Is US Attorney General Barr Showing Wrongful and Undue Deference to Roberts?

US Attorney General William P. Barr's (Barr) 2019 speeches at the Federalist Society and Notre Dame University's Law School categorized a litany of deliberate lawbreaking by federal judges **[Note 1].**

Barr identify that the federal judges are 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."
Barr has identified **[Note 2]**

Barr explained how the federal judges are wrongfully justifying their lawbreaking by claiming that they are entitled to use the coercive power of the state to *"remake a man."* He has demonstrated federal judicial misconduct is responsible for the *"grim"* consequences that include the wreckage of the family, record levels of depression and mental illness, dispirited young people, soaring suicide rates, increasing numbers of angry and alienated young males, an increase in senseless violence, and a deadly drug epidemic. **[Note 3 and 4]**. Barr remarked that these federal judges are willing to ignore propriety and violate laws and legal standards and practices that protect truth and fairness to achieve their leftist goals.

Barr has remarked on the Founder's reasoning and the Constitution's making of a strong, independent Executive. **[Note 5]** Barr notes that judges do not act as *co-equal* if they act to resolve disputes between the other two branches.

Barr remarked on the fact that one side of the Divided Legislative has no right to "run" to court to get from judges, especially when the federal judges themselves have aggressively encroaching on the Executive branch. He noted that judges do not act as co-equals when they interfere with the natural and norm fighting between the divided legislative and the Executive branches of government.

As Justice Scalia observed, the Constitution gives Congress and the President many *"clubs with which to beat"* each other. "*Conspicuously absent from the list is running to the courts to resolve their disputes. That omission makes sense . . . In any event, the prospect that courts can meaningfully resolve interbranch disputes about the meaning of the Constitution is mostly a false promise."* **[Note 6]** Barr pointed to Madison's explanation in Federalist 51 and remarked that since American Presidency and the constitutionally divided two Houses of Congress have *"clubs with which to beat"* on each and the federal judges have no right to interfere in the process. **[Note 7]**

Barr remarked on federal judges that violate Constitution's "separation-of-power principles" by *"appointing [themselves as] the ultimate arbiter of separation of powers disputes between Congress and Executive"* **[Note 8]** are *"directly usurp Executive decision-making authority."* **[Note 9]** Meanwhile, these are same judges that granted civil rights to our foreign enemies and that exposed military personal to litigation in US civil courts, **[Note 10]** that fabricated national injunctions against Presidential policies that have no foundation in the federal judges' Article III

jurisdiction **[Notes 11]** and that protected their own privacy while allowing Congress to use subpoenas against the Executive branch for political purposes. **[Note 12]**

Barr shows how and why the Farmers created of American Presidency as a political and constitutional institution, as the federal government's "*solitary unitary executive*," and why the Founders got it right to do so. **[Note 13]** Barr remarked on the musty thinking about sharing power among the three branches when in fact the branches have specific separate powers **[Note 14].**

Barr remarked that "the process of secularization has accelerated," that REFRA has come under assault, and the idea of religious accommodation has fallen out of favor. Barr remarked that, "*as lawyers, we should be particularly active in the struggle that is being* ***waged against religion on the legal plane****. We must be vigilant to resist efforts by the forces of secularization to drive religious viewpoints from the public square and to impinge upon the free exercise of our faith. I can assure you that, as long as I am Attorney General, the Department of Justice will be at the forefront of this effort, ready to fight for the most cherished of our liberties: the freedom to live according to our faith*."

Because this Administration firmly supports accommodation of religion, the battleground has shifted to the states. Some state governments are now attempting to compel religious individuals and entities to subscribe to practices, or to espouse viewpoints, that are incompatible with their religion.

Ground zero for these attacks on religion are the schools. To me, this is the most serious challenge to religious liberty.

For anyone who has a religious faith, by far the most important part of exercising that faith is the teaching of that religion to our children. **The passing on of the faith. There is no greater gift we can give our children and no greater expression of love.**

For the government to interfere in that process is a monstrous invasion of religious liberty."

