THE CENTER ON LAW AND SECURITY AT THE NYU SCHOOL OF LAW

presents:

PRESIDENTIAL POWERS

★★ AN AMERICAN DEBATE ★★

APRIL 25, 2006

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The Center on Law and Security is a unique kind of think tank, bringing influential practitioners and intellectuals together to debate matters of critical importance to global stability. To that end, the Center's frequent conferences include professors, policy experts, journalists, officials, and those engaged in the daily practice of national security. The diversity of our participants provides rare insights into the nation's political and cultural life.

This conference, *Presidential Powers: An American Debate*, took place in the midst of one of the most controversial presidencies in American history. The answers to the urgent questions of our post - 9/11 era – those shaping the war in Iraq, U.S. detention policy, wiretap surveillance, and presidential signing statements – depend upon an interpretation of the appropriate scope of presidential powers. The boundaries of the president's authority are not static and settled, but rather in constant flux depending on the situation and the perspective of the people sitting in the White House, in Congress, and on the Supreme Court bench.

I hope that this transcript, collecting in one place the conclusions of some of the country's most informed and thoughtful political analysts, will allow the public to better understand the breadth of the debate and to participate in the national discussion.

Karen J. Greenberg
Executive Director

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PARTICIPANT BIOGRAPHIES, APRIL 25TH, 2006

SIDNEY BLUMENTHAL is a senior fellow at the Center on Law and Security at NYU School of Law. He is a widely-published journalist, especially on American politics and foreign policy. He started his career in Boston, then wrote for *The New Republic, The Washington Post, Vanity Fair*, and *The New Yorker*. He served as assistant and senior adviser to Bill Clinton from August 1997 until January 2001. He subsequently wrote a book, *The Clinton Wars.* His other books include *The Permanent Campaign, The Rise of the Counter-Establishment,* and *Pledging Allegiance: The Last Campaign of the Cold War.*

JOHN BRADEMAS, president emeritus of New York University, was NYU president from 1981 to 1992. Before coming to New York, John Brademas served as United States Representative in Congress from Indiana's third district for 22 years (1959-81), the last four as house majority whip. While in Congress he was a member of the Committee on Education and Labor, where he played a leading role in writing most of the federal legislation enacted during that time concerning schools, colleges and universities; services for the elderly and the handicapped; libraries and museums; the arts and humanities. John Brademas is serving, by appointment of President Clinton, as chairman of the President's Committee on the Arts and the Humanities. He is also chairman of the National Endowment for Democracy and a member of the Consultants' Panel to the Comptroller General of the United States. Co-sponsor of the 1965 legislation creating the National Endowments for the Arts and the Humanities, John Brademas for ten years chaired the congressional subcommittee with jurisdiction over them. He was chief House sponsor of the Arts, Humanities and Cultural Affairs Act; Arts and Artifacts Indemnity Act; Museum Services Act; Library Services and Construction Act; National Commission on Libraries and Information Services Act; Education for All Handicapped Children Act; Alcohol and Drug Abuse Education Act; and International Education Act. He was also a major co-author of the Elementary and Secondary Education Act of 1965; the Higher Education Acts of 1972 and 1976, which focused on student aid; and the measure creating the National Institute of Education.

JOHN DEAN is a visiting scholar at the University of Southern California. He served as counsel to the president of the United States in July 1970 at age 31. He was chief minority counsel to the Judiciary Committee of the United States House of Representatives, the associate director of a law reform commission, and associate deputy attorney general of the United States. He served as Richard Nixon's White House lawyer for a thousand days. Dean has written many articles on law, government, and politics. He has recounted his days in the Nixon White House and Watergate in two books, *Blind Ambition* (1976) and *Lost Honor* (1982). Dean now works as a writer, lecturer, and private investment banker. In 2001 he published *The Rehnquist Choice: The Untold Story of the Nixon Appointment that Redefined the Supreme Court;* in 2002 he published an e-book, *Unmasking Deep Throat*; and in early 2004 he coauthored *Warren G. Harding*. His newest book is *Worse Than Watergate: The Secret Presidency of George W. Bush.*

