Preserver or Disrupter:
The Supreme Court and the Balance of Powers Today

Purdue University Program on American Institutional Renewal

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My presence here this afternoon is both a great pleasure and a serious challenge.

It's a pleasure because I have deep ties to Indiana University – albeit, forgive me, to the Bloomington campus. My daughter is a happy graduate of IU Bloomington, where she received a solid foundation for the Hollywood film and television career she is successfully pursuing. My sister taught anthropology and my brother-in-law was dean of the law school. I was fortunate enough to receive an honorary degree in 2016, making me a proud honorary Hoosier. So even though I understand the rivalry – one of my favorite editors was a Purdue graduate – coming to Purdue for the first time feels like a homecoming.

It's a challenge because talking about the functioning of American government these days – let alone the Supreme Court – is to risk taking a deep dive into the polarization that besets American society. My hope is to inform without offending. Is that even possible today? I'm comforted in the knowledge that this lecture is endowed in memory of Senator Birch Bayh, who exemplified the devotion to public service and the commitment to civility that seem so sadly lacking now. I never knew Senator Bayh. But I did know, although only slightly, that other estimable Hoosier politician, Senator Richard Lugar. One a Democrat, the other a Republican, they were political rivals but they were also friends who shared the goal of using politics to make things better for their state and their country. Politics, to them, was not an end in itself. It was a means to

an end, the way our democratic system gives us to harness the power of government to deliver services and improve lives.

Politics today often sounds like a dirty word, but it doesn't have to be and it shouldn't be. In that spirit, my lecture won't be partisan, but it will be political. By that, I mean that I will talk about the political system by which Americans govern themselves. You don't need me to tell you that it is a system under stress. That's not a partisan statement. It's a fact. And it's obvious to all that one core aspect of American government that is buckling under stress is the separation of powers. The implication of this fact is my subject today.

But first, I have to say a word about this occasion: Constitution Day. All across the country today, schools, colleges and universities are marking the 238th anniversary of the signing of the Constitution with lectures, readings, and displays of various kinds. Maybe some of these institutions would be doing this anyway, but I have to acknowledge that during my decades of school attendance in the 1950s and 60s, no one had ever heard of Constitution Day, much less celebrated it. We are here because of a law enacted in 2004, sponsored by Senator Robert Byrd of West Virginia, who during his 51 years in the Senate famously carried a copy of the Constitution in his pocket and whipped it out to answer any question. The law provides that all educational institutions that receive federal money must observe September 17, give or take a few days, as Constitution Day or lose their federal money.

So here's a question to ponder: Is Constitution Day constitutional? Doesn't this law compel or coerce speech, when it is clear that under the First Amendment, the government cannot tell individuals what to say? Well, you might say, it's not really coercion if a school can simply opt out by declining the federal money. But that runs into

another Supreme Court doctrine called the doctrine of unconstitutional conditions: the government may not attach a condition to receipt of a benefit that is so onerous that as a practical matter, the benefit can't be declined.

Certainly Senator Byrd had no doubt about the constitutionality of the program he set in motion. Rather, he said that "constant study and renewal of our knowledge about the Constitution" was essential. "If we fail to understand the importance of the checks and balances between Congress, the Supreme Court, and the Executive Branch," he said in his Constitution Day message in 2006, "we will not be in a position to know when these checks are threatened."

Nonetheless, there is a substantial academic literature that questions the constitutional legitimacy of this observance. Alain Sanders, a political scientist, published an article in Constitutional Commentary back in 2007, noting that the coercion at the heart of Constitution Day "may be used not only today to dictate a loose, well-intentioned, information program about the Constitution." He warned: "It may be used tomorrow to dictate a uniform educational curriculum on anything the federal government considers important or useful for the nation's youth." That was, he said, "a dangerous slope on which to tread and to slip."

I raise this question not to cast a cloud of doubt over our gathering today, but rather because describing Constitution Day as a possible peril rather than a purely benign exercise teaches us something important, namely that nothing about the Constitution is simple. Well, a few things are simple: no one who has not attained the age of 35 can be President of the United States. But any aspect of the constitutional system that is expressed in words rather than numbers is subject to interpretation, and interpretation means complexity.

Take my topic – the separation of powers. That's not a phrase found in the Constitution, but rather is a common description for the tripartite system of government that the Framers established. As James Madison expressed the rationale for separated powers in Federalist No. 47: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

That's the theory. How does that translate into practice? Obviously, the framers didn't contemplate complete separation, but rather a dynamic equilibrium: the president signs or vetoes the bills that Congress passes; the Senate confirms or rejects presidential nominees. The nature of the equilibrium at any one time responds to politics – to the political strength or weakness of the occupant of the White House, to the nature of congressional leadership, and to the Supreme Court's view of its role. President Franklin Roosevelt, supported by huge majorities in Congress, sought to bring the Supreme Court to heel and eventually succeeded. Derogatory descriptions of "the imperial presidency" and "the imperial judiciary" have been heard throughout American history. Now it is common, and well justified, to deplore the disappearance of Congress as a co-equal branch of government. "As Congress Lies Down, Trump Walks All Over It," read a headline in the New York Times earlier this month.

