

## THE ROLE OF THE EXECUTIVE

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Good Evening. Thank you all for being here. And thank you to Gene Meyer for your kind introduction.

It is an honor to be here this evening delivering the Nineteenth Annual Barbara K. Olson Memorial Lecture. I had the privilege of knowing Barbara and had deep affection for her. I miss her brilliance and ebullient spirit. It is a privilege for me to participate in this series, which honors her.

The theme for this year's Annual Convention is "Originalism," which is a fitting choice—though, dare I say, a somewhat "unoriginal" one for the Federalist Society. I say that because the Federalist Society has played an historic role in taking originalism "mainstream."<sup>1</sup> While other organizations have contributed to the cause, 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 originalist approach to the law.<sup>2</sup> I was honored to work with Ed in the Reagan White House and be there several weeks ago when President Trump presented him with the Presidential Medal of Freedom. As the President aptly noted, over the course of his career, Ed Meese has been

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\* Attorney General of the United States. This Essay is a lightly edited version of Attorney General Barr's remarks at the Nineteenth Annual Barbara K. Olson Memorial Lecture on November 15, 2019, at the Federalist Society's 2019 National Lawyers Convention.

1. See John O. McGinnis, *An Opinionated History of the Federalist Society*, 7 GEO. J.L. & PUB. POL'Y 403, 406–07, 411 (2009); Michael Kruse, *The Weekend at Yale That Changed American Politics*, POLITICO MAG. (Sept./Oct. 2018), <https://www.politico.com/magazine/story/2018/08/27/federalist-society-yale-history-conservative-law-court-219608> [<https://perma.cc/J7TW-HRLE>].

2. Kruse, *supra* note 1.

among the nation's "most eloquent champions for following the Constitution as written."<sup>3</sup>

I am also proud to serve as the Attorney General under President Trump, who has taken up that torch in his judicial appointments. That is true of his two outstanding appointments to the Supreme Court, Justices Neil Gorsuch and Brett Kavanaugh; of the many superb court of 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 for this afternoon's lecture that had an originalist angle. It will likely come as little surprise to this group that I have 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 it 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 steady encroachment on presidential authority by the other branches of government.<sup>4</sup> This process, I think, has substantially weakened the functioning of the executive branch, to the detriment of the nation. This evening, I would like to expand a bit on these themes.

## I. THE FRAMERS' VIEW OF THE EXECUTIVE

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

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3. Donald J. Trump, President, United States, Remarks by President Trump at Presentation of the Medal of Freedom To Edwin Meese (Oct. 8, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-presentation-medal-freedom-edwin-meese/> [<https://perma.cc/CHW8-QXBH>].

4. *See, e.g.*, Common Legislative Encroachments On Executive Branch Authority, 13 Op. O.L.C. 248 (1989).

The grammar school civics class version of our Revolution is that it was a rebellion against monarchial tyranny and that, in framing our Constitution, one of the main preoccupations of the Founders was to keep the executive branch weak.<sup>5</sup> This is misguided. By the time of the Glorious Revolution of 1689, monarchical power was effectively neutered and had begun its steady decline.<sup>6</sup> 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.<sup>7</sup> Indeed, British thinkers came to conceive of Parliament, rather than the people, as the seat of sovereignty.<sup>8</sup>

During the Revolutionary era, American thinkers who 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 multimember 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.<sup>9</sup> Under the Articles of Confederation, for example, there was no executive separate from Congress.<sup>10</sup>

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 two branches of government.

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5. Cf. Erin Peterson, *Presidential Power Surges*, HARV. L. TODAY (July 17, 2019), <https://today.law.harvard.edu/feature/presidential-power-surges/> [https://perma.cc/33DU-QFMJ] ("The starting point was that we'd gone through a revolution against monarchial power," [Professor Mark Tushnet] says. "Nobody wanted the chief executive to have the kinds of power the British monarch had.").

6. See Louis Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023, 1027 (1989).

7. *Id.* ("The experience of the American colonies under British rule persuaded them that they needed protection for rights against the legislature as well as against the executive.").

8. See, e.g., JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 72 (J.H. Burns, H.L.A. Hart & Ross Harrison eds., Cambridge Univ. Press 1981) (1776).

9. Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 IOWA L. REV. 891, 895 (1990) (describing how Congress set up committees and civil offices to serve in an executive capacity under Congress's direction).

10. *Id.* at 892-93 ("Fundamentally, the Articles of Confederation created a government with a *single* branch of government—a Congress with members appointed by and representing the state legislatures.").

The consensus for a strong, independent executive arose from the Framers' experience in the Revolution and under the Articles of Confederation.<sup>11</sup> They had seen that the war had almost been lost and was a bumbling enterprise because of the lack of strong executive leadership.<sup>12</sup> Under the Articles of Confederation, they had been mortified at the inability of the United States to protect itself against foreign impositions or to be taken seriously on the international stage.<sup>13</sup> They had also seen that, after the Revolution, too many States had adopted constitutions with weak executives overly subordinate to the legislatures.<sup>14</sup> Where this had been the case, state governments had proven incompetent and indeed tyrannical.<sup>15</sup>

From these practical experiences, the Framers had come to appreciate that, to be successful, republican government required the capacity to act with energy, consistency, and decisiveness.<sup>16</sup> 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.<sup>17</sup> As Jefferson put it, "[F]or the prompt, clear, and consistent action so necessary in an Executive, unity of person is necessary . . . ."<sup>18</sup>

While there may 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—Polybius, Montesquieu, Locke—had, the Framers thought of executive power as a dis-

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11. Charles J. Cooper & Leonard A. Leo, *Executive Power Over Foreign and Military Policy: Some Remarks on the Founders' Perspective*, 16 OKLA. CITY UNIV. L. REV. 265, 268–69 (1991).

12. *Id.*

13. Cooper & Leo, *supra* note 11, at 269–70; Bruce Stein, *The Framers' Intent and the Early Years of the Republic*, 11 HOFSTRA L. REV. 413, 418–19 (1982).

14. THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 2003); Cooper & Leo, *supra* note 11, at 267–68.

15. THE FEDERALIST NO. 70, *supra* note 14, at 423 (Alexander Hamilton).

16. *See, e.g., id.* at 421–22.