"I will not dwell on all the bitter results of the new secular age. Suffice it to say that the campaign to destroy the traditional moral order has brought with it immense suffering, wreckage, and misery. And yet, the forces of secularism, ignoring these tragic results, press on with even greater militancy."

Barr remarked on the "*self-inflation of the judicial branch*" to the point that it has become "the prime source of the erosion of separation-of-power principles generally, and Executive Branch authority specifically."

Barr remarked on large city "*[d]strict Attorneys that style themselves as 'social justice' reformers*," **[Note 15]** and on the "*use of the criminal law process as a political weapon*."[1]

[1]. Remarks in video interview at the Wall Street Journal's Chief Executive Officer Council on December 10, 2019.

You have remarked that "*so-called progressives [who] treat politics as their religion*" and how federal judicial misconduct leads to government with "*no liberty, just tyranny*" **[Note 16]**. You have remarked that these so-called progressives claim to be on a "holy mission" and justify themselves by claiming they are "*virtuous people pursuing a deific end*" **[Note 17]** who use the law as a "*battering ram to break down traditional moral values and to establish moral relativism as a new orthodoxy*" and who "*take a delight in compelling people to violate their conscience*." **[Note 18]** You have remarked that "*restraints could not be handed down from above by philosopher kings. Instead, social order must flow up from the people themselves—freely obeying the dictates of inwardly possessed and commonly shared moral values. And to control willful human beings, with an infinite capacity to rationalize, those moral values must rest on authority independent of men's will—they must flow from a transcendent Supreme Being . . . free government was only suitable and sustainable for a religious people—a people who recognized that there was a transcendent moral order antecedent to both the state and man-made law and who had the discipline to control themselves according to those enduring principles*" **[Note 19]**. **[Note 20]**.

Barr has remarked that "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. Now, "resistance" is the language used to describe insurgency against rule imposed by an occupying military power. It obviously connotes that the government is not legitimate. This is a very dangerous – 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 the past, they essentially see themselves as engaged in a war to cripple, by any means necessary, a duly elected government."

Barr remarked that *"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 interbranch rivalry. Second, the Judiciary has usurped Presidential authority for itself,*

The Travel Ban case is a good example. There the President made a decision under an explicit legislative grant of authority, as well has his Constitutional national security role, to temporarily suspend entry to aliens coming from a half dozen countries pending adoption of more effective vetting processes. 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. 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. 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 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. 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 very few exceptions, neither the Constitution, nor the Administrative Procedure Act or any other relevant statute, calls for judicial review of executive motive. 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 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, and 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 40 nationwide injunctions against the government. By comparison, during President Obama's first two years, district courts issued a total of two nationwide injunctions against the government. Both were vacated by the Ninth Circuit.

Attorney Barr has remarked that "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 debilitate his policy agenda.

The legal flaws underlying nationwide injunctions are myriad. Just to summarize briefly,

1. nationwide injunctions have no foundation in courts' Article III jurisdiction or traditional equitable powers
2. they radically inflate the role of district judges
3. allowing any one of more than 600 individuals to singlehandedly freeze a policy nationwide,
4. a power that no single appellate judge or Justice can accomplish
5. they foreclose percolation and reasoned debate among lower courts
6. often requiring the Supreme Court to decide complex legal issues in an emergency posture with limited briefing

7. they enable transparent forum shopping, which saps public confidence in the integrity of the judiciary

8. they displace the settled mechanisms for aggregate litigation of genuinely nationwide claims, such as Rule 23 class actions

9. [. . .] 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. The Fifth Circuit concluded that the closely related DAPA policy (along with an expansion of DACA) was unlawful, and the Supreme Court affirmed that decision by an equally divided vote. 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.

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. 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 — 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 judicial means.** A humanitarian crisis at the southern border ensued. And just this week, the Supreme Court finally heard argument on the legality of the DACA rescission. 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."

Attorney Barr has remarked that: "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*."

