



## SPEECH

# "Confronting The Judicial War on Faith" Conference

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April 8, 2005

Washington, D.C.

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Thank you very much. I have only one regret in starting out, and that is that I wish I could have been here sooner. Unfortunately, things were already on my schedule when this was being put together. I was yesterday in Indiana speaking for a crisis pregnancy center fundraiser. So, I was still doing the Lord's work.

But I come here today to try--if I can contain myself in a relatively impassive way--to talk about what I think is now the denouement of the crisis of constitutional self-government in our country.

And I say that because I think we have been headed toward it for a while. But even as, during the course of Roman times--on the day that Christ was crucified and in the aftermath, if you had consulted what might have been the equivalent of the media, and if you had taken a public opinion poll, most of the people in the Roman Empire would not have had the faintest idea of who Christ was and didn't realize that an epoch had just been passed in the history of the world--so, I think that many Americans don't realize that *in terms of the integrity of our constitutional system, an epoch just passed in Florida.*

And if we do not react to it, then what we understand to be constitutional self-government in this country--at least in terms of its practical mechanisms of survival--is, in fact, already dead.

Why do I say this? I say it because one of the key principles that is intended both to keep us from tyranny, as a free people, and to assure that the critical judgments that have to do with the most fundamental issues of principle and life and death and conscience will be brought *to the people* for decision--that is to say, will not be made by those who happen at any given moment to be in control of the instruments of government, but will be forced to the people as a whole--that mechanism in the Constitution has now been destroyed, and it lies in ruins unless we recapture the understanding that underlies it and revive it, before it's too late.

Now, why do I say this? I say this because we have just witnessed a spectacle of the governor of the state of Florida standing before all of us telling us he hadn't the power to do anything about what he himself admitted to be the unconstitutional order of a probate judge backed up by a county sheriff.

So, what does that mean? That meant that at the moment that Jeb Bush declared himself to be thus incompetent--and I use the word advisedly--in the face of the judicial order, the executive power in Florida was transferred from him to the probate judge, who became the supreme executive authority in the state of Florida.

We know, though, that if we're at all familiar with the Florida constitution--and I think that in

some ways Providence might have blessed us here, because [the fact] that this took place in the state of Florida I found to be providential. Why? Because the Florida constitution, unlike some of our constitutions, doesn't leave things to be implied. It says them outright.

The President of the United States is the supreme executive authority in America. Is that phrase used in the Constitution? We know it's true, but it's not there. But in Florida, it is. The supreme executive power shall be vested in a governor, it says.

Now, let's use our common sense here. Supreme--what does this mean? "Higher than this, there is nothing," in terms of executive power within the state of Florida. Right?

So, if the governor of the state of Florida goes into a situation and says to a county sheriff, "Get out of my way," does the county sheriff have, from any source whatsoever, constitutionally, the executive power to say "no" to the governor? I think it's pretty obvious you can't be the supreme executive power if there is somebody higher than you. That's not possible.

So, the notion that Jeb Bush did not have the power to go to Pinellas County, walk through the door, and, if he had to do it, reinsert [Terri's feeding tube] himself (and his representatives vested with his delegated authority would have had the same thing)--that is palpably absurd.

But it's more than absurd. It's dangerous.

If subordinate executive authorities, whether in Florida or nationally, can by court order forcibly resist the executive power of the state of Florida, then every judicial judgment and every judicial order is *potentially insurrectionary*, in the literal sense. It would constitute forcible resistance against the constitutionally-designated executive power of the state or of the nation.

I hope we all appreciate what we're witnessing here, because that dismantles the basis for both public order within our states and national security within our country.

The question I've been putting to folks who are trying to pretend--even people who call themselves conservatives--trying to pretend that, somehow or another, if you don't obey every court order, whatever it may be, you're guilty of some disrespect for law. I do hope we remember--as, say, Hamilton did when he was making his case for judicial review in Federalist 78--that the Constitution, or, in the case of the state, our constitutions, they constitute within their purview and jurisdiction the supreme expression of the will of the people. And that will constitutes the ultimate authority on which the claim of lawfulness is based in America. Right?