17. *See, e.g., id.*

18. *See* Letter from Thomas Jefferson to John Adams (Feb. 28, 1796), in 28 THE PAPERS OF THOMAS JEFFERSON 618, 618–19 (John Catanzariti et al. eds., 2000).

tinct species of power.<sup>19</sup> To be sure, executive power includes the responsibility for carrying into effect the laws passed by the legislature—that is, applying the general rules to a particular situation.<sup>20</sup> 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 preexisting legal regime but rather demand speed, secrecy, unity of purpose, and prudent judgment to meet contingent circumstances.<sup>21</sup> They agreed that—due to the very nature of the activities involved, and the kind of decisionmaking they require—the Constitution generally vested authority over these spheres in the Executive.<sup>22</sup> For example, Jefferson, 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.<sup>23</sup>

A related 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 a plague or natural disaster. This residual power to meet contingency is essentially the federative power discussed by Locke in his *Second Treatise*.<sup>24</sup>

And, finally, there are the Executive’s powers of internal management. These are the powers necessary for the President to superintend and control the executive function, 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

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19. See ERIC NELSON, *THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING* 15, 17, 184–228 (2014).

20. See *id.* at 195.

21. See *id.* at 221–24.

22. See *id.*

23. 5 THOMAS JEFFERSON, *Opinion on the Powers of the Senate*, in *THE WRITINGS OF THOMAS JEFFERSON* 161, 161 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1895).

24. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 77, § 147 (Richard H. Cox ed., Harlan Davidson, Inc. 1982) (1690).

the appointment power,<sup>25</sup> and others are implicit, such as the removal power.<sup>26</sup>

One of the more amusing aspects of modern progressive polemic is their breathless attacks on the “unitary executive theory.”<sup>27</sup> They portray this as some new-fangled “theory” to justify executive power of sweeping scope. In reality, the idea of the unitary executive does not go so much to the breadth of presidential power. Rather, the idea is that, whatever the executive powers may be, they must be exercised under the President’s supervision.<sup>28</sup> This is not “new,” and it is not a “theory.” It is a description of what the Framers unquestionably did in Article II of the Constitution.<sup>29</sup>

After you decide to establish an executive function independent of the legislature, naturally the next question is who will perform that function? The Framers had two potential models. They could insinuate “checks and balances” into the executive branch itself by conferring executive power on multiple individuals (a council) thus dividing the power.<sup>30</sup> Alternatively, they could vest executive power in a solitary individual.<sup>31</sup> The Framers quite explicitly 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.<sup>32</sup> Even Jefferson—usually

25. U.S. CONST. art. II, § 2, cl. 2–3.

26. *Myers v. United States*, 272 U.S. 52, 119, 125 (1926).

27. See, e.g., Chris Edelson, *Exploring the Limits of Presidential Power*, ACS: EXPERT F. (Dec. 2, 2013), <https://www.acslaw.org/expertforum/exploring-the-limits-of-presidential-power> [<https://perma.cc/6TTD-46RR>] (stating that critics describe the unitary executive theory as placing the President above the law).

28. See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 3–4 (2008).

29. See *id.* (“[T]he theory of the unitary executive holds that the Vesting Clause of Article II, which provides that ‘the executive Power shall be vested in a President of the United States of America,’ is a grant to the president of all the executive power, which includes the powers to remove and direct all lower-level executive officials.”).

30. See RICHARD J. ELLIS, *FOUNDING THE AMERICAN PRESIDENCY* 31–43 (1999) (discussing the early debate over having one President or multiple).

31. See THE FEDERALIST NO. 70, *supra* note 14 (Alexander Hamilton) (commenting on how a unitary executive is more favorable than a plurality in the executive).

32. *Id.* at 421 (“Energy in the executive is a leading character in the definition of good government. . . . [Politicians and statesmen] have, with great propriety, con-

seen as less of a hawk than Hamilton on executive power<sup>33</sup>—was insistent that executive power be placed in single hands, and he cited America’s unitary executive as a signal feature that distinguished America’s success from France’s failed republican experiment.<sup>34</sup>

The implications of the Framers’ 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.<sup>35</sup> So much for this supposedly nefarious theory of the unitary executive.

## II. ENCROACHMENTS ON THE EXECUTIVE BRANCH TODAY

We all understand that the Framers expected that the three branches would be jostling and jousting with each other, as each threatened to encroach on the prerogatives of the others.<sup>36</sup> 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 interbranch struggles for power.<sup>37</sup>

So let me turn now to how the Executive is presently faring in these interbranch battles. I am concerned that the deck has become stacked against the Executive. Since the mid-60s, there

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sidered energy as the most necessary quality of [a single executive], and have regarded this as most applicable to power in a single hand . . .”).

33. See John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421, 422–23 (2008).

34. See Letter from Thomas Jefferson to Destutt de Tracy (Jan. 26, 1811), in 3 THE PAPERS OF THOMAS JEFFERSON, RETIREMENT SERIES 334, 335–36 (J. Jefferson Looney et al. eds., 2006).

35. CALABRESI & YOO, *supra* note 28, at 34–35; see also 1 ANNALS OF CONG. 463 (1789) (Joseph Gales ed., 1834) (“If the Constitution has invested all Executive power in the President, I venture to assert that the Legislature has no right to diminish or modify his Executive authority.”).

36. See *Constitutional Amendment to Restore Legislative Veto: Hearing on S.J. Res. 135 Before the S. Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 98th Cong. 63 (1984) (statement of Peter L. Strauss, Professor, Columbia Law School) (“The framers expected the branches to battle each other to acquire and defend power.”).

37. See THE FEDERALIST NO. 51, *supra* note 14, at 318–19 (James Madison) (“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.”).

has been a steady grinding down of the executive branch's authority that accelerated after Watergate.<sup>38</sup> 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.<sup>39</sup>

When these disputes arise, I think there are two aspects of contemporary thought that tend to operate to the disadvantage of the Executive. The first is the notion that politics in a free republic is all about the legislative and judicial branches protecting liberty by imposing restrictions on the Executive.<sup>40</sup> The premise is that the greatest danger of government becoming oppressive arises from the prospect of executive excess. So, there is a knee-jerk tendency to see the legislative and judicial branches as the good guys protecting society from a rapacious would-be autocrat.