Former US Attorney General Jefferson B. Sessions remarked that "Judicial activism is . . . a threat to our representative government and the liberty it secures." **[Note 21]**

1. In late 2019, in two speeches, the Hon. Attorney General for the US William Pelham Barr committed resources to keep an eye out for cases in two areas. One is to protect religious liberties. Two is to protect the Constitution and rule law from "leftist … militant secularists . . . so-called progressive" federal judicial that "seem to take a delight in compelling people to violate their conscience [or acquiesce] . . . [that] eliminate laws that reflect traditional moral norms.

One of the speeches was presented at University of Notre Dame Law School and its Nicola Center for Ethics and Culture. The other was presented in honor of 19th Annual Barbara K. Olson Memorial Lecture at the Federalist Society's 2019 National Lawyers Convention. The excerpts in endnotes from a transcript of Attorney General William P. Barr's "**Notre Dame 2019**" speech posted on the Department of Justice's website under the title of "Attorney General William P. Barr Delivers Remarks to the Law School and the de Nicola Center for Ethics and Culture at the University of Notre Dame, South Bend, IN Friday, October 11, 2019" and from a transcript of Attorney General William P. Barr's "**Federalist Society 2019**" speech posted on the Department of Justice's website under the title of "Attorney General William P. Barr Delivers the 19th Annual Barbara K. Olson Memorial Lecture at the Federalist Society's 2019 National Lawyers Convention Washington, DC Friday, November 15, 2019."

In the Notre Dame speech, "The Attorney General committed to "set up a task force within the Department with different components that have equities in these areas, including the Solicitor General's Office, the Civil Division, the Office of Legal Counsel, and other offices; be involved in regular meetings on these matters, to keep an eye out for cases or events around the country that discriminate against people of faith, or impinge upon the free exercise of religion, and to be vigilant to resist efforts by the forces of secularization to drive religious viewpoints from the public square and to impinge upon the free exercise of our faith." He gave an assurance you that "as long as he is Attorney General, the Department of Justice will be at the forefront of this effort, ready to fight for the most cherished liberties: the freedom to live according to our faith."

Notre Dame 2019. https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-law-school-and-de-nicola-center-ethics

Federalist Society 2019. https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-19th-annual-barbara-k-olson-memorial-lecture

2. Federalist Society 2019. "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 to an abstract ideal of perfection. *Whatever means they use are therefore justified because, by definition, they are a virtuous people pursing 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.

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. This means that we naturally test the propriety and wisdom of action under a "rule of law" standard. 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?

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 far, especially when doing so under the weight of a hyper-partisan media."

3. Federalist Society 2019. "In other words, religion helps frame moral culture within society that instills and reinforces moral discipline. I think we all recognize that over the past 50 years religion has been under increasing attack. On the one hand, we have seen the steady erosion of our traditional Judeo-Christian moral system and a comprehensive effort to drive it from the public square. On the other hand, we see the growing ascendancy of secularism and the doctrine of moral relativism. By any honest assessment, the consequences of this moral upheaval have been grim. Virtually every measure of social pathology continues to gain ground. In 1965, the illegitimacy rate was eight percent. In 1992, when I was last Attorney General, it was 25 percent. Today it is over 40 percent. In many of our large urban areas, it is around 70 percent. Along with the wreckage of the family, we are seeing record levels of depression and mental illness, dispirited young people, soaring suicide rates, increasing numbers of angry and alienated young males, an increase in senseless violence, and a deadly drug epidemic. As you all know, over 70,000 people die a year from drug overdoses. That is more causalities in a year than we experienced during the entire Vietnam War. I will not dwell on all the bitter results of the new secular age. Suffice it to say that the campaign to destroy the traditional moral order has brought with it immense suffering, wreckage, and misery. And yet, the forces of secularism, ignoring these tragic results, press on with even greater militancy. Among these militant secularists are many so-called "progressives." But where is the progress? We are told we are living in a post-Christian era. But what has replaced the Judeo-Christian moral system? What is it that can fill the spiritual void in the hearts of the individual person? And what is a system of values that can sustain human social life? The fact is that no secular creed has emerged capable of performing the role of religion. Scholarship suggests that religion has been integral to the development and thriving of *Homo sapiens* since we emerged roughly 50,000 years ago. It is just for the past few hundred years we have experimented in living without religion. We hear much today about our humane values. But, in the final analysis, what undergirds these values? What commands our adherence to them? What we call "values" today are really nothing more than mere sentimentality, still drawing on the vapor trails of Christianity."