VIET DINH is a professor of law and co-director of the Asian Law and Policy Program at Georgetown Law. He is currently a principal at Bancroft Associates PLLC. Prior to his appointment at Georgetown, Viet Dinh was assistant attorney general for legal policy at the U.S. Department of Justice from 2001 to 2003. As the official responsible for federal legal policy, he conducted a comprehensive review of Department of Justice priorities, policies and practices after 9/11 and played a key role in developing the USA-PATRIOT Act and revising the attorney general's guidelines. He also served as associate special counsel to the U.S. Senate Whitewater Committee, as special counsel to Senator Pete V. Domenici for the impeachment trial of president Clinton, and as counsel to the special master in *In re Austrian and German Bank Holocaust Litigation*. After graduating from law school, where he was a class marshal and an Olin Research Fellow in Law and Economics, Dinh was a law clerk to Judge Laurence H. Silberman of the U.S. Court of Appeals for the D.C. Circuit and to U.S. Supreme Court Justice Sandra Day O'Connor. His representative publications include "Defending Liberty: Terrorism and Human Rights" in the *Helsinki Monitor*, "Codetermination and Corporate Governance in a Multinational Business Enterprise" in the *Journal of Corporation Law*, and "Financial Sector Reform and Economic Development in Vietnam" in *Law and Policy in International Business.*

MICKEY EDWARDS is executive director of the Aspen Institute-Rodel Fellowships in Public Leadership. He is also a lecturer at Princeton University's Woodrow Wilson School of Public and International Affairs and was a Republican member of Congress from Oklahoma for 16 years (1977-92). He was a member of the House Republican leadership and served on the House Budget and Appropriations committees. Since leaving the Congress he has taught at Harvard, Georgetown, and Princeton universities and has chaired various task forces for the Constitution Project, the Brookings Institution, and the Council on Foreign Relations. In addition, he is currently an advisor to the US Department of State and a member of the Princeton Project on National Security.

NOAH FELDMAN is a professor of law at the New York University School of Law, specializing in constitutional studies, with particular emphasis on the relation-

ship between law and religion, constitutional design, and the history of legal theory. Feldman was named a Carnegie Scholar for 2005-06. He is a contributing writer for *The New York Times Magazine* and an adjunct senior fellow at the Council on Foreign Relations. In 2004-05, he was a visiting professor at the Yale and Harvard Law Schools and a fellow of the Whitney Humanities Center. In 2003, he served as senior constitutional advisor to the Coalition Provisional Authority in Iraq, and subsequently advised members of the Iraqi Governing Council on the drafting of the Transitional Administrative Law, or interim constitution. He is the author of three books: *Divided By God: America's Church-State Problem and What We Should Do About It* (Farrar, Straus & Giroux 2005); *What We Owe Iraq: War and the Ethics of Nation building* (Princeton University Press 2004); and *After Jihad: America and the Struggle for Islamic Democracy* (Farrar, Straus & Giroux 2003).

BARTON GELLMAN is a special projects reporter on the national staff of *The Washington Post*, following tours as diplomatic correspondent, Jerusalem bureau chief, Pentagon correspondent and D.C. superior court reporter. He shared the Pulitzer Prize for national reporting in 2002 and has been a jury-nominated finalist (for individual and team entries) three times. His work has also been honored by the Overseas Press Club, Society of Professional Journalists (Sigma Delta Chi), and the American Society of Newspaper Editors. He is author of *Contending with Kennan: Toward a Philosophy of American Power*, a study of the post-World War II "containment" doctrine and its architect, George F. Kennan.

DAVID GOLOVE is the Hiller Family Foundation Professor of Law and director of the J.D./LL.M. Program in International Law at the New York University School of Law. David Golove has secured a reputation as one of the most original and promising scholars in constitutional law. In a recent book-length article for the *Michigan Law Review*, "Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power," Golove considers a question of constitutional law that has been controversial from the moment of the nation's birth in 1776 and remains so today. In a more recent article published in the *NYU Law Review*, Golove challenges the distinguished constitutional scholar Laurence Tribe in a debate over the interpretation of the Treaty Clause, which Golove defended in his *Harvard Law Review* article. In 1999, Golove published a piece in the *University of Colorado Law Review* supporting the president's authority to order military operations to implement a United Nations Security Council resolution without authorization by Congress.