Law is passed by our represented legislatures. It represents, therefore, the constitutionally-determined will of the people. It is law. It was passed and ratified by the people, by their representatives, or through convention and so forth. And because it has the stamp of that ratification, it is law. That is the constitutional version.

If I am a judge and what I say has no basis, either in constitution or law passed by duly elected legislatures, from what does it derive its authority as law in this country?

Well, if you're trying to tell me it has some authority as law, you're telling me that there is some way for something to derive authority of law that is *not* passed through the constitutional process of representation. And that would mean that we are no longer a sovereign people. We are no longer a free people. We are subject to the vagaries of the arbitrary determinations of so-called law made by judges that we do not elect, who will not respect the embodiment of the will of the people either in laws or in our constitutions.

[applause]

It means, to put it profoundly, simply, that we have destroyed our republic, we have destroyed self-government, and we have destroyed the hard-won place of a self-governing people.

I frankly don't understand how this can be hard for people to understand.

But let's take an illustration. There was a dispute--was there not?--a difference of opinion in America over whether or not we should have sent forces to Iraq. I don't think you or I would put it past some clever lawyer to come up with an argument that would suggest that by sending troops to this country or that country or to the other country, the President is violating some basic constitutional right. It could even be "the right to life," since they're putting people in the way of death, and doing so on a basis that is x, y, or z and "unconstitutional." Let's assume, just for the sake of argument, that some clever lawyer does that, and in the way that some of these left-wingers do, they find some judges to agree with them. They make the plausible argument, and on that day of the week, in a Supreme Court packed by Hillary Clinton, after so and so dies, we get a judgment that basically says, "No, the President of the United States can't send troops to Iraq," or wherever he thinks is necessary for the national security of the country.

Now, I ask you: at that moment under the Constitution of the United States, must the President of the United States obey a court order that substitutes the will of the judiciary for *his* will and judgment when it comes to the deployment of our forces?

I don't think there's a soul who is mad enough to suggest that he would have to obey, because they realize at that point the judiciary would be the commander in chief of our armed forces! And I believe the Constitution is pretty clear in designating *the President* as Commander in Chief.

So, you have the Constitution or you have the judiciary. Which is supreme? Which is superior? The Constitution.

Now, some people will have made the case that . . . and I keep getting this . . . I got it today from some reporter who called me up, and he's saying, "But it has been accepted as law in the country that the judiciary has the ultimate say on the Constitution." No, it hasn't, by the way. And I know that there are careless people who would assert that, but I don't care whether you look at *Marbury vs. Madison* or you look at *Federalist 78*--an argument, not a law, *an argument* is what established the judiciary's prerogative to disregard those elements of a given law that they judge to be contrary to the Constitution.

Now, the reason I stress that it was an argument, and that we accepted it on the basis of the fact that it was a *reasonable* argument that was compatible with common sense, that means that the standard was not that we accepted it because the judges *told us*. No. We accepted it because it was *reasonable*. We accepted it because it corresponded, within a certain limit, to common sense.

Why do I say that? Well, it's simple. The judge swears an oath, doesn't he? As a matter of fact, all public officials swear oaths to the effect that they must support, preserve, protect, and defend--some words to that effect--the Constitution of the United States and of their given state. Everybody swears to this. All over the country, if you are a public official, you took this oath.

And if you are called upon to take an action in the use of your power that you conscientiously believe is unconstitutional--that is to say, contravenes the terms either of the state or the federal constitution--how can taking that action be compatible with your oath?

So, somebody puts a law in front of you, and that law has a provision that you say, "Well, no, I compared it over here to what's in the Constitution and that's un-constitutional. I can't apply that." Isn't that what the judges say, "Because that's against my sworn duty to uphold the Constitution"?

I think that makes perfect sense, by the way. I have no problem at all with that understanding of constitutional review. You know where I have a problem, though? I have a problem with the notion that somehow or another that this is the exclusive prerogative of the judiciary--since, the last time I looked, those who compose the legislature take the same oath, and the president or the governor takes the same oath.

So, let us pause at a situation where the governor of a state, like Jeb Bush, is confronted with a situation where a court order has come down that says, "You've got to do 'x,'" and he looks at that and says, "Well, no. That's incompatible with this or that provision of the Florida constitution." Or the president says, "of the U.S. Constitution."