This prejudice is wrongheaded and atavistic. It comes out of the early English Whig view of politics and English constitutional experience, where political evolution was precisely that.<sup>41</sup> You started out with a king who holds all the cards; he holds all the power, including legislative and judicial. 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 those of the

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38. See, e.g., ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE* 101, 107 (2005) (noting in 1974 Congress substantially broadened the Freedom of Information Act to allow for judicial review of executive determinations that something needed to be kept secret, even for national security materials).

39. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492–508 (2010) (holding that the dual for-cause removal limitations under the Sarbanes-Oxley Act of 2002 for members of the Public Company Accounting Oversight Board constrained presidential power in violation of the constitutional separation of powers); *Morrison v. Olson*, 487 U.S. 654, 703–15 (1988) (Scalia, J., dissenting) (arguing that the independent counsel provisions of the Ethics in Government Act of 1978, which the majority upheld, constrained presidential power in violation of the separation of powers); *Common Legislative Encroachments On Executive Branch Authority*, 13 Op. O.L.C. 248 (1989).

40. See Julian Davis Mortenson, *Article II Vests the Executive Power, not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1210–19 (2019); Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 17–21 (2002).

41. See Mortenson, *supra* note 40, at 1191–1201.

judiciary.<sup>42</sup> A watershed in this evolution was, of course, the Glorious Revolution in 1689.<sup>43</sup>

But by 1787, we had the exact opposite model in the United States.<sup>44</sup> The Founders greatly admired how the British constitution had given rise to the principles of a balanced government.<sup>45</sup> 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.<sup>46</sup>

Part of their more perfect construction was a new kind of executive. They created an office that was already the ideal Whig executive. It already had built into it the limitations that Whig doctrine aspired to.<sup>47</sup> It did not have the power to tax and spend;<sup>48</sup> it was constrained by habeas corpus and by due process in enforcing the law against members of the body politic;<sup>49</sup> it was elected for a limited term of office;<sup>50</sup> and it was elected by the nation as whole.<sup>51</sup> That is a remarkable democratic institution—the only figure elected by the nation as a whole. 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 from those that weighed on seventeenth-century English Whigs. It was not executive power that was of so much concern to them; it was danger of the legislative branch, which they viewed as the most dangerous branch to liberty.<sup>52</sup> As Madison warned, "The legislative department is

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42. *Id.*

43. *Id.* at 1196–99.

44. ARTICLES OF CONFEDERATION of 1781 (lacking a single executive and vesting all executive and legislative power in a congress).

45. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1756–58 (1996).

46. Victoria Nourse, *Toward a "Due Foundation" for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447, 474–76 (1996).

47. See Flaherty, *supra* note 45, at 1761–62.

48. U.S. CONST. art. I, § 8, cl. 1.

49. U.S. CONST. art. I, § 9, cl. 2; *id.* amend. V.

50. U.S. CONST. art. II, § 1.

51. *Id.*

52. See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 71, 144, 386–88 (Max Farrand ed., 1911).

everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."<sup>53</sup> And indeed, they viewed the presidency as a check on the legislative branch.<sup>54</sup>

The second contemporary way of thinking that operates against the Executive is a notion that the Constitution does not sharply allocate powers among the three branches, but rather that the branches—especially the political branches—“share” powers.<sup>55</sup> 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 that it is not such a big deal if one branch expands its role within that sphere at the expense of the other.<sup>56</sup>

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.<sup>57</sup> Thus, the legislative power granted in the

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53. THE FEDERALIST NO. 48, *supra* note 14, at 306 (James Madison).

54. *See, e.g.*, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 52, at 144; THE FEDERALIST NO. 73, *supra* note 14, at 441 (Alexander Hamilton) (defending the Executive’s veto power as necessary to “establish[] a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good”).

55. *See, e.g.*, RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN 29 (The Free Press 1991) (1960) (presenting the view that the United States is not “a government of ‘separated powers’” but “a government of separated institutions *sharing* powers”); Lloyd N. Cutler, *Now Is the Time for All Good Men . . .*, 30 WM. & MARY L. REV. 387, 387 (1989) (“[The Framers] decided the best way to maintain checks and balances among the branches was to allow at least one other branch to share in each power principally assigned to a different branch.”); Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 301 (1989); *see also* THE FEDERALIST NO. 37, *supra* note 14, at 224 (James Madison) (“[N]o skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary . . .”).

56. *See* Flaherty, *supra* note 45, at 1737 (“To [the functionalist], the Constitution . . . invites[] the legislature, the executive, and the judiciary to share power in creative ways. So long as the arrangements that emerge do not upset the specified design at the top of the structure . . . what emerges is fair game.”).

57. *See* THE FEDERALIST NO. 48 (James Madison); Edward Susolik, Note, *Separation of Powers and Liberty: The Appointments Clause, Morrison v. Olson, and Rule of Law*, 63 S. CAL. L. REV. 1515, 1528 (1990) (noting that for a “strict separation of powers . . . [l]egislative, executive, and judicial functions are conceptualized as separate and distinct, and actors within each branch are not to undertake duties allocated to another branch”).

Constitution is granted to the Congress.<sup>58</sup> At the same time, the Constitution gives the Executive a specific power in the legislative realm—the veto power.<sup>59</sup> Thus, the Executive “shares” legislative power only to the extent of this specific grant of veto power. The Executive does not get to interfere with the broader legislative power assigned solely to the Congress.<sup>60</sup>

In recent years, both the legislative and judicial branches have been responsible for encroaching on the presidency’s constitutional authority. Let me first say something about the legislature.

A. *Encroachments by the Legislative Branch*

As I have said, the Framers fully expected intense pulling and hauling between the Congress and the President. Unfortunately, just in the past few years, we have seen 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 available to sabotage the functioning of his administration.<sup>61</sup> Now “resistance” is the language used to describe an insurgency against rule imposed by an occupying military power. The term obviously connotes that the government opposed is not legitimate.<sup>62</sup> This is a very dangerous—indeed, incendiary—

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58. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”).