KAREN J. GREENBERG is the executive director of The Center on Law and Security at New York University School of Law. She is the editor of the *NYU Review of Law and Security*, co-editor of *The Torture Papers: The Road to Abu Ghraib;* and editor of *Al Qaeda Now* and *The Torture Debate in America* (Cambridge University Press). She is a frequent writer and commentator on issues related to national security, terrorism, and torture and has also authored numerous articles on the United States and Europe during World War II. She has a Ph.D. in American political history from Yale and teaches in the European Studies Department at NYU. She is a former vice president of the Soros Foundations/Open Society Institute and the founding director of the Program in International Education. She is a member of the Council on Foreign Relations and an editor of the Archives of the Holocaust, Columbia University Series. She has served as a consultant to the NEH, the NY Council for the Humanities, the NYC Board of Education and USAID.

NAT HENTOFF writes a weekly *Village Voice* column, in addition to writing on music for *The Wall Street Journal*. Among other publications in which his work has appeared are *The New York Times, The New Republic, Commonweal, The Atlantic* and *The New Yorker*, where he was a staff writer for more than 25 years. Hentoff's views on journalistic responsibility and the rights of Americans to write, think and speak freely are expressed in his weekly column, and he has come to be acknowledged as the foremost authority in the area of First Amendment defense. He is also an expert on the Bill of Rights, the Supreme Court, student rights and education. He has published many books on jazz, as well as biographies and novels, and a number of books for children. Among his works: *Does Anybody Give A Damn?: Nat Hentoff on Education; Our Children Are Dying; A Doctor Among Addicts; Peace Agitator: The Story of A. J Muste; The New Equality; The First Freedom: The Tumultuous History of Free Speech in America; The Day They Came to Arrest the Book; The Man from Internal Affairs; Boston Boy; John Cardinal O'Connor: At The Storm Center of a Changing American Catholic Church; Free Speech for Me and Not for Thee: How the American Left and Right Relentlessly Censor Each Other,* and *Listen to the Stories: Nat Hentoff on Jazz and Country Music.*

STEPHEN HOLMES is the Walter E. Meyer Professor of Law at the NYU School of Law. Holmes taught briefly at Yale and Wesleyan Universities before becoming a member of the Institute for Advanced Study in Princeton in 1978. From Princeton, he moved to Harvard University's Department of Government, where he stayed until 1985 when he joined the faculty at the University of Chicago. At the University of Chicago, Holmes served as director of the Center for the Study of Constitutionalism in Eastern Europe and as editor-in-chief of the *East European Constitutional Review*. He has also been the director of the Soros Foundation program for promoting legal reform in Russia and Eastern Europe. Holmes' research centers on the history of European liberalism and the disappointments of democracy and economic liberalization

after communism. He has published a number of articles on democratic and constitutional theory as well as on the theoretical origins of the welfare state. In 1995, he published *Passions and Constraint: The Theory of Liberal Democracy*; in this work, Holmes presents a spirited vindication of classical liberalism and its notions of constitutional government. He coauthored, with Cass Sunstein, a book on *The Cost of Rights* (Norton, 1998).

BOB KERREY is president of The New School in New York City. For twelve years prior to becoming president of The New School, Kerrey represented the state of Nebraska in the United States Senate. Before that he served as Nebraska's governor for four years. Kerrey served for eight years on the Senate Select Committee on Intelligence and led the post-Aldrich Ames reforms of the federal intelligence agencies. He introduced the first bi-partisan Social Security legislation in 1995 and re-introduced a broadly supported bill in 1999. He also introduced legislation that would make health care a right for all U.S. citizens and legal residents, as well as control the growing cost of all health care, including Medicare. He led the effort to reform the Internal Revenue Service in 1998 and participated with President George Herbert Walker Bush and President Clinton to balance the federal budget. Kerrey is the author of *When I Was A Young Man: A Memoir*, published by Harcourt Books (May 2002).