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5. The consensus [among the Framers] for a strong, independent Executive arose from . . . practical experiences [that the War had almost been lost and was a bumbling enterprise because of the lack of strong Executive leadership, state governments had proven incompetent and indeed tyrannical, too many States had adopted constitutions with weak Executives overly subordinate to the Legislatures], the Framers had come to appreciate that, to be successful, Republican government required the capacity to act with energy, consistency and decisiveness . . . As Jefferson put it, '[F]or the prompt, clear, and consistent action so necessary in an Executive, unity of person is necessary"….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 distinct specie of power . . . Executive power . . . meant more than this . . . the power to handle essential sovereign functions . . . 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 contingent circumstances. They agreed that – due to the very nature of the activities involved, and the kind of decision-making they require – the Constitution generally vested authority over these spheres in the Executive . . . Executive power is the power to address exigent circumstances that demand quick action . . . powers necessary . . . for the President to superintend and control the Executive function, including the powers necessary to protect the independence of the Executive . . . and the confidentiality of its internal deliberations. One of the more amusing aspects of modern progressive polemic is their breathless attacks on the "unitary executive theory . . . 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 . . . [t]he 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. Alternatively, they could vest Executive power in a solitary individual. 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. Even Jefferson – 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 America's unitary Executive as a signal feature that distinguished America's success from France's failed republican experiment. 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. So much for this supposedly nefarious theory of the unitary executive.

6. Federalist Society 2019. "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 interbranch 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 decision-making 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." 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 various forms. As Justice Scalia observed, the Constitution gives Congress and the President many "clubs with which to beat" each other. Conspicuously absent from the list is running to the courts to resolve their disputes. When the Judiciary purports to pronounce a conclusive resolution to constitutional disputes between the other two 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 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."

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8. Federalist Society 2019. 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 interbranch 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 decision-making 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." 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 various forms. As Justice Scalia observed, the Constitution gives Congress and the President many "clubs with which to beat" each other. 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 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 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* that Congress did not "disrupt the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions."

9. Federalist Society 2019. "Apart from their overzealous role in interbranch disputes, the courts have increasingly engaged directly in usurping Presidential decision-making authority for themselves. One way courts have effectively done this is by expanding both the scope and the intensity of judicial review. In recent years, we have lost sight of the fact that many critical

decisions in life are not amenable to the model of judicial decision-making. They cannot be reduced to tidy evidentiary standards and specific quantums 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 call into play the "precautionary principle." This is the principle that when a decision maker 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."

10. Federalist Society 2019. 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*. 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. For the first time, the Court ruled that foreign persons who had no connection with 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.

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 ride 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. 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. Thus, the Constitution in this arena deliberately sacrifices efficiency; invests the accused with rights that 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.

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. 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 – 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. For the first time in American history our armed forces is incapable of taking prisoners. 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. 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.

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.

11. Federalist Society 2019. The impact of these judicial intrusions on Executive responsibility have been hugely magnified by another judicial innovation – the nationwide injunction. First used in 1963, and 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 40 nationwide injunctions against the government. By comparison, during President Obama's first two years, district courts issued a total of <u>two</u> nationwide injunctions against the government. Both were 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 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; 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 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, 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.

Of particular relevance to my topic tonight, nationwide injunctions also disrupt the political process.

12. Federalist Society 2019. "the sheer volume of [the intrusion] 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 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. **There is no FOIA 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 process . . . such efforts "obstruction of Congress" and holding Cabinet Secretaries in contempt.

13. Federal Society 2019. "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 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. 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.

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. Alternatively, they could vest Executive power in a solitary individual. 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. Even Jefferson – 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 America's unitary Executive as a signal feature that distinguished America's success from France's failed republican experiment.