Is there somebody willing to argue that, somehow or another, even though it is his sworn duty to "preserve, protect, and defend," or to "uphold, protect, and defend," or to "support, protect, and defend"--the words vary--the constitutions, that they can take, in a way that is compatible with their oath, a step under the mandate of a judge and do that which is unconstitutional, and still be true to their oath?

Let's put that one on Jeopardy. Let the music play for a minute, and I don't think it takes long.

[laughter]

So, all I'm saying here is quite clear. If the argument holds for the judiciary--and we say it does--then it also holds for the other branches, when it comes to the fulfillment of that duty that they have with respect to the power they exclusively control under our constitutions.

And what does that mean? Well, it means--and it's the only thing that could lead to this result, by the way--that we have a system of checks and balances. People have used that phrase. I remember learning it when I was growing up, and people will still use it occasionally. And I don't know, maybe they think that by the system of "checks and balances," checks meant like "the checks you write."

[laughter]

Well, it only means that in the case of the legislature.

[laughter]

It's one of the checks they have, the ability to not to write the checks. But that's neither here nor there.

Or it could mean, "I have the ability to check on you and see what you're doing." I think that's called "oversight" by some of the superficial social scientists. And they think that that's somehow what accounts for checks and balances.

No, y'all. *The word "check" was used in the literal sense to mean "to stop, to hinder, to put an obstacle in the way of, so that action cannot be taken."* Okay? And that means, to put it in simple language, the power to say, "No."

So, the judge issues an order. The executive looks at that order and says, "This is incompatible with my oath, because it's contrary to the Constitution." Or the law, too, by the way, just to specify it. He can do that, too. And so he looks at the judiciary and says, "No, I will not carry out your unlawful, unconstitutional order."

And somebody's going to object. Could be somebody that . . . well, I won't mention any names, because I don't want to say anything. But there have been some people who I thought I respected a lot who have been making these absurd arguments. And they want to suggest that, "Well, if the governor said that or if the president says that, that's disrespect for law." No, it's not! That's *respect* for law. Last time I looked, respect for law meant that if the law says it, you respect that. Right?

[applause]

Now, if that is the situation with respect to the governor, he can't follow the judiciary's order. The same would be true, by the way, in the case of a law, because the executive could also refuse to carry out elements of the law that were contrary.

What you would then say is going to be "the check." Some people, every time I have raised this argument, say, "Well, that means we're going to have an executive who can do anything--a governor who will do anything." No, it doesn't. It doesn't mean that at all--because the Founders weren't that stupid. Neither were the people who wrote our state constitutions.

There are also checks against the executive, like the power of the legislature to stop writing checks. That's one of the important checks. But what's the most important one? We all know what it is. It's the power to kick him out of office--to say, "Well, if you don't want to carry out what we believe to be is this perfectly clear and constitutional law, you're gone, and we'll keep kickin' them out, until we find somebody who understands our will."

What's to keep the legislature from doing that? Well, they'll only be stopped from doing that if they can't muster the required constitutional majority to get it done. But that means, doesn't it, that within the limits of that required constitutional majority, the governor can say, "No," and sit right where he is.

Now, is there something the judiciary can do about that? Well, the judiciary could appeal to the legislature for help, if it's a judicial order that's not being executed. But what if the governor and the legislature agree? Well, if the governor and legislature agree, y'all, then the judiciary can have whatever opinion it likes, but it is not the law.

[applause]

And people say, "Well, that's outrageous." No, it's not outrageous. *I take that directly from the reasoning whereby the judges themselves claim the power of judicial review.*

Because, if you do not have the right on the basis of a conscientious view of constitutional authority to say "no" when you're the governor or the legislature, where on earth would the judges get it? Last time I looked, the legislature with the concurrence of the executive makes the law. Right? *If a judge refuses to carry out the provisions of that law, why isn't the judge the lawbreaker?*

You can't have it both ways. Either the logic of constitutional review applies to all the branches, or it cannot apply to any of the branches.

I would argue that it's meant to apply to all of them, so that we will have a system in which all three branches feel responsible to the Constitution, and will express their sense in the pursuance of their particular duty of what the Constitution requires.