In the aftermath of the Watergate scandal of the 1970s, an activist Congress enacted limits on the presidency that some people eventually came to view as having gone too far. An effort to reconstitute presidential power played out for some decades and is playing out today under the label of the "unitary executive," meaning that the independent or quasi-independent Executive Branch agencies that are the legacy of the New Deal need to be brought under direct presidential control. Congress also responded

to Watergate by placing limits on the ability of politicians to raise and spend money on their campaigns. As a libertarian view of the First Amendment took hold at the Supreme Court, the limits on campaign finance were reduced to near the vanishing point by a series of Supreme Court decisions that, being based on the Constitution, left Congress with little ability to respond.

I mention these incidents from the past to show that there is no one settled view of the separation of powers. If there is one lesson to draw from history, it is that a healthy separation of powers requires each branch to take an active role in defending its own prerogatives while respecting the boundaries that two centuries of experience have established as norms.

I'll have more to say about the present moment, but first let me recount something that happened six years ago, in the summer of 2019. Earlier that year, the president had gone to Congress to request a $5.7 billion appropriation to fortify ten locations in the wall he was building on the border with Mexico. Congress appropriated only $1.375 billion and specified that the money was to be spent only in eastern Texas. This did not satisfy the president, who declared a national emergency that he said entitled him to take the money he wanted from elsewhere in the Defense Department's budget and to spend it on portions of the wall in New Mexico, Arizona and California.

The president claimed that he had "express statutory authority" to do that under Section 8005 of the Defense Department appropriations act, which does in fact authorize some transfers from one budgetary bucket to another. But that law also sets some conditions: the transfer has to be in response to "unforeseen military requirements" and can occur "in no case where the item for which funds are requested has been denied by Congress."

Needless to say, a lawsuit ensued, brought by an environmental group claiming that the construction would endanger the fragile landscape in the places that Congress had aimed to protect. After the plaintiffs prevailed in Federal District Court, the appeals court, while setting the case for argument a few months down the road, refused to grant the administration's request for a stay of the District Court's decision. In its refusal, the appeals court cited Article I, Section 9, Clause 7 of the Constitution: "No money shall be drawn from the Treasury, but in consequence of appropriations made by law." In other words, this was a case about the separation of powers.

The administration then took its case to the Supreme Court. We need a stay now, without waiting for the appeals court to hear the case, the administration said, because the fiscal year is about to run out and we have to spend the money that we say is ours before the appropriation vanishes. The House of Representatives filed a brief at the court opposing the administration's request. "The power of the purse is an essential element of the checks and balances built into our Constitution," the House reminded the justices, adding that "even the monarchs of England learned long ago that they could not spend funds over the opposition of Parliament."

By a vote of 5 to 4, ruling from what later came to be known as the shadow docket, the court gave the administration what it had requested, a stay that allowed the construction to proceed. If anyone was surprised, it certainly was not the president. Back in February, when he declared the national emergency and announced his plan to repurpose the billions of dollars, he had observed: "We will then be sued. And we will possibly get a bad ruling, and then we will get another bad ruling, and then we will end up in the Supreme Court, and hopefully we will get a fair shake and win."

That president, of course, was Donald Trump. Why, when there are so many similar examples from today's headlines, did I go into such detail on this old case? Because I think it is such a clear example of what happens when the separation of powers breaks down and when the Supreme Court becomes the breakdown's enabler. It is a template. Most Americans have forgotten this case (which was called Trump v. Sierra Club) if they ever knew of it, but the president and the people around him certainly have not. I could condense the pages I just read from into three lines:

Congress: *Mr. President, you may not.*

President: *Well, I will anyway.*

Supreme Court: *Oh, OK.*

Before bringing this story up to date, I want to reflect for a moment on what the separation of powers used to mean.

In 1952, during the Korean War, the country's steelworkers were about to go on strike, posing an imminent threat to the country's ability to continue producing weapons and other war material. When efforts to head off the strike failed, President Truman issued an executive order directing the Secretary of Commerce to seize the steel mills in the name of the United States in order to keep them running. The steel mill owners sued, arguing that the president lacked the constitutional authority to take such action. The case reached the Supreme Court on an extremely fast track. Every member of the Court, all nine justices, had been appointed either by FDR or President Truman. Truman argued that the seizure was vital to the nation's defense. His claim of constitutional authority rested on the Constitution's commander-in-chief clause, which provides that "the President shall be commander in chief of the Army and Navy of the United States." How would the court respond?