59. See U.S. CONST. art. I, § 7, cl. 2.

60. See *Springer v. Philippine Islands*, 277 U.S. 189, 201–02 (1928) (discussing the “generally inviolate” rule that “the executive cannot exercise either legislative or judicial power”).

61. See David S. Meyer & Sidney Tarrow, *Introduction* to *THE RESISTANCE: THE DAWN OF THE ANTI-TRUMP OPPOSITION MOVEMENT* 1, 1–24 (David S. Meyer & Sidney Tarrow eds., 2018) (describing how a variety of social activism movements combined to create the origins of “The Resistance”); Charlotte Alter, *How the Anti-Trump Resistance Is Organizing Its Outrage*, *TIME* (Oct. 18, 2018, 6:35 AM), <http://time.com/longform/democrat-midterm-strategy/> [<http://perma.cc/CDD9-HBZB>]; Alex Seitz-Wald, *The anti-Trump ‘Resistance’ turns a year old—and grows up*, *NBC NEWS* (Jan. 19, 2018, 8:53 AM), <http://www.nbcnews.com/storyline/2018-state-of-the-union-address/anti-trump-resistance-turns-year-old-grows-n838821> [<http://perma.cc/CPY2-4EVS>].

62. See Tom Ginsburg, Daniel Lansberg-Rodriguez, Mila Versteeg, *When to Overthrow your Government: The Right to Resist in the World’s Constitutions*, 60 *UCLA L. REV.* 1184, 1208 (2013) (describing the “right to resist” as a “necessary

notion to import into the politics of a democratic republic.<sup>63</sup> What it means is that, instead of viewing themselves as the “loyal opposition,” as opposing parties have done in the past,<sup>64</sup> they essentially see themselves as engaged in a war to cripple, by any means necessary, a duly elected government.<sup>65</sup>

A prime example of this is the Senate’s unprecedented abuse of the advice-and-consent process.<sup>66</sup> The Senate is free to exercise that power to reject 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 government.<sup>67</sup>

Yet that is precisely what the Senate minority has done from his very first days in office. As of September of this year, the

popular response in cases of illegitimately exercised or formulated government authority”).

63. See Arthur Kaufmann, *Small Scale Right to Resist*, 21 NEW ENG. L. REV. 571, 574 (1985–1986) (“The tragedy of resistance [is] not only its futility but also its danger to the order of the community . . . .”); Edward Rubin, *Judicial Review and the Right To Resist*, 97 GEO. L.J. 61, 63 (2008) (“Resistance . . . is always traumatic, typically dangerous, and often ineffective; and unsuccessful efforts generally lead to disastrous consequences for the participants.”).

64. See George Anastaplo, *Loyal Opposition in a Modern Democracy*, 35 LOY. U. CHI. L.J. 1009, 1010 (2004) (describing the role of the “loyal opposition” as a foil against presidency policies, used by a competing, yet cooperating, political party); see also Jean H. Baker, *A Loyal Opposition: Northern Democrats in the Thirty-Seventh Congress*, 25 CIVIL WAR HIST. 139 (1979) (noting that even during the Civil War, Democrats from northern states played the role of “loyal opposition” against the Lincoln Administration).

65. Joel Kotkin, *Loyal opposition versus resistance to trump*, ORANGE COUNTY REG. (Jan. 8, 2017, 12:00 AM), <http://www.oregister.com/2017/01/08/loyal-opposition-versus-resistance-to-trump/> [<http://perma.cc/5VBF-PAN7>]; Campbell Robertson, *In Trump Country, the Resistance Meets the Steel Curtain*, N.Y. TIMES (Feb. 6, 2020), <https://nyti.ms/2UqYF9n> [<https://perma.cc/6DQU-PHJA>].

66. *Compare Nominations: A Historical Overview*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm> [<https://perma.cc/E9DU-U79H>] (last visited May 3, 2020) and *The Confirmation Process for Presidential Appointees*, HERITAGE FOUND., <https://www.heritage.org/political-process/heritage-explains/the-confirmation-process-presidential-appointees> [<https://perma.cc/842A-RS35>] (last visited May 3, 2020) (three rejections of Supreme Court nominations and nine rejections of cabinet appointments in the past hundred years) with Dan Cancian, *Donald Trump Suffers Setback as Senate Rejects Hundreds of Nominations*, NEWSWEEK (Jan. 5, 2019, 10:43 AM), <https://www.newsweek.com/donald-trump-judicial-nominations-116th-congress-us-senate-charles-schumer-1280392> [<https://perma.cc/7PUM-DHUD>] (hundreds of nominees rejected and increased timeframe for decisions during the Trump Administration).

67. See THE FEDERALIST NO. 76, *supra* note 14, at 455–57 (Alexander Hamilton).

Senate had been forced to invoke cloture on 236 Trump nominees<sup>68</sup>—each of those representing its own massive consumption of legislative time meant only to delay an inevitable confirmation. How many times was cloture invoked on nominees during President Obama’s first term? Seventeen times.<sup>69</sup> The second President Bush’s first term? Four times.<sup>70</sup> 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.

Congress has in recent years also largely abdicated its core function of legislating on the most pressing issues facing the national government.<sup>71</sup> They either decline to legislate on major questions or, if they do, 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.<sup>72</sup> This phenomenon first arose in the wake of the Great Depression, as Congress created a number of so-called “independent agencies” and housed them, at least nominally, in the executive branch.<sup>73</sup> More recently, the Dodd-Frank Act’s crea-

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68. See *Cloture Motions—115th Congress*, U.S. SENATE, <https://www.senate.gov/legislative/cloture/115.htm> [<https://perma.cc/29BP-CAYD>] (last visited May 3, 2020); *Cloture Motions—116th Congress*, U.S. SENATE, <https://www.senate.gov/legislative/cloture/116.htm> [<https://perma.cc/4MGP-EHRL>] (last visited May 3, 2020).

69. See *Cloture Motions—111th Congress*, U.S. SENATE, <https://www.senate.gov/legislative/cloture/111.htm> [<https://perma.cc/6KT5-Y33Q>] (last visited May 5, 2020); *Cloture Motions—112th Congress*, U.S. SENATE, <https://www.senate.gov/legislative/cloture/112.htm> [<https://perma.cc/X5SM-PSAK>] (last visited May 5, 2020).