We would want that, wouldn't we?

And then people will say, "That's going to lead to problems and paralysis," and this and that. Well, it's possible, I'll admit, that there would be times when that kind of a disagreement amongst the branches would mean that the government couldn't do anything.

[laughter, cheers, applause]

I knew that was coming! Your reaction is like mine.

Why is it that at some level in this country we no longer understand that that is an *intentional effect*? One of the ways in which one safeguards the freedom of a people is to make sure that there are times when the government cannot simply act in a way that preempts what the people care about, if the people don't come together to demand that action. Understand what I'm saying?

That means that in every such area, who's going to be left with the initiative? *The people themselves!* And I think that that's the way it's supposed to be.

Now, that doesn't mean that will happen in every case. No, of course not. What it does mean, though, is in the case where something like that were to take place--whether it was between the president and the judiciary, the president and the legislature, where you didn't have a

sufficient majority to impeach, in our present situation with the judges running riot--what is supposed to happen? It's supposed to become, in the true sense of the term, a political question.

And I say that advisedly. If you look at the Federalist Papers, I think it was Federalist 16, actually, where this came up. Maybe it was Federalist 35. Hamilton was talking about the constitution of the court for impeachment, and he pointed out that impeachment is an inherently political question.

How can we miss this? Impeachment is not some kind of *legalistic criminal procedure*. No. It's an inherently *political question*. It is intended especially to be about those issues where you take strong issues of principle and fundamental importance, and, as it were, bring them before the representatives of the people in order for them to express themselves. And if, in those circumstances, a party feels strongly and cannot muster the votes to call the executive to account, what is supposed to happen? They are supposed to appeal to the people in order to procure a change in the legislative majority. That's how the system is supposed to work, in order to guarantee the sovereignty of the people.

I think, by the way, that this shouldn't be so hard for us to understand, because it's actually the way in which a good executive acts when he is dealing with his subordinates. There are people who have written extensively about how FDR, for instance, used and abused this approach, where you set up a situation where you know your subordinates are going to be fighting with one another in order to make sure that none of them gets to make the decision--you do.

Those battles will, at the end of the day, throw the critical decisions back into your lap, so that you keep control of the power and the management of the organization or the government.

Has it not occurred to us lately that the whole idea of the system of separation of powers, the whole idea of checks and balances, was so that periodically those who are entrusted with government power would be forced back to the original fount of government authority--would be forced to consult the people, either by means of the ordinary elections and the seeking of new majorities, or by means of constitutional amendments and conventions? It's supposed to work that way.

And I have folks who say, just like the situation that I outlined to you with the court trying to order the president about when it comes to the deployment of our forces, if a president were to say, "No," one reporter said to me, "Well, that would be a constitutional crisis." And I said, "No. That would be the ordinary operation of our government."

Constitutionally, it's the way it is supposed to be. Why are we afraid of it? Well, I'll tell you why I think we're afraid of it. I don't think we, by the way, in terms of the people, are afraid of it. But I think we have elements now in our politics and amongst our elites, and they're afraid of it, because they kinda like the present situation.

From their point of view, I think we must consider the power of the judiciary, and I know I can say this now, because just about everybody has, in some way or another, been exposed to this wonderful trilogy, but I think the power of the judiciary is like the One Ring in the Lord of the Rings. "One Ring to rule them all, One Ring to find them, One Ring to bring them all and in the darkness bind them."

And people keep saying, "Well, we've got to have someone to make the judgment about what's constitutional." No, we don't. We have *the people* to do that, if it comes to that. We don't need a branch of government to be supreme in that regard. And if there is one, it means that that branch of government has "the ring of power" that can combine in one place all the powers of government. And when you combine in one place, under one will, on a permanent basis all the powers of government, you do not have a constitution, you do not have a republic, you do not have freedom. You have tyranny--and that tyranny is without end.

And that's the situation that our Founders understood, and that we are now allowing in our country--but I think it's being allowed because it's in the interest of politicians--for two reasons, or three.

