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BEYOND TRUMP: THREATS TO THE PRESIDENCY

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Good afternoon, and thanks very much to Jack Solowey for that generous introduction. And thanks to Nick Gallagher and the NYU chapter of the Federalist Society for holding this important conference, and for allowing me the privilege of this podium.

The invitation to speak here actually came at the very beginning of the month. You know, time was when you got an invitation four weeks in advance, you could actually prepare, and if you finished drafting your speech you could at least be assured that what sounded timely when you sat down to write it would still sound timely when you got up to deliver it.

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No more.

Given the pace of political events, I think the United States may be in danger of fitting Henry Kissinger's description of Germany—which he called a country that creates more history than it can consume domestically, within its own borders. There is absolutely no assurance that what you write in the morning will necessarily be timely if you say it in the afternoon, let alone if you say it a few weeks later. Events have a way of turning prepared remarks into confetti. And of course the insights of others—which I have spent the day listening to—have a way of doing the same thing.

I think a lot of the odd behavior we have seen emanating from the White House—and from elsewhere—during the Trump Administration has led many in the opinion business—people who are paid to have and express opinions—to say that the institution of the presidency, and indeed, the country, will never again be the same as it was before Donald Trump became president. That that will damage the ability of our country to function and to protect its citizens and residents. And that it will change if not forever then certainly for the foreseeable future the relationship between the president and the citizenry, and between the executive and the other branches of government.

I have a hard time seeing that, and I would like to return for a few moments to basics, and then to examining some trends that were at work long before President Trump took office and how they may be affected both directly and indirectly by his tenure.

So let's start with basics. In its first three articles the Constitution puts in place a structure of three branches of government—each independent of the others in a sense, but all operating as part of the same structure, and necessarily interacting with one another—occasionally colliding with one another.

Specifically, Article I creates a legislature of two houses, but they may legislate only on specific topics. It doesn't say all legislative powers shall be vested in a Congress of the United States; it says "all

legislative Powers herein granted shall be vested in a Congress of the United States," and the list is restricted to what is in Article I, section 8. And the much celebrated "necessary and proper" clause at the end that gives Congress the power to enact laws necessary and proper isn't some joker in the deck—some wild card that cancels out the limitations in the article, but only a grant of power "to make all laws which shall be necessary and proper to carry into execution the foregoing powers."

Now I recognize that there have been some broad readings of the commerce clause that have permitted legislation on a range of subjects that would have amazed the founders, and not necessarily delighted them. But those readings are subject to review, and if necessary reconsideration, by the same branch that created them—the judiciary.

Article II, by contrast, contains no such limitations. It provides that "the executive Power shall be vested in a President of the United States of America"—not "the executive Power herein granted" but "the executive Power"—period; all of it.

Neither of those articles will be amended as a result of Donald Trump's tenure in office, whether it lasts four years or eight.

I also don't see a return to what Woodrow Wilson described as the "Congressional government" that he said followed Andrew Johnson's impeachment. For one thing, Articles I and II of the Constitution, as they have been read by the Court, would seem to stand pretty firmly against that.

But for another, that would require that Congress as an institution at least show a collective tendency to face up to and deal with, and—most importantly—take responsibility for, decisions. And I suggest to you that that body collectively—and individually—is nowhere near ready to do that, even if one were to assume that the most critical problems we face lent themselves to attack by a legislative body. (And I don't think they do.)

Most of our truly critical problems arise in connection with our relations with the rest of the world, in its relationship to us, and—relatedly—in connection with assuring that we can defend ourselves.

Yet foreign relations and national defense are peculiarly the responsibility of the executive.

But let us assume for a moment that somehow the legislature collectively was of a mind to engage in foreign policy or national defense governance. How would that work? Let me give you an example from my own experience. When I went through confirmation hearings, several Democrat members of the Senate Judiciary Committee tried to get me to say that waterboarding as engaged in by the CIA on what we now know was three prisoners was torture. Inasmuch as I did not know what precisely was done under the heading of waterboarding, and inasmuch as there is a statute that defines torture in precise terms based on its effect—severe physical or mental pain or suffering—I couldn't answer the question responsibly. They pushed for an answer, claiming in some cases that I was being evasive or worse.

It was not until I found out that not on one occasion but in fact on two there had been proposed legislation to define waterboarding as torture, and that those bills had been voted down, did I realized that what the senators were trying to do was to get someone to do their work for them—and to take the blame for the result. They were unwilling to write a law that made waterboarding illegal, and to take responsibility for whatever might be lost as a result, but they had no problem trying to get an executive officer to do the job for them.