70. See *Cloture Motions—107th Congress*, U.S. SENATE, <https://www.senate.gov/legislative/cloture/107.htm> [<https://perma.cc/QX6C-ZWVH>] (last visited May 5, 2020); *Cloture Motions—108th Congress*, U.S. SENATE, <https://www.senate.gov/legislative/cloture/108.htm> [<https://perma.cc/26AE-ZSBN>] (last visited May 5, 2020).

71. See David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL’Y 213, 244–53 (2020); Ethan Blevins, *Ending the Administrative State is an Uphill and Necessary Battle for a Free Nation*, NAT’L REV. (Feb. 20, 2020, 5:50 PM), <https://www.nationalreview.com/bench-memos/ending-administrative-state-uphill-necessary-battle-free-nation/> [<https://perma.cc/C9PB-7JY5>].

72. Schoenbrod, *supra* note 71, at 244–53; Blevins, *supra* note 71; Chuck DeVore, *The Administrative State Is Under Assault And That’s A Good Thing*, FORBES (Nov. 27, 2017, 1:53 PM), <https://www.forbes.com/sites/chuckdevore/2017/11/27/the-administrative-state-is-under-assault-and-thats-a-good-thing/#60c12ddc393c> [<https://perma.cc/D825-TAUW>].

73. John Yoo, *Franklin Roosevelt and Presidential Power*, 21 CHAP. L. REV. 205, 227–31 (2018).

tion of the Consumer Financial Protection Branch, a single-headed independent agency that functions like a junior varsity President for economic regulation, is just one of many examples.<sup>74</sup>

Of course, Congress's effective withdrawal from the business of legislating leaves it with a lot of time for other pursuits. And the pursuit of choice, particularly for the opposition party, has been to drown the executive branch with "oversight" demands for testimony and documents.<sup>75</sup> I do not 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.<sup>76</sup>

The costs of this constant harassment are real. For example, we all understand that confidential communications and a private, internal deliberative process are essential for 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.<sup>77</sup> There is no FOIA<sup>78</sup> for Congress or 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 Executive's internal decisional

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74. See *PHH Corp. v. CFPB*, 839 F.3d 1, 15–17 (D.C. Cir. 2016), *rev'd en banc*, 881 F.3d 75 (D.C. Cir. 2018).

75. See, e.g., Laura Blessing, *Congressional Oversight in the 116th*, GOV'T AFF. INST. AT GEO. U. (Mar. 8, 2019), <https://gai.georgetown.edu/congressional-oversight-in-the-116th/> [<https://perma.cc/7PQ5-XJDS>].

76. Alex Moe, *House investigations of Trump and his administration: The full list*, NBC NEWS (May 27, 2019, 12:02 PM), <https://www.nbcnews.com/politics/donald-trump/house-investigations-trump-his-administration-full-list-n1010131> [<https://perma.cc/SW85-2AUN>] (listing fourteen different Democrat-led House committees investigating President Trump as of May 2019).

77. See, e.g., Classified Information Procedures Act, 18 U.S.C. app. 3 (2018); RULES OF THE HOUSE OF REPRESENTATIVES, r. XVII(10), *reprinted in* H.R. DOC. NO. 114-192, at 788–89 (2017) (authorizing "secret sessions"); STANDING RULES OF THE SENATE, r. XXI, *reprinted in* S. DOC. NO. 113-18, at 15 (2013) (authorizing "closed sessions"); *Supreme Court Procedures*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> [<https://perma.cc/UJ47-WM8F>] (last visited May 3, 2020) (noting that only Justices are allowed in the room when the Supreme Court holds conference).

78. 5 U.S.C. § 552 (2018).

process.<sup>79</sup> 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 confidentiality in executive branch decisionmaking necessarily means that some communications must remain off limits to Congress and the public.<sup>80</sup> There was a time when Congress respected this important principle as well.<sup>81</sup> 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.<sup>82</sup>

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.<sup>83</sup> When I ask my friends on the other side, what exactly are you referring to? I get vacuous stares, followed by sputtering about

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79. See *ACLU v. CIA*, 823 F.3d 655, 662 (D.C. Cir. 2016) (“Nevertheless, because it is undisputed that Congress is not an agency, it is also undisputed that ‘congressional documents are not subject to FOIA’s disclosure requirements.’” (quoting *United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 597 (D.C. Cir. 2004))).

80. *United States v. Nixon*, 418 U.S. 683, 711 (1974) (“Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.”).

81. *In re Sealed Case*, 121 F.3d 729, 740 n.9 (D.C. Cir. 1997) (“Interestingly, it appears that Congress has at times accepted executive officers’ refusal to testify about conversations they had with the President, even as it was insisting on access to other executive branch documents and materials.” (citing MARK J. ROZELL, *EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY* 44 (1994); Robert Kramer & Herman Marcuse, *Executive Privilege—A Study of the Period 1953–1960*, 29 *GEO. WASH. L. REV.* 827, 872–73 (1961))).

82. See, e.g., H.R. REP. NO. 116-125, at 1–2 (2019).

83. Tim Ahmann, *Top Democrats say Trump is shredding Constitution with emergency declaration*, REUTERS (Feb. 15, 2019, 11:25 AM), <https://www.reuters.com/article/us-usa-shutdown-democrats/top-democrats-say-trump-is-shedding-constitution-with-emergency-declaration-idUSKCN1Q423R> [<https://perma.cc/36UX-FE96>]; see also Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 *IND. L.J.* 177, 191–203 (2018).

the travel ban<sup>84</sup> or some such thing. While the President has certainly thrown out the traditional Beltway playbook, he was upfront about that beforehand, and the people voted for him. What I am talking about today are fundamental constitutional precepts. The fact is that this Administration's policy initiatives and proposed rules, including the travel ban, have transgressed neither constitutional nor traditional norms, and have been amply supported by the law and patiently litigated through the court system to vindication.<sup>85</sup>

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 exercises of executive power—such as, under its DACA program, refusing to enforce broad swathes of immigration law.<sup>86</sup>

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 the undermining of the rule of law. This highlights a basic disadvantage that conservatives have always had in contesting the political issues of the day. It was adverted to by the old, curmudgeonly Federalist, Fisher Ames, in an essay during the early years of the Republic.<sup>87</sup>

In any age, the so-called progressives treat politics as their religion. Their holy mission is to use the coercive power of the state to remake man and society in their own image, according

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84. See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

85. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2403–04, 2423 (2018) (upholding the travel ban).

