

In essence, the Court has taken the rules that govern our domestic criminal justice process and carried them over and superimposed them on the nation’s activities when it is engaged in armed conflict with foreign enemies. This rides roughshod -- roughshod over a fundamental distinction that is integral to the Constitutio[n] and integral to the role played by the President in our system.

As the Preamble suggests, governments are established for two different security reasons: [1] to secure "domestic tranquility" and [2] to provide for defense against external dangers. And they're two very different realms of government action.

In a nutshell, under the Constitution, when the government is using its law enforcement powers domestically to discipline an errant member of the community for a violation of law, then protecting the liberty of the American people requires that we sharply curtail the government’s power so that it does not itself threaten the liberties of the American people. And thus, the Constitution in this arena deliberately sacrifices efficiency; it invests the accused with rights that are essentially -- that essentially create a level playing field between the collective interests of community and those of the individual; and it dilutes the government’s power by dividing it and turning it on itself as a check, and at each stage of the criminal justice process the Judiciary is expressly empowered to serve as a check and neutral arbiter.

None of these considerations are applicable when the government is defending the country against armed attacks from foreign adversaries. In this realm, the Constitution is concerned with one thing -- preserving the freedom of the political community by destroying the external threat. And here, the Constitution is not concerned with handicapping the government to preserve other values. The Constitution does not confer “rights” on foreign enemies. Rather, the Constitution is designed to maximize the government’s efficiency to achieve victory --



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even at the cost of “collateral damage” that would be unacceptable in the domestic law enforcement realm. The idea that the judiciary acts as a neutral check on the political branches to protect foreign enemies from our government is insane.

The impact of *Boumediene* has been extremely consequential. I see its consequences everyday. For the first time in American history our Armed Forces are incapable of taking prisoners. We are now in a crazy position that, if we identify a terrorist enemy on the battlefield, such as an ISIS leader, we can kill them with a drone strike or any weapon -- summarily. But if we capture them, the military is tied down in developing evidence for an adversarial process and must spend massive resources in interminable litigation as to whether there was a sufficient basis to capture this prisoner.

The fact that our courts are now willing to invade and muck about in this core area of Presidential responsibility illustrates how far the doctrine of Separation of Powers has been eroded.

Now, in this partisan age, we should take special care not to allow the passions of the moment to cause us to permanently disfigure the genius of our Constitutional structure. As we look back over the sweep of American history, in -- in my view it has been the American Presidency that has best fulfilled the vision of the Founders. It has brought to our Republic a dynamism and effectiveness that other democracies plainly lack.

And at every critical juncture where the country has faced a great challenge:

-- whether it be our earliest years as a weak, nascent country combating internal rebellions, and maneuvering for survival in a world of far stronger nations;

-- or whether it has been during our period of continental expansion, with the Louisiana Purchase, and the acquisition of Mexican territory that took us all the way across the continent;



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- or whether it be the Civil War, the epic test of this nation;
- World War II, the struggle against Fascism;
- or the Cold War and the challenge of Communism;
- and the struggle against racial discrimination;
- and most recently, the fight against Islamist Fascism and international terror[ism].

One would have to say that it has been the American Presidency that has stepped to the fore and provided the leadership, consistency, energy, and perseverance that allowed us to surmount these challenges and brought us through to success.

In so many areas, it is critical to our nation's future that we restore and preserve in full vigor our Founding principles. And not the least of these is the Framers' vision of a strong, independent Executive, chosen by the country as a whole.

¹ During his introduction, Mr. Meyer had mistakenly introduced AG Barr as the "82nd" U.S. Attorney General. Eric Holder was the 82nd U.S. Attorneys General.

² **Broader Quotation:** "Perhaps Ed's greatest contribution to American law has been his unwavering advocacy for the legal principle that judges must adhere to the original meaning of the Constitution, setting aside their own personal and political views. Through the decades, Ed has been one of the most eloquent champions for following the Constitution as written." [Source: https://www.youtube.com/watch?time_continue=188&v=jd4mXxccW0s&feature=emb_logo (as transcribed by American Rhetoric).]