I know we have heard in the past, and hear to some extent in the present, of the excesses of the imperial presidency, and the suggestion that the founders would disapprove, having been shaped by the excessive exercise of executive power in the person of George III.

I think a more accurate reading of history is that their attitude toward the executive was shaped by the unfortunate experience of

the Articles of Confederation, and the dangers of a weak to non-existent executive that were illustrated during the eight years that we were governed—sort of—by the Articles of Confederation.

If we perceive now a dramatic change in the relationship of Congress to the president, I think that is far more personal than institutional; it is a change in the relationship between Congress and this president. You may recall that right after the election, some on the left began immediately to rally to a call to resist—one word. Not resist this program or that, not resist this policy or that, but simply resist.

It hasn't gotten much play, and I think although many people in this room are aware of it, the electorate at large isn't, that part of this resistance—which of course is meant to evoke the courageous image of those few (and despite lots of post-war myth, they were only a few) who resisted Nazi Germany in occupied countries during World War II—a good deal of this resistance has involved use of Senate rules to largely prevent staffing of the executive branch of government in those positions that require Senate confirmation, and thereby actually to prevent this administration from governing.

Although I think it is fair to say that right after the election the incoming Administration seems not to have been ready with lists of potential holders of executive office to nominate, the fact is that there are now scores of nominees whose hearings have been slowed down and who have been denied floor votes by a very simple expedient: there is a Senate rule that permits any senator to insist that at least 30 hours of floor debate be set aside for each nominee.

When you consider how many hundreds of jobs there are—I believe 674 by conservative count—that can be filled only with Senate-confirmed appointees, it becomes apparent that if each nominee for such a job were to receive 30 hours of debate by the full Senate, it would take several years to fill all the positions requiring Senate confirmation. The effect of that has been—and I think

consciously so—to make it impossible for the Administration to govern except through holdovers.

It used to be that the rule for executive nominees was that a president was entitled to have his team in place in the executive. Although judges were fought over for reasons we will get to, and that have had far greater significance than anything going on in the friction between the executive and the legislative branches of government, the use of this Senate rule to change what had been the normal presumption—that is a change that is strictly personal to this president, and one that the legislature, and particular members of the legislature—have not been made to defend before the public.

One thing that may change, though, in the performance of the government during or after the Trump Presidency, and this would be very much a change for the better, is the willingness of the judiciary to limit the powers of Congress, particularly its power to delegate legislative powers to an administrative bureaucracy—what Justice Scalia described in a case involving the federal sentencing guidelines when he referred to the sentencing commission as a "junior-varsity Congress."

Because appointments to the federal bench thus far in the current administration, particularly to the Courts of Appeal—although the appointment of Justice Gorsuch was indeed a major step—have been resolutely conservative, tolerance for the administrative state may begin to wane.

Before I get further down the road to where the judiciary appears to be taking us, I want to touch on one area in which Congress could assert itself, to our collective benefit, and that is in its power to investigate. Congressional oversight is properly exercised in aid of Congress's assertion of its own powers, principally the power to legislate. And here we come to a point that was made as recently as yesterday in a *Wall Street Journal* column by Bill McGurn. Congress could demand that public officials who have resisted subpoenas for documents be compelled to testify, whether in aid of legislation or—

frankly—in aid of removing them from office by impeachment if necessary.

John Koskinen of the IRS resisted to the end testifying candidly about that agency's discriminatory treatment of conservative groups seeking tax exempt status; he could have been impeached. Not that that in itself would have accomplished a great deal because he had only a limited time to serve in office. But he could have been compelled to testify and make himself and his agency politically accountable, on pain of contempt. That by itself would also have served the salutary goal of convincing others in the executive that when congress asks for information, it means business. That, in turn, might have prevented the spectacle of the Justice Department and the FBI resisting demands for documents.

And that, in turn, would perhaps diminish the tendency to see every unusual problem as the occasion for appointing a special counsel.

Now judges for centuries have worn black robes in part as a symbol that they are, or at least are supposed to be, the same; the same to and for everyone, just as the law itself is the same for everyone. It isn't supposed to matter whose head is popping up from beneath the black crepe; they all apply the same law.

That probably has been a bit dubious for some time, but it has been at least aspirational—even if all judges are not actually the same, they perhaps should aspire to a careful enough adherence to an objective law that the result should depend on what the facts are and what the law is, not what the opinion trends are and who the judge is.