86. See Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Protection, et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/JG97-XT57>]; Barack Obama, President, United States, *Remarks by the President in Address to the Nation on Immigration* (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/7ADG-YUZB>].

87. FISHER AMES, *Laocoon No. II*, in *WORKS OF FISHER AMES* 103, 106–08 (Boston, T.B. Wait & Co. 1809).

to an abstract ideal of perfection.<sup>88</sup> 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 collateral consequences and the systemic implications. They never ask whether the actions they take could be justified as a general rule of conduct, equally applicable to all sides.<sup>89</sup>

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 healthy development of natural civil society and individual human flourishing.<sup>90</sup> This means that we naturally test the propriety and wisdom of action under a “rule of law” standard.<sup>91</sup> The essence of this standard is to ask what the overall impact on society over the long run if the action we are taking, or principle we are applying, in a given circumstance was universalized—that is, would it be good for society over the long haul if this was done in all like circumstances?<sup>92</sup>

For these reasons, conservatives tend to have more scruple 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 war, especially when doing so under the weight of a hyper-partisan media.

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88. See Jim DeMint & Rachel Bovard, Opinion, *Progressive politics is the Left's new religion*, WASH. EXAMINER (Sept. 24, 2019, 12:00 AM), <https://www.washingtonexaminer.com/opinion/progressive-politics-is-the-lefts-new-religion> [https://perma.cc/6ZA5-G3AH].

89. See, e.g., John O. McGinnis, *Progressivism Is a Long-Term Threat to the Rule of Law*, LAW & LIBERTY (July 18, 2016), <https://lawliberty.org/progressivism-is-a-long-term-threat-to-the-rule-of-law/> [https://perma.cc/GGJ5-XCDY].

90. See Lee Edwards, *What Is Conservatism?*, HERITAGE FOUND. (Oct. 25, 2018), <https://www.heritage.org/conservatism/commentary/what-conservatism> [https://perma.cc/5E5Q-JKEM]; Russell Kirk, *Ten Conservative Principles*, RUSSELL KIRK CTR., <https://kirkcenter.org/conservatism/ten-conservative-principles/> [https://perma.cc/V5U8-BPDF] (last visited May 4, 2020).

91. Calvin R. Massey, *Rule of Law and the Age of Aquarius*, 41 HASTINGS L.J. 757, 759 (1990) (book review) (“Adherence to the rule of law is truly conservative in that it preserves the balance between majoritarian power and individual rights or societal values, in order to permit a systemic solution to materialize.”).

92. See Antonin Scalia, *The Rule of Law as A Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80 (1989).

*B. Encroachments by the Judicial Branch*

Let me turn now to what I believe has been the prime source of the erosion of separation-of-power principles generally, and executive branch authority specifically. 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. 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 Executive, thus preempting the political process, which the Framers conceived as the primary check on inter-branch rivalry. 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 decisionmaking that heretofore have been considered at the core of presidential power.

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.”<sup>93</sup> 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 encroachments” that Madison described take various forms. As Justice Scalia observed, the Constitution gives Congress and the President many “clubs with which to beat” each other.<sup>94</sup> Conspicuously absent from the list is running to the courts to resolve their disputes.

That omission makes sense. When the judiciary purports to pronounce a conclusive resolution to constitutional disputes between the other two branches, it does not act as a coequal.

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93. THE FEDERALIST NO. 51, *supra* note 14, at 318–19 (James Madison).

94. Transcript of Oral Argument at 10, *Zivotofsky v. Clinton*, 566 U.S. 189 (2012) (No. 10-699).

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 needed to forge 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 courts can meaningfully resolve interbranch 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 pursuit of his executive function? Nothing in the Constitution provides a manageable standard for resolving such a question. It is thus no surprise that the courts have produced amorphous, unpredictable balancing tests like the Court's holding in *Morrison v. Olson*<sup>95</sup> that Congress did not disrupt "the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions."<sup>96</sup>

Apart from their overzealous role in interbranch disputes, the courts have increasingly engaged directly in usurping presidential decisionmaking authority for themselves. One way courts have effectively done this is by expanding both the scope and the intensity of judicial review.<sup>97</sup>

In recent years, we have lost sight of the fact that many critical decisions in life are not amenable to the model of judicial decisionmaking. 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. They are decisions that frequently have 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

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95. 487 U.S. 654 (1988).

96. *Id.* at 695 (alterations adopted) (quoting *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 443 (1977)) (internal quotation marks omitted).

97. *See, e.g., Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017), *rev'd*, 138 S. Ct. 2392 (2018).

call into play the “precautionary principle.”<sup>98</sup> This is the principle that when a decisionmaker is accountable for discharging a certain obligation—such as protecting the public’s safety—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 involving national security or foreign affairs.

The travel ban case is a good example. There the President made a decision under an explicit legislative grant of authority, as well as his constitutional national security role, to temporarily suspend entry to aliens coming from a half dozen countries pending adoption of more effective vetting processes.<sup>99</sup> The common denominator of the initial countries selected was that they were unquestionable hubs of terrorism activity, which lacked functional central government’s and responsible law enforcement and intelligence services that could assist us in identifying security risks among their nationals seeking entry.<sup>100</sup> Despite the fact there were clearly justifiable security grounds for the measure, the district court in Hawaii and the Ninth Circuit blocked this public safety measure for a year and half on the theory that the President’s motive for the order was religious bias against Muslims.<sup>101</sup> 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.<sup>102</sup>

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98. Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003, 1003–04 (2003).

99. *Trump v. Hawaii*, 138 S. Ct. at 2403–05.

100. *Id.* at 2403–04.

101. *Id.* at 2404, 2406–07.

102. See, e.g., *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026 (9th Cir.), *stay granted*, 140 S. Ct. 3 (2019); *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir.), *stay granted*, 140 S. Ct. 1 (2019); *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019).