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. So much for this supposedly nefarious theory of the unitary executive."

14. "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. 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 wrong-headed and atavistic . . . 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. 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 such a big deal if one branch expands its role within that sphere at the expense of the other."

This mushy thinking obscures what it means to say that powers are shared under the Constitution. Constitution generally assigns broad powers to each of the branches in defined areas. Thus, the Legislative power granted in the Constitution is granted to the Congress. At the same time, the Constitution gives the Executive a specific power in the Legislative realm – the veto power. Thus, the Executive "shares" Legislative power only to the extent of the specific grant of veto power. The Executive does not get to interfere with the broader Legislative power assigned to the Congress.

15. On August 12, 2019, Attorney General remarked at the Grand Lodge Fraternal Order of Police's 64th National Biennial Conference on a "the emergence in some of our large cities of District Attorneys that style themselves as "social justice" reformers, who spend their time undercutting the police, letting criminals off the hook, and refusing to enforce the law. These anti-law enforcement DAs have tended to emerge in jurisdictions where the election is largely determined by the primary. Frequently, these candidates ambush an incumbent DA in the primary with misleading campaigns and large infusions of money from outside groups. Once in office, they have been announcing their refusal to enforce broad swathes of the criminal law."

16. Notre Dame 2019. "Men are subject to powerful passions and appetites, and, if unrestrained, are capable of ruthlessly riding roughshod over their neighbors and the community at large. No society can exist without some means for restraining individual rapacity. But, if you rely on the coercive power of government to impose restraints, this will inevitably lead to a government that is too controlling, and you will end up with no liberty, just tyranny. On the other hand, unless you have some effective restraint, you end up with something equally dangerous – licentiousness – the unbridled pursuit of personal appetites at the expense of the common good. This is just another form of tyranny – where the individual is enslaved by his appetites, and the possibility of any healthy community life crumbles. "In the words of Madison, "We have staked our future on the ability of each of us to govern ourselves…" This is really what was meant by "self-government." It did not mean primarily the mechanics by which we select a representative legislative body. It referred to the capacity of each individual to restrain and govern themselves."

The "force, fervor, and comprehensiveness of the assault on religion we are experiencing today. This is not decay; it is organized destruction. Secularists, and their allies among the "progressives," have marshaled all the force of mass communications, popular culture, the entertainment industry, and academia in an unremitting assault on religion and traditional values. These instruments are used not only to affirmatively promote secular orthodoxy, but also drown out and silence opposing voices, and to attack viciously and hold up to ridicule any dissenters. One of the ironies, as some have observed, is that the secular project has itself become a religion, pursued with religious fervor. It is taking on all the trappings of a religion, including inquisitions and excommunication. Those who defy the creed risk a figurative burning at the stake – social,

educational, and professional ostracism and exclusion waged through lawsuits and savage social media campaigns . . . today – in the face of all the increasing pathologies – instead of addressing the underlying cause, we have the State in the role of alleviator of bad consequences. We call on the State to mitigate the social costs of personal misconduct and irresponsibility. So[,] the reaction to growing illegitimacy is not sexual responsibility, but abortion. The reaction to drug addiction is safe injection sites. The solution to the breakdown of the family is for the State to set itself up as the ersatz husband for single mothers and the ersatz father to their children. The call comes for more and more social programs to deal with the wreckage. While we think we are solving problems, we are underwriting them. We start with an untrammeled freedom and we end up as dependents of a coercive state on which we depend. Interestingly, this idea of the State as the alleviator of bad consequences has given rise to a new moral system that goes hand-in-hand with the secularization of society. It can be called the system of "macro-morality." It is in some ways an inversion of Christian morality. Christianity teaches a micro-morality. We transform the world by focusing on our own personal morality and transformation. The new secular religion teaches macro-morality. One's morality is not gauged by their private conduct, but rather on their commitment to political causes and collective action to address social problems."