I think what we saw increasingly well before Donald Trump is that judges are perceived to be, and in some cases very well may be, political players. And so it matters very much who the judge is. It matters to the point where a confirmed justice now sitting on the Supreme Court could tell the Senate Judiciary Committee, and the rest of us, that a wise Latina might very well have something to offer

to the process of deciding a case that would not be available from a white, Anglo-Saxon, Protestant male—even a wise one—and no one challenged her, or suggested that the comment was the least bit objectionable, or even remarkable.

More recently, news reporters describing a panel of Ninth Circuit judges sitting to decide a case involving what has been referred to as the travel ban, referred to the panel as "bipartisan"—meaning that it included at least one appointee of each of our political parties—and these reporters thought the term was not only accurate but actually complimentary.

Since we are concerned with a long-term trend, it is fair to ask when did this all begin; how did we come to this?

There are those who might say it began at the latest when President Roosevelt sent to Congress something called the Judicial Procedures Reform Bill of 1937—which, like any piece of legislation whose title includes the word "reform," contained a lot of mischief—and soon became known as the "court-packing plan."

You will recall that the plan to pack the court did not go through, and didn't have to because the Justices took the hint and started permitting New Deal legislation to stand, thereby carrying out what became known as the "switch in time that saved nine."

But I would bring the date a lot closer in time—specifically to 1965, when the supreme court decided *Griswold v. Connecticut* and for the first time articulated as a Constitutional construct the right to privacy.

I use the phrase "as a Constitutional construct" advisedly, because those of you familiar with the actual words of the actual Constitution, and its amendments, may be aware that the word "privacy" appears nowhere in the document.

Griswold involved a Connecticut statute that was probably considered uncommonly silly even in 1965, that banned the sale and distribution of contraceptive devices. Now even though the statute generally went unenforced, a number of professors and students at

my alma mater, Yale Law School, along with one or two cooperative physicians, decided to arrange a test case to challenge the constitutionality of the law. So the physicians duly distributed contraceptives, and were duly fined a symbolic $100, and the case wound its way up to the Supreme Court, which decided in 1965 that the statute was unconstitutional. It violated the right to privacy, and that although the word privacy was not to be found anywhere in the written Constitution, the concept of a right to a zone of privacy could be found in what was described as penumbras formed by emanations from the Amendments that were in the written Constitution.

Of course, once you start enforcing emanations that form penumbras, it really isn't that long a distance to defining the "heart of liberty" as having to include "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," although the mystery of human life could be terminated by the right to define one's own concept of existence and of meaning—or so it seems from the result in *Planned Parenthood v. Casey*, where that passage appeared.

Even the right to define one's own concept of existence, or at least the existence of one's unborn child, might have to yield when it is found, as held in *Gonzales v. Carhart* in 2007, in a passage written by the same Justice who said we all have the right to define our own concept of existence, that "the government may use its voice and its regulatory authority to show its profound respect for the life within the woman."

The point here is not simply to skip rocks off the Supreme Court, or even only Justice Kennedy (who wrote the passages quoted immediately above), but rather to lift the lid off a tendency in the judiciary that I suggest to you is having and has had profound effects on our governance.

It is quite simply the tendency to see every societal problem as one that can and probably should be solved by judges. And once judges start down that road, they risk becoming political

functionaries like any other, expected to serve the will of whatever theory or thought is current among those regarded as right-thinking people.

I don't mean here to blame solely the judiciary for this development. Far from it. After all, Congress has the power to define—and of course to limit—the jurisdiction of federal courts, and Congress could use that power any time it wished to constrain the courts or at least to limit them to proper subject matter.

Rather, it would seem that Congress is at the least passively complicit in the process, if it does not actually encourage it actively. After all, it is far easier to duck controversial issues, such as abortion and other privacy related issues, and simply to shrug and say the courts have decided, than it is to have to try to resolve such issues through the political process of give-and-take, and risk offending some active constituency.

That is not likely to change until the effect of appointing conservative judges can be felt on a wide scale, which is to say not for a while.

Until then, it appears we will have to put up with such things as the most current arrogation of power by courts, which concerns an issue that at least arguably engages the duty and authority of the executive with respect to protecting our national security—namely, the executive order, or orders, embodying the so-called travel ban.