³ Letter to George Wythe, 16 January 1796. In Paul L. Ford, *The Works of Thomas Jefferson: Correspondence 1793-1798*. Broader quotation: "I fear the oligarchical executive of the French will not do. We have always seen a small council get into cabals & quarrels, the more bitter & relentless the fewer they are. We saw this in our committee of the states; & that they were from their bad passions, incapable of doing the business of their country. **I think that for the prompt, clear & consistent so necessary in an executive, unity of person is necessary as with us.** I am aware of the objection to this, the the office becoming more important may bring on serious discord in elections. In our country I think it will be long first; not within our day, & we may safely trust to the wisdom of our successors the remedies of the evil to arise in theirs." [emphasis added]

⁴ "There is another power in every commonwealth, which one may call natural, because it is that which answers to the power every man naturally had before he entered into society: for though in a commonwealth the members of it are distinct persons still in reference to one another, and as such as governed by the laws of the society; yet in reference to the rest of mankind, they make one body, which is, as every member of it before was, still in the state of nature with the rest of mankind. Hence it is, that the controversies that happen between any man of the society with those that are out of it, are managed by the public; and an injury done to a member of their body, engages the whole in the reparation of it. So that under this consideration, the whole community is one body in the state of nature, in respect of all other states or persons out of its community. This therefore contains the power of war and peace, leagues and alliances, and all the transactions, with all persons and



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communities without the commonwealth, and may be called **federative**, if any one pleases. So the thing be understood, I am indifferent as to the name. These two powers, executive and federative, though they be really distinct in themselves, yet one comprehending the execution of the municipal laws of the society within its self, upon all that are parts of it; the other the management of the security and interest of the public without, with all those that it may receive benefit or damage from, yet they are always almost united." [emphasis added; Source: <https://www.gutenberg.org/files/7370/7370-h/7370-h.htm>]

⁵ **Scalia:** Have you heard of the theory of the unitary executive?

Cheney: No. Tell me about it.

Scalia: It's an interpretation a few, like myself happen to believe, of Article II of the Constitution that vests the President with absolute executive authority. And I mean absolute.

Cheney and Scalia both smile. This is what Cheney has been looking for." [Source: Vice movie script at: <https://www.scriptslug.com/script/vice-2018>]

⁶ The Federalist Papers: 48

⁷ The as prepared for delivery transcript included the following examples: "such as, under its DACA program, refusing to enforce broad swathes of immigration law."

⁸ Text within blue asterisks [* *] undelivered but contained in the as prepared for delivery transcript

⁹ **Broader quotation:** "It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal. But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." [emphasis added; Source: https://avalon.law.yale.edu/18th_century/fed51.asp]

¹⁰ In a relevant exchange, Justice Scalia draws out a more nuanced view in that the Legislative Branch's chances of winning its inter-branch battles with the Executive Branch are actually better -- perhaps because Congress has a more extensive array of beating clubs-- leading Scalia to wonder openly about the prospect of Judicial intervention to rectify the imbalance. To wit: "Mr. Lewin, you're -- it seems to me you're not arguing for a co-equal congressional power; you're arguing for a superior congressional power. You're saying whatever Congress says the President has to comply with. Now, that's quite different from saying they both gave authority in the field. And if they both have authority in the field and they're exercising it in different fashions, I frankly would not be inclined to intervene. I would let -- I would let them conduct the usual inter-branch hand wrestling that goes on all the time, which probably means that if Congress cares enough, Congress will win because, as you say, it has an innumerable number of clubs with which to beat the executive." [Source: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=2ahUKEwiF7cjUt_LIAhURQ6wKHbhJDiYQFjAFegQIAxAB&url=https%3A%2F%2Fwww.supremecourt.gov%2Fforal_arguments%2Fargument_transcripts%2F2011%2F10-699.pdf&usq=AOvVaw1hmcO616pMvCIKGG8mHHDY]

¹¹ Presumably a reference to Barber-Colman Company v. Wirtz, [Source: <https://www.leagle.com/decision/1963361224fsupp1371332>] though the use of such injunctions in the U.S. has been traced at least as far back as Lukens Steel Co. v. Perkins. [<https://supreme.justia.com/cases/federal/us/310/113/>]