The travel ban case highlights an especially troubling aspect 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 governmental action. To take the classic example, if a police officer has probable cause to initiate a traffic stop, his subjective motivations are irrelevant.<sup>103</sup> 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.<sup>104</sup>

What is true of police officers and gerrymanderers is equally true of the President and senior executive officials. With very few exceptions, neither the Constitution, nor the Administrative Procedure Act<sup>105</sup> or any other relevant statute, calls for judicial review of executive motive. They apply only to executive action.<sup>106</sup> 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 decisionmaking process—have no more foundation in the law than a subpoena to a court to try to determine a judge's real motive for issuing its decision. And courts' indulgence of such claims, even if they are ultimately rejected, represents a serious intrusion on the President's constitutional prerogatives.

The impact of these judicial intrusions on executive responsibility have been hugely magnified by another judicial innovation—the nationwide injunction. First used in 1963,<sup>107</sup> and

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103. *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

104. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) ("[P]artisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.").

105. 5 U.S.C. §§ 551, 553–559, 701–706 (2018).

106. *See, e.g., id.* § 706(2) (providing that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions" that are arbitrary, capricious, or contrary to law).

107. *See Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 520, 536 (D.C. Cir. 1963) (upholding an injunction against a rule that would establish a uniform wage in the electrical motors and generators industry); *see also* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 437–39 (2017).

sparely since then until recently, these court orders enjoin enforcement of a policy not just against the parties to a case, but against everyone. Since President Trump took office, district courts have issued over forty nationwide injunctions against the government.<sup>108</sup> By comparison, during President Obama's first two years, district courts issued a total of two nationwide injunctions against the government.<sup>109</sup> Both were vacated by the Ninth Circuit.<sup>110</sup>

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.<sup>111</sup> No other President has been subjected to such sustained efforts to debilitate his policy agenda.

The legal flaws underlying nationwide injunctions are myriad. Just to summarize briefly, nationwide injunctions have no foundation in courts' Article III jurisdiction or traditional equitable powers;<sup>112</sup> they radically inflate the role of district judges, allowing any one of more than 600 individuals to singlehandedly freeze a policy nationwide, a power that no single appellate judge or Justice can accomplish; they foreclose percolation and

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108. Tessa Berenson, *Inside the Trump Administration's Fight to End Nationwide Injunctions*, TIME (Nov. 4, 2019, 3:12 PM), <https://time.com/5717541/nationwide-injunctions-trump-administration/> [<https://perma.cc/K4EK-29GC>]. As of February 2020, the number is up to fifty-five. Jeffrey A. Rosen, Deputy Attorney Gen., United States, Opening Remarks at Forum on Nationwide Injunctions and Federal Regulatory Program (Feb. 12, 2020), <https://www.justice.gov/opa/speech/deputy-attorney-general-jeffrey-rosen-delivers-opening-remarks-forum-nationwide> [<https://perma.cc/T23U-6GKF>].

109. See *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 929 (C.D. Cal. 2010), *vacated by*, 658 F.3d 1162 (9th Cir. 2011); *L.A. Haven Hospice, Inc. v. Sebelius*, No. CV08-4469-GW (RZX), 2009 WL 5865294, at \*1 (C.D. Cal. Aug. 20, 2009), *aff'd in part, vacated in part, remanded*, 638 F.3d 644 (9th Cir. 2011).

110. See *Log Cabin Republicans*, 658 F.3d at 1168; *L.A. Haven Hospice*, 638 F.3d at 648 (vacating "that portion of the injunction barring enforcement of the regulation against hospice providers other than Haven Hospice").

111. See Jordan Fabian & Jacqueline Thomsen, *Courts become turbocharged battleground in Trump era*, HILL (July 22, 2019, 6:00 AM), <https://thehill.com/homenews/administration/453881-courts-become-turbocharged-battleground-in-trump-era> [<https://perma.cc/D3F8-HZ6N>].

112. See Memorandum from the Attorney General to Heads of Civil Litigating Components United States Attorneys, *Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions* 7-8 (Sept. 13, 2018), <https://www.justice.gov/opa/press-release/file/1093881/download> [<https://perma.cc/Y9U6-E79W>]; Bray, *supra* note 107, at 425-27.

reasoned debate among lower courts, often requiring the Supreme Court to decide complex legal issues in an emergency posture with limited briefing; they enable transparent forum shopping,<sup>113</sup> which saps public confidence in the integrity of the judiciary; and they displace the settled mechanisms for aggregate litigation of genuinely nationwide claims, such as Rule 23 class actions.<sup>114</sup>

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. As you recall, DACA was a discretionary policy of enforcement forbearance adopted by President Obama's administration.<sup>115</sup> The Fifth Circuit concluded that the closely related DAPA policy (along with an expansion of DACA) was unlawful,<sup>116</sup> and the Supreme Court affirmed that decision by an equally divided vote.<sup>117</sup> Given that DACA was discretionary—and that four Justices apparently thought a legally indistinguishable policy was unlawful—President Trump's administration understandably decided to rescind DACA.<sup>118</sup>

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.<sup>119</sup> In the middle of those negotiations—indeed, on the same day the President invited cameras into the Cabinet Room to broadcast his negotiations with bipartisan leaders from both Houses of Congress<sup>120</sup>—a district judge in the Northern District

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113. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring).

114. See Michael R. Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 634–39 (2017).

115. *Texas v. United States*, 809 F.3d 134, 146–47 (5th Cir. 2015).

116. *Id.* at 146.

117. *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (mem.).

118. See Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://nyti.ms/2x7xOo2> [<https://perma.cc/GW4K-CHEL>].

119. *Id.* (discussing President Trump's efforts to find a "replacement" for DACA).

120. See Donald J. Trump, President, United States, Remarks by President Trump in Meeting with Bipartisan Members of Congress on Immigration (Jan. 9, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-bipartisan-members-congress-immigration/> [<https://perma.cc/7YNW-JVUT>].

of California enjoined the rescission of DACA nationwide.<sup>121</sup> Unsurprisingly, the negotiations over immigration legislation collapsed after one side achieved its preferred outcome through judicial means.<sup>122</sup> A humanitarian crisis at the southern border ensued.<sup>123</sup> And just this week, the Supreme Court finally heard argument on the legality of the DACA rescission.<sup>124</sup> The Court will not likely decide the case until next summer, meaning that President Trump will have spent almost his entire first term enforcing President Obama's signature immigration policy, even though that policy is discretionary and half the Supreme Court concluded that a legally indistinguishable policy was unlawful. That is not how our democratic system is supposed to work.