First, with a lot of these issues that are hot-button issues and controversial issues of principles and so forth, it means that they no longer have to have courage when it comes to them. It means that they can have it both ways. And I'll be blunt about this. It means that they can do what Jeb Bush has just got through doing, and he thinks he's going to get away with. They can posture for as long as they like about it: "I believe the Constitution. I'm a moral Republican. I think this is terribly wrong. I am with you guys. We've gotta stop this! This is terrible. Err on the side of life," all of this.

You listen to the rhetoric, and he's winning support, and everybody thinks he's a wonderful fella. And then when it comes right down to it, did he do anything? No. He did nothing. And then when he was standing there doing nothing that was the least bit risky, what did he say? "Well, I went to the limits of my power, but that nasty judge made me do it. Those judges made me do it! Don't blame me."

What is the one thing that people with power always long for? A lack of accountability. They want to be able to do what they please without being held responsible for the result. They want to be able to win support and curry favor and get what they need to stay in power without being accountable to those constituents who put them where they are.

And if you have the convenient mechanism of a court, where you can dump some of the issues that will otherwise be "ugly"--as I think Senator Orrin Hatch called them. He was talking about abortion other day, and he said, "All these **ugly** discussions start over abortion."

Why is it that our politicians consider those discussions that involve the people of this country in thinking once again about the meaning of the principles on which it is founded--of the sense of justice and right which it is supposed to represent, of the constitutional liberty in which we are supposed to share--why are those questions **ugly**? The deep questions. The questions of profound principle. Why are they **ugly**? When, in point of fact, they force us to reconsider some of those elements of who we are as a people that ought to be considered most beautiful and most noble, because they correspond to the best aspiration of the human heart for dignity and for liberty and for justice. I don't see anything ugly in them.

What I see is the **ugly** ambition of politicians who no longer wish to serve those principles--who instead wish us to have a politics in which everything is about material distribution, because the issues of material distribution are the issues through which the people can be manipulated and in which their conscience and their judgment and their decency need not be consulted in the course of that manipulation.

This is where we are. And I think being in this dangerous place, if we care about the future of our country, if we care about constitutional self-government, if we care about the rule of law, then we must ourselves develop a clear and better understanding. We must with courage and without regard for consequence, articulate that understanding, and we must organize the people no longer to accept a leadership that is feckless in its disregard for our liberty.

Because after all, what's the *common good* in this country? "Common good" is a phrase you don't hear much, anymore. This, despite the fact when you go back and read the texts about what law is and so forth, one of the elements of law that you find in Grotius and Pufendorf and Aquinas, and all these people--Montesquieu--a law is not just a rule that is then backed by force. It is a rule made for the sake of the common good of the whole people that is backed by force. Now, that means that you actually can't just make law unless you give some consideration to the common good.

What is the common good of the American people? Well, I think it is pretty clear, at one level, what our common good is--the one that we, all of us, are supposed to share "in common." I think it is pretty clear. As a matter of fact, I think it is so clear that it's the reason why, when you look at the oaths of office that our officials take--has it ever struck you as

interesting, or maybe even a little bit odd, that officials in this country don't swear to protect the country? They don't swear to protect our lives. They don't swear to support our prosperity or any of these materials things. Instead, they are sworn and duty-bound to uphold, protect, and defend those constitutions that represent our right to self-government. For, *that* is our common good.

And when we allow these officials to come forward and--with total disregard for that oath and that good--to redefine our politics in such a way that they are powerless any longer to serve it, to preserve it, to defend it, then we have allowed them so to redefine our politics that our common good is lost, that our liberty no longer exists.

And I think that having witnessed this spectacle where an innocent person is done to death by the rule of law, you do realize that that represents at the individual level--where, in some ways, it is most important--the loss of all security? What Montesquieu called [unintelligible]--the loss of anything that protects us from the invasion of an utterly reckless and abusive power.

*What you can do to us one by one becomes the basis for destroying the liberty of us all*, because that's where intimidation begins. Hasn't anybody studied how the great tyrants of the Twentieth Century got their job done, how Stalin got his job done? They didn't intimidate everybody all at once. You just have to start intimidating the people who ought to act as the tribunes and spokesmen of the liberties of the people. You kill them off. You make them afraid to speak. And without the rallying points that are required for common action, the people can then be cowed and fragmented by an appeal to their selfish interests and the manipulation of their fear.