MARTY LEDERMAN was an attorney advisor in the Department of Justice's Office of Legal Counsel from 1994 to 2002, where he concentrated on questions involving freedom of speech, the Religion Clauses, congressional power and federalism, equal protection, separation of powers, copyright, and food and drug law. Before that, he was an attorney at Bredhoff & Kaiser, where his practice consisted principally of federal litigation, including appeals, on behalf of labor unions, employees and pension funds, with particular emphasis on constitutional law, labor law, civil rights, RICO and employment law. Most recently, he has been in private practice specializing in constitutional and appellate litigation. He regularly contributes to the weblogs "SCOTUSblog" and "Balkinization," including on matters relating to executive power, detention, interrogation and torture. He served as law clerk to then-Chief Judge Jack B. Weinstein on the United States District Court for the Eastern District of New York and to Judge Frank M. Coffin on the United States Court of Appeals for the First Circuit.

ANTHONY LEWIS is a two-time Pulitzer Prize winner for national reporting: in 1955, for a series of articles in the *Washington Daily News*, and in 1963, for distinguished reporting in his coverage of the Supreme Court's proceedings in that year. Lewis lectured at Harvard Law School for fifteen years, teaching a course on the Constitution and the press. He has been a visiting professor at a number of schools, including the Universities of California, Illinois, Oregon, and Arizona. Since 1983, Lewis has been the James Madison Visiting Professor of First Amendment Issues at Columbia University. He began his career in journalism as a deskman for the Sunday *New York Times* (1948-52). In 1952 he worked for the Democratic National Committee, and joined staff of *Washington Daily News*. Lewis returned to *New York Times* in 1955, reporting from Washington (1955-64), from Europe as London bureau chief (1965-72), and as an editorial columnist (1969-2001). Lewis is the author of several books, including *Portrait of a Decade: The Second American Revolution* (1964), a chronicle of the Civil Rights Movement in the United States; *Gideon's Trumpet* (1964), a history of James Earl Gideon's landmark Supreme Court case about his right to legal counsel; and *Make No Law: The Sullivan Case and the First Amendment* (1992), an account of a Montgomery, Alabama official's 1960 libel suit against *The New York Times* for its criticism of Montgomery's response to civil rights protests.

DONNA R. NEWMAN is a prominent federal litigator and criminal defense attorney. Newman predominately practices criminal defense in federal court and represents criminal defendants in complex litigation, securities fraud, money laundering, white collar crimes, civil litigation and appeals, and cases involving both international and constitutional law. She has represented well over 500 hundred clients in such matters from simple frauds to complex securities fraud and racketeering cases. She has participated as a speaker on various panels on terrorism and constitutional rights and has frequently appeared as a guest on national television shows speaking on issues of constitutional rights and the impact of 9/11 on civil liberties. One of her major cases was the representation of Jose Padilla who was designated an enemy combatant by President Bush in June 2002. This landmark case concerning constitutional issues and international law was litigated all the way to the U.S. Supreme Court.

PATRICK F. PHILBIN served as an associate deputy attorney general at the Justice Department responsible for national security and intelligence issues from June 2003 until November 2005. Before moving to the deputy attorney general's office, he served as a deputy assistant attorney general in the Office of Legal Counsel from September 2001 to May 2003. Before his service in the Justice Department, he was a partner in the Washington office of the law firm Kirkland & Ellis, where he handled primarily appellate litigation in federal courts. He graduated from Harvard Law School in 1992 and clerked for Judge Laurence Silberman on the D.C. Circuit and for Justice Clarence Thomas at the Supreme Court.

RICHARD PILDES is the Sudler Family Professor of Constitutional Law at the NYU School of Law. He is one of the nation's leading scholars of public law and a specialist in legal issues affecting democracy. In the