"It is hard to resist the constant seductions of our contemporary society. This is where we need grace, prayer, and the help of our church. Beyond this, we must place greater emphasis on the moral education of our children. Education is not vocational training. It is leading our children to the recognition that there is truth and helping them develop the faculties to discern and love the truth and the discipline to live by it. We cannot have a moral renaissance unless we succeed in passing to the next generation our faith and values in full vigor. The times are hostile to this. Public agencies, including public schools, are becoming secularized and increasingly are actively promoting moral relativism. If ever there was a need for a resurgence of Catholic education – and more generally religiously-affiliated schools – it is today. I think we should do all we can to promote and support authentic Catholic education at all levels. Finally, as lawyers, we should be particularly active in the struggle that is being waged against religion on the legal plane. We must be vigilant to resist efforts by the forces of secularization to drive religious viewpoints from the public square and to impinge upon the free exercise of our faith. I can assure you that, as long as I am Attorney General, the Department of Justice will be at the forefront of this effort, ready to fight for the most cherished of our liberties: the freedom to live according to our faith."

17. Federalist Society 2019. "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 to an abstract ideal of perfection. Whatever means they use are therefore justified because, by definition, they are a virtuous people pursing 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.

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. This means that we naturally test the propriety and wisdom of action under a "rule of law" standard. 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?

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 far, especially when doing so under the weight of a hyper-partisan media."

18. Notre Dame 2019. "A third phenomenon which makes it difficult for the pendulum to swing back is the way law is being used as a battering ram to break down traditional moral values and to establish moral relativism as a new orthodoxy. Law is being used as weapon in a couple of ways. First, either through legislation but more frequently through judicial interpretation, secularists have been continually seeking to eliminate laws that reflect traditional moral norms. At first, this involved rolling back laws that prohibited certain kinds of conduct. Thus, the watershed decision legalizing abortion. And since then, the legalization of euthanasia. The list goes on. More recently, we have seen the law used aggressively to force religious people and entities to subscribe to practices and policies that are antithetical to their faith. The problem is not that religion is being forced on others. The problem is that irreligion and secular values are being forced on people of faith. This reminds me of how some Roman emperors could not leave their loyal Christian subjects in peace but would mandate that they violate their conscience by offering religious sacrifice to the emperor as a god. Similarly, militant secularists today do not have a live and let live spirit - they are not content to leave religious people alone to practice their faith. Instead, they seem to take a delight in compelling people to violate their conscience."

19. But what was the source of this internal controlling power? In a free republic, those restraints could not be handed down from above by philosopher kings. Instead, social order must flow up from the people themselves – freely obeying the dictates of inwardly-possessed and commonly-shared moral values. And to control willful human beings, with an infinite capacity to rationalize, those moral values must rest on authority independent of men's will – they must flow from a transcendent Supreme Being. In short, in the Framers' view, free government was only suitable and sustainable for a religious people – a people who recognized that there was a transcendent moral order antecedent to both the state and man-made law and who had the discipline to control themselves according to those enduring principles. As John Adams put it, "We have no government armed with the power which is capable of contending with human passions unbridled by morality and religion. Our Constitution was made only for a moral and religious people. It is wholly inadequate for the government of any other." As Father John Courtney Murray observed, the American tenet was not that: "Free government is inevitable, only that it is possible, and that its possibility can be realized only when the people as a whole are inwardly governed by the recognized imperatives of the universal moral order."

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21. In a speech at **Heritage Foundation** on October 2018, former US Attorney General Jefferson B. Sessions delivered "Remarks to the Heritage Foundation on Judicial Encroachment." He remarked that "empathy" is "more akin to emotion, bias, and politics than law" and that "Judicial activism is therefore a threat to our representative government and the liberty it secures. We at the DOJ fight against this heresy relentlessly." The former Attorney General remarked, "In effect, activist advocates want judges who will do for them what they have been unable to achieve at the ballot box. It is fundamentally undemocratic. Too many judges believe it is their right, their duty, to act upon their sympathies and policy preferences."

Heritage Foundation 2018. https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-heritage-foundation-judicial-encroachment