There was a time when judges did not need to be reminded of the limits of their mandate, particularly in matters of national security. Justice Jackson, writing for the court in *Chicago & Southern Air Lines v. Waterman Steamship Co.*, in 1948, explained why national security issues were the responsibility of those branches of government with political accountability. Such decisions, he wrote, are "wholly confided by our Constitution to the political departments of the government, executive and legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the

people whose welfare they advance or imperil. They are decisions of a kind for which the judiciary has neither aptitude, facilities nor responsibility, and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

That was the rule in ordinary times. But with respect to President Trump these are not ordinary times, because currently fashionable thought in some circles regards whatever he does as the act of someone who cannot be regarded as a president, because, although he was duly elected, his taking of a solemn oath to uphold the Constitution cannot be taken seriously, as he has not shown he is the sort of person who understands what a solemn obligation actually is. That is the underlying reasoning that seems to be the only support for the judicial decisions invalidating the travel ban order.

As you know, the order in question bars entry into the United States for any non-U.S.-citizen who does not have either a visa or a green card and who is traveling from any of seven nations, five of which are predominately Muslim. These nations were already singled out by the prior administration and by Congress for particular concern. Despite the recitation in the last order of the reason why each of these countries presented a legitimate cause for concern, and despite an explicit statute that grants the president authority to exclude any alien or group of aliens so long as he avers that it is in the national interest to do so, a few district judges have held that the order in question violates the Establishment Clause of the Constitution by disfavoring a particular religion—the Muslim faith—in contrast to others.

Interestingly, the cited support for this conclusion in each case lies not in the effect of the order, which after all does not apply to most Muslim countries, but the cited support comes rather from statements by the president who signed the order that were made in some cases during his campaign for president, when he said he would impose a ban on Muslims, in some cases years before he ran for president and in contexts other than immigration, and finally on

statements by him and by others after he was elected to the effect that the order in question essentially embodies the promises and positions he took during the campaign.

What the judges who decided these cases have done is to say essentially that so long as the order emanates from Donald Trump, it cannot be given the normal presumption of regularity that would attach to the order of another president or indeed any other executive officer who had taken an oath to uphold the Constitution and who was acting on a stated basis that was facially neutral and non-discriminatory.

In essence, what they seem to be saying is that this president's acts are permanently tainted by whatever statements of improper motive he has ever made, or have ever been made on his behalf by others.

There are two ways that this can stop. One, of course, would be that there is the long-term change in the judiciary that the appointment of conservative judges can introduce—a process likely to take years.

The other is by some event that focuses the mind of the electorate.

All of this would be of limited interest—after all, these orders are on their face temporary and in any event deal only with one discrete issue—if not for the fact that whether we acknowledge it or not, we have been for decades the main targets of a war being waged by a death cult. That is a war that we did not choose, and that will go on whether we acknowledge it or not. It is a war we may well have to fight on our own soil during the Trump Presidency, and if courts will not permit the government to act because the motives of the person who heads it are suspect, we may be in for tragically difficult times.

I recognize that the Defense Department recently issued its annual view of the challenges facing us and has said that our principal concern at the moment has shifted from terrorism to the conduct of conventional sovereign states—specifically China and Russia. I certainly am not going to stand up here and deny that they

present enormous challenges, but so far as a shift away from terrorism, the terrorists—whether in the ungovernable suburbs of Paris or the ungovernable swaths of Libya, do not seem to have gotten the memo; and indeed, the DNI two weeks after the Defense Department report issued his own report and found that terrorism was active and thriving around the world.

We cannot summon the will to resist it systematically, however, until we first get our minds around the nature of the adversary we face: proponents of a totalitarian ideology, based in a religion that functions across geographic lines in large part because it does not recognize the legitimacy of nation-states—any nation-states. In order to do that—to get our minds around that—we will have to follow the direction of perhaps the greatest president of the United States, certainly the greatest lawyer president, who said this in 1862 about how to deal with an unprecedented crisis that threatened the existence of the country at that time: he said, "as our case is new, so we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country."

And how do we get people to disenthrall themselves? I recognize that the willingness and ability of a chief executive to articulate the problem would help. But we can do our share, perhaps by helping people recall that in one respect this "-ism" is like the others we faced—and faced down—in the 20th century. It is similar to them in that it holds out the dream of a world without whatever it is that the ideology opposes. So Nazism dreamt of a world without Jews, and communism dreamt of a world without God, and Islamism—sharia supremacism, as practiced by Iran among the Shia and the Muslim Brotherhood among Sunnis—dreams of a world without kuffar—infidels, which is to say a world without most of us.

If knowing that doesn't get people to disenthrall themselves, I think nothing will.

Thanks very much for hearing me.