By a vote of 6 to 3, in Youngstown Sheet and Tube Company v. Sawyer, the court held that the seizure was unconstitutional. It was an act of lawmaking, Justice Hugo Black wrote for the majority, and "the founders of the nation entrusted the lawmaking power to the Congress alone in both good and bad times." That was clear enough, but the case became known for the concurring opinion by Justice Robert Jackson, a close ally of FDR's who had served the Roosevelt administration as both solicitor general and attorney general. His definition of the separation of powers, not in theory but in practice, was to endure for many decades. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government," he wrote. "It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." And he continued: "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."

Then Jackson came to the heart of his opinion. He laid out three different circumstances. First, "When the president acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." That was clearly not this case.

Second, when the president acts in the absence of congressional authority, he enters a "zone of twilight" in which the president and Congress may have concurrent authority, and which branch prevails may depend on "the imperatives of events and contemporary imponderables rather than on abstract theories of law." That category did not fit this case either, Jackson said.

And then there was the third category: when the president takes action "incompatible with the expressed or implied will of Congress." Then, the president's power was at its "lowest ebb," Jackson wrote, because what was at stake in such a claim to presidential power was "the equilibrium established by our constitutional system." And that was the steel seizure case. Justice Jackson was forceful in his rejection of the president's claim to authority under the Commander in Chief clause. "Nothing in our Constitution is plainer than that declaration of war is entrusted only to Congress," Jackson wrote. "There are indications that the Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute him also Commander-in-Chief of the country, its industries and its inhabitants."

He concluded with these words: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up."

It is painful to read those eloquent words – Jackson is known as the best writer ever to sit on the Supreme Court -- side by side with the current court's nearly complete silence in the face of challenges of profound and historic dimension. The Court granted the president's request for stays of adverse decisions some two dozen times this summer, and in most of those cases, it has been the dissenters who have chosen to speak while the majority remained silent. I want to be fair to the Court. None of these were decisions on the merits, which would have produced written opinions and may eventually do so. All were procedural, for the most part granting a stay of a District Court decision while the administration was appealing to the next highest level.

But these were procedural rulings with real consequences. In July, for example, the Court granted a stay of a District Court decision that blocked the administration from dismantling the Department of Education. The 6-to-3 majority provided no explanation whatever. In a dissent joined by Justices Kagan and Jackson, Justice Sotomayor objected that "only Congress has the power to abolish the department." She continued: "When the Executive publicly announces its intent to break the law, and then executes on that promise, it is the judiciary's duty to check that lawlessness, not expedite it." Of course, even if the Supreme Court rules eventually that the dismantling was unlawful, it will be extremely difficult to reanimate the department, with nearly all its employees fired, its grants cut off and its programs shuttered. The dissenters alluded to that reality: "The majority is either willfully blind to the implications of its ruling or naïve, but either way the threat to our Constitution's separation of powers is grave."

Last week, the federal appeals court in Washington, D.C. enjoined the administration from firing the Register of Copyrights. It was an easy case. The Register of Copyrights, an important administrative position, is lodged in the Library of Congress, which is part of the legislative branch. The Librarian of Congress by statute is the only one who can hire and fire the occupant of this position. (As it happened, the president recently fired the Librarian of Congress.) The president's firing of this official, ostensibly because he disagreed with a report she prepared for Congress on copyright aspects of artificial intelligence, was "akin to the president trying to fire a federal judge's law clerk," the appeals court said.

Certainly, the administration will come to the Supreme Court with an emergency request for a stay while the justices consider whether to hear the case on the merits. You

may remember my three-line rendition of the border wall case from 2019. Here would be my rendition of Perlmutter v. Blanche:

Appeals court: *Mr. President, this official is not yours to fire.*

President: *Well, I did it anyway.*

And what will be the third line?

Early this past summer, when I received the invitation from Professor Crosson to deliver this lecture and we chose the title, "Preserver or Disrupter, The Supreme Court and the Balance of Power," I assumed, and I suppose he did, too, that we would get some actual decisions from the court by now. Finally, a decision will be on the way – not soon enough for my visit to Purdue. Last week, the court agreed to hear, on the merits, the Trump administration's urgent appeal of the decision that invalidated the president's tariffs. The case will be heard in early November. This will be a fascinating exercise in the separation of powers, really a mirror of all that has gone before. The United States Court of Appeals for the Federal Circuit ruled last month that the statutory authority the president claimed for imposing "tariffs of unlimited duration on nearly all goods from nearly every country in the world" does not exist. Full stop. The statute is the International Emergency Economic Powers Act, which authorizes the president to "regulate" imports. But it does not, the appeals court said, "use the words 'tariffs' or 'duties' not any similar terms like 'customs,' 'taxes,' or 'imposts.'"

"Congress alone has access to the pockets of the people," the appeals court concluded its decision, quoting James Madison in Federalist 48. Does the separation of powers still mean what the framers thought it meant on September 17, 1787, when they signed the document and prepared to head home? Does it still mean what Robert Jackson thought it meant 73 years ago, when he voted against his party and blocked an

action that the president described as an urgent necessity? Or does it mean something quite different today – unbounded presidential power with very little balance? And if so, on Constitution Day 2025, what are the implications for American democracy?

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