area of democracy, Pildes, along with the co-authors of his acclaimed casebook, *The Law of Democracy: Legal Structure of the Political Process* (now in its second edition), has helped to create a new field of study in the law schools. While issues of democracy have been in the background of many public-law courses, *The Law of Democracy* systematically explores issues of democratic theory in the concrete institutional, policy, and doctrinal settings in which they have arisen historically: issues such as the right to vote, the role of direct democracy, the appropriate role of political parties, the financing of democratic elections, and the representation of minority interests in democratic institutions. Pildes is also an engaged public intellectual and an active public-law litigator. He has written for *The New York Times, The Wall Street Journal, The New Republic, The American Prospect*, and similar journals. Apart from his academic work, Pildes has also served as a federal court-appointed independent expert on voting rights litigation, an assistant to a special master for the redistricting of a state legislature, and has worked with the state of North Carolina in redistricting litigation before the United States Supreme Court. He clerked for Judge Abner J. Mikva of the U.S. Court of Appeals for the District of Columbia Circuit and for Justice Thurgood Marshall of the U.S. Supreme Court, after which he practiced law in Boston. He began his academic career at the University of Michigan Law School, where he was assistant and then full professor of law from 1988 until joining the NYU School of Law faculty. He has been a visiting professor at the University of Chicago Law School, Harvard Law School, the University of Texas Law School, and was a fellow in Harvard's prestigious Program in Ethics and the Professions from 1998-1999.

JUDGE RICHARD POSNER is a senior lecturer at the University of Chicago Law School, where he has been a member of the faculty since 1969. In 1981, Richard Posner was appointed judge of the U.S. Seventh Circuit Court of Appeals by President Ronald Reagan. He served as the chief judge from 1993 to 2000. Prior his position at the University of Chicago Law School, he was associate professor at Stanford Law and also served as general counsel of the President's Task Force on Communications Policy. Following his graduation from Harvard Law School, Judge Posner clerked for Justice William J. Brennan Jr. From 1963-65, he was assistant to Commissioner Philip Elman of the Federal Trade Commission. For the next two years he was assistant to the solicitor general of the United States. Judge Posner has written a number of books, including *Economic Analysis of Law* (6th ed., 2003), *The Economics of Justice* (1981), *Law and Literature* (2d ed. 1997), *The Problems of Jurisprudence* (1990), *Cardozo: A Study in Reputation* (1990), *The Essential Holmes* (1992), *Sex and Reason* (1992), *Overcoming Law* (1995), *The Federal Courts: Challenge and Reform* (1996), *Law and Legal Theory in England and America* (1996), *The Problematics of Moral and Legal Theory* (1999), *Antitrust Law* (2d ed. 2001), *Law, Pragmatism, and Democracy* (2003), *Catastrophe: Risk and Response* (2004), *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11* (2005), as well as books on the Clinton impeachment and Bush v. Gore. Judge Posner has written many articles in legal and economic journals and book reviews in the popular press. He has taught administrative law, antitrust, economic analysis of law, history of legal thought, conflict of laws, regulated industries, law and literature, the legislative process, family law, primitive law, torts, civil procedure, evidence, health law and economics, law and science, and jurisprudence. He was the founding editor of the *Journal of Legal Studies* and (with Orley Ashenfelter) the *American Law and Economics Review.*

DAVID RIVKIN, Jr., is a partner in the Washington office of Baker & Hostetler LLP, a visiting fellow at the Nixon Center, a contributing editor of *National Review* magazine and a member of the U.N. Subcommission on the Promotion and Protection of Human Rights (an expert body, supporting the U.N. Human Rights Commission). He specializes in regulatory – e.g., energy and environmental matters – and appellate litigation work with a particular emphasis on complex constitutional and public policy issues. Before returning to the private sector in 1993, Mr. Rivkin served in a variety of legal and policy positions in the Reagan and George H. W. Bush administrations, including stints at the White House Counsel's office, Office of the Vice President and the Departments of Justice and Energy. He has published for various newspapers and magazines, including *The Wall Street Journal, The Washington Post, The New York Times, The Washington Times, Los Angeles Times, Foreign Affairs, Foreign Policy, National Interest, National Review, Policy Review, Harvard Journal of Law & Policy, American University Law Review, Administrative Law Journal, University of Pennsylvania Law Review,* and *University of Chicago Journal of International Law.* He has been a frequent commentator and guest on TV and radio shows, including CNN, MSNBC, ABC/Nightline, NBC, FOX News, NPR, BBC, Canadian Broadcasting Corporation, and numerous Australian, French, German, and Swiss TV stations.