And this is where we are headed. To be sure, just as the Nazis did it in Germany, I am sure that those who might reach for abusive power in America will want to do it all according to the *forms of law*.

But we have to remember, I think, is that American self-government is not about the forms of law. We are not a people who acknowledge that if you do it according to the forms, it's law. We believe that it's not law unless it has been done in accordance with the key principle of legitimate government, which is that it must be *based upon consent*, and that those laws must be therefore made by constitutional means that result in a representative decision on behalf of the people.

It is for the sake of the understanding, now, I think, that we must move forward to bring back within the boundaries of proper constitutional understanding a judiciary run riot--a judiciary that, when you look, as I'm sure you have in the course of the conference, at the particular foci of its abuses, I think it would be fair, as I said in one piece during the Schiavo business . . . *Ronald Reagan said that the Soviet Union was the focus of evil in the international arena. I believe that in our country today the judiciary is the focus of evil in our domestic affairs.*

[applause]

We shall either recapture a sense of its proper authority, we shall either recall it in the boundaries of that authority, we shall either end its abuses--or we shall be made to suffer insufferable wrongs.

And I want to leave you with this thought, because there's a phrase in the Declaration of Independence--one of those phrases that, I'm afraid, is again like many of the key and important words and concepts of our great heritage sadly neglected these days. But you do recall that, in the course of the Declaration, they referred to the fact that, well, you know, if you're a prudent people, you're not just going to be just changing government for light and transient causes, and this will lead to a disposition "to suffer, while evils are sufferable." Remember that? It's a beautiful phrase, will "suffer while evils are sufferable," because I think it suggests the prudence, the discipline, the respect for law--a respect for law that, yes, will even sometimes tolerate here and there a wrong, here and there a problem, so that things will not just be overturned in unbridled frenzy of popular riot and ambition. That makes sense.

But it does lead us to think about something. What's an insufferable evil? What are they referring to? "Suffer while evils are sufferable." See, I think about the Revolution and I think, well, obviously when they chose the alternative of opposing King George with force, they suffered a lot of evils. They went to war and were killed. They saw their children killed. They saw their homes and homesteads destroyed. They saw all their property wasted and gone. All, in fact, of the material evils that individuals can suffer, they suffered in order to oppose what they regarded as tyranny.

Well, that would mean from their point of view that *those* evils weren't insufferable. What was the insufferable evil? Well, I just would want to suggest to you that those of you who watched the Terri Schiavo travesty and who saw this innocent, helpless person done to death under the forms of law, you will recall--I am sure you can even feel now--the anguish and the helplessness that you experienced. You can also recall the sense of shame that must have attended that anguish as you realized that this was done in the name of *your* country, of *your* Constitution, of *your* laws, of *your* liberty.

And somewhere in the midst of it all, that conscience which, in many of us, must be shaped by our reverence for the highest will and the highest law--which is that of God Almighty--cried out against this abuse and urged us not to stand for it! For, if we stand for it, we become the tool of evil! We become the accomplices of wrong! We become those who, standing silently by, allow the triumph of evil over right, and justice, and good.

And I think that what you felt at the point--that sense that you would not bear it, that you would find a way to act to end this tyranny of evil--that was the sense of insufferable wrong. . .

[applause]

. . . the wrongs that are done not to our bodies, and not to our homes, and not to our property, but to our *consciences* that are the property of good and right and the will of God.

And I believe we have now come to the point where, in their assault on marriage, and in their assault on innocent life, and in their insufferable assault on the liberty and constitutional self-government that ought to be the birthright of every American, the judiciary has put us all in the position where we are called upon to tolerate their abuse, tolerate their evil, tolerate their wrong, and it is *insufferable!* We should suffer it no longer.

[applause]

If we understand this, then we understand the true nature of the crisis we are in. We will thank God and our Founders that we can, if we will, meet this crisis--without violence, without rivers of blood, without the terrible tragedies that so often attended the need to oppose injustice at other times and places. For, though they will not regard it, we still have a constitutional power. We still have a constitutional opportunity. And, now, like the Founders who gave it to us, we must pledge our lives and fortunes and honor in order to assure that we shall use it to restore our liberty.

God bless you.

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