To my mind, the most blatant and consequential usurpation of executive power in our history was played out during the administration of President 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*.<sup>125</sup> 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.<sup>126</sup> For the first time, the Court ruled that foreign persons who had no connection with

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121. See *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1048–50 (N.D. Cal. 2018) (issued January 9, 2018).

122. See Elana Schor & Burgess Everett, *Senate immigration debate ends in failure*, POLITICO (Feb. 15, 2018, 6:15 PM), <https://www.politico.com/story/2018/02/15/immigration-daca-senate-412459> [<https://perma.cc/DH7Q-LBDN>].

123. *Humanitarian and Security Crisis at Southern Border Reaches 'Breaking Point'*, DEP'T HOMELAND SECURITY (Mar. 6, 2019), <https://www.dhs.gov/news/2019/03/06/humanitarian-and-security-crisis-southern-border-reaches-breaking-point> [<https://perma.cc/3FQ9-DYPT>].

124. See Amy Howe, *Argument analysis: Justices torn, hard to read in challenge to decision to end DACA*, SCOTUSBLOG (Nov. 12, 2019, 2:07 PM), <https://www.scotusblog.com/2019/11/argument-analysis-justices-torn-hard-to-read-in-challenge-to-decision-to-end-daca/> [<https://perma.cc/53NG-JNL9>].

125. *Boumediene v. Bush*, 553 U.S. 723 (2008).

126. See *id.* at 826–27, 843–48 (Scalia, J., dissenting).

the United States other than being confronted by our military on the battlefield had “due process” rights and thus have the right to habeas corpus to obtain judicial review of whether the military has a sufficient evidentiary basis to hold them.<sup>127</sup>

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 over a fundamental distinction that is integral to the Constitution and integral to the role played by the President in our system.

As the Preamble suggests, governments are established for two different security reasons—to secure domestic tranquility and to provide for defense against external dangers.<sup>128</sup> These are 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 it does not itself threaten the liberties of the people.<sup>129</sup> Thus, the Constitution in this arena deliberately sacrifices efficiency; invests the accused with rights that essentially create a level playing field between the collective interests of community and those of the individual; and dilutes the government’s power by dividing it and turning it on itself as a check. At each stage the judiciary is expressly empowered to serve as a check and neutral arbiter.<sup>130</sup>

None of these considerations are applicable when the government is defending the country against armed attacks from foreign enemies. In this realm, the Constitution is concerned with one thing—preserving the freedom of our political community by destroying the external threat.<sup>131</sup> Here, the Constitution is not concerned with handicapping the government to preserve other values. The Constitution does not confer “rights”

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127. *Id.* at 770–71 (majority opinion).

128. U.S. CONST. pmb1.

129. *See, e.g.*, U.S. CONST. amends. IV–VIII.

130. *See* U.S. CONST. art III., § 2, cl. 1.

131. *See* U.S. CONST. art. I, § 8, cl. 11–13, 15–16; *id.* art. II, § 2, cl. 1.

on foreign enemies.<sup>132</sup> Rather the Constitution is designed to maximize the government's efficiency to achieve victory—even at the cost of “collateral damage” that would be unacceptable in the domestic 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.<sup>133</sup> For the first time in American history, our Armed Forces are incapable of taking prisoners.<sup>134</sup> We are now in a crazy position that, if we identify a terrorist enemy on the battlefield, such as ISIS, we can kill them with drone or any other weapon.<sup>135</sup> But if we capture them and want to hold them at Guantanamo or in the United States, the military is tied down in developing evidence for an adversarial process and must spend resources in interminable litigation.<sup>136</sup>

The fact that our courts are now willing to invade and muck about in these core areas of presidential responsibility illustrates how far the doctrine of separation of powers has been eroded.<sup>137</sup>

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132. *Boumediene*, 553 U.S. at 841 (Scalia, J., dissenting) (“There is simply no support for the Court’s assertion that constitutional rights extend to aliens held outside U.S. sovereign territory . . .” (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990))); see also *Johnson v. Eisentrager*, 339 U.S. 763, 784–85 (1950).

133. See, e.g., Beverly E. Bashor, *The Liberty/Safety Paradigm: The United States’ Struggle to Discourage Violations of Civil Liberties in Times of War*, 41 W. ST. U. L. REV. 617, 641–42 (2014) (explaining that, after the *Boumediene* decision, the executive branch and Congress have had to use different tactics to detain suspected terrorists); Ernesto Hernández-López, *Detaining ISIS: Habeas and the Phantom Menace*, 71 OKLA. L. REV. 1109, 1142–51 (2019).

134. See Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 769 (2011) (describing how unclear the law is on whether the United States can detain individuals).

135. See Jonathan G. D’Errico, *Executive Power, Drone Executions, and the Due Process Rights of American Citizens*, 87 FORDHAM L. REV. 1185, 1190–93 (2018).

136. See *Boumediene*, 553 U.S. at 769 (“Habeas corpus proceedings may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks.”).

137. See Heather P. Scribner, *A Fundamental Misconception of Separation of Powers: Boumediene v. Bush*, 14 TEX. REV. L. & POL. 90, 160–62 (2009).

## CONCLUSION

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, 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 have lacked.

At every critical juncture where the country has faced a great challenge—whether it be in our earliest years as the weak, nascent country combating regional rebellions, and maneuvering for survival in a world of far stronger nations; whether it be during our period of continental expansion, with the Louisiana Purchase, and the acquisition of Mexican territory; whether it be the Civil War, the epic test of the nation; World War II and the struggle against fascism; the Cold War and the challenge of Communism; the struggle against racial discrimination; and most recently, the fight against Islamist Fascism and international terrorism—one would have to say that it has been the presidency that has stepped to the fore and provided the leadership, consistency, energy, and perseverance that allowed us to surmount the challenge and brought us success.

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