JEFFREY SMITH is the responsible partner for Arnold & Porter, LLP's government contracts and public policy group. In October 1996, he rejoined the firm after serving as general counsel of the Central Intelligence Agency from May 1995 to September 1996. In May of 1993, Secretary of Defense Perry appointed Smith to the congressionally mandated Commission to Review the Roles and Missions of the Armed Services. Previously, he chaired the Joint Security Commission established by Secretary of Defense Les Aspin and Director of Central Intelligence R. James Woolsey to review security policy and practices in the defense and intelligence communities. In late 1992 and early 1993, he served as the chief of the Clinton transition team at the Department of Defense. Prior to joining Arnold & Porter, Smith served as the

general counsel of the Senate Armed Services Committee. He also was Senator Sam Nunn's designee to the Iran/Contra Committee and the Senate Select Committee on Intelligence. Prior to working for the Senate, he was an assistant legal adviser at the State Department. Earlier, as an army judge advocate general officer, he served as the Pentagon's lawyer for the Panama Canal negotiations. He has lectured and written on national security and international law, and is a member of the Council on Foreign Relations.

SUZANNE SPAULDING is a Principal at Bingham Consulting Group. She is an authority on national-security related issues, including terrorism, homeland security, critical infrastructure protection, cybersecurity, intelligence, law enforcement, crisis management, and issues related to the threat from chemical, biological, nuclear, or radiological weapons. She was recently the executive director of two congressionally mandated commissions: the National Commission on Terrorism, chaired by Amb. L. Paul Bremer III, and the Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction, chaired by former CIA Director John Deutch. Suzanne served as minority staff director for the U.S. House of Representatives Permanent Select Committee on Intelligence. Her previous legislative experience includes serving as deputy staff director and general counsel for the Senate Select Committee on Intelligence and as legislative director and senior counsel for Senator Arlen Specter (R-PA). She has also worked for Representative Jane Harman (D-CA). She was assistant general counsel at the CIA, including a position as legal adviser to the Nonproliferation Center, and also spent several years in private practice. In 2002, she was appointed by Virginia Governor Mark Warner to the Secure Commonwealth Panel, established after the attacks of September 11 to advise the governor and the legislature regarding preparedness issues in the commonwealth of Virginia.

JEFFREY TOOBIN is a legal analyst for CNN Worldwide. Based in the network's New York bureau, Toobin joined CNN in April 2002. Toobin joined CNN from ABC News, where, during his seven-year tenure as a legal analyst, he provided legal analysis on the nation's most provocative and high-profile cases, including the O.J. Simpson civil trial and the Kenneth Starr investigation of the Clinton White House. Toobin received a 2000 Emmy Award for his coverage of the Elian Gonzales custody saga. Toobin remains a staff writer at *The New Yorker,* where he has been covering legal affairs for the magazine since 1993. He has written articles on such subjects as Attorney General John Ashcroft, the 2001 dispute over Florida's votes for president, the Paula Jones sexual harassment case, Supreme Court Justice Clarence Thomas and the trial of Timothy McVeigh. His article "An Incendiary Defense", published in the July 25, 1994 issue of the magazine, broke the news that the O.J. Simpson defense team planned to accuse Mark Fuhrman of planting evidence and to play "the race card." Previously, Toobin served as an assistant U.S. attorney in Brooklyn. He also served as an associate counsel in the Office of Independent Counsel Lawrence E. Walsh, an experience that provided the basis for his first book, *Opening Arguments: A Young Lawyer's First Case – United States v. Oliver North*. Toobin has written several critically acclaimed, best-selling books including *A Vast Conspiracy: The Real Story of the Sex Scandal that Nearly Brought Down a President; The Run of His Life: The People v. O.J. Simpson*; and *Too Close to Call: The 36-Day Battle to Decide the 2000 Election.* All three books were published by Random House.

MICHAEL VATIS is a senior fellow at the Center on Law and Security at the NYU School of Law and counsel at Steptoe & Johnson. From 2003 to 2004, Vatis served as the executive director of the Markle Foundation Task Force on National Security in the Information Age, an expert group made up of technology company executives, former government officials, academics, and civil libertarians. He served as associate deputy attorney general and deputy director of the executive office for national security at the Department of Justice from 1994 to 1998. From 1993 to 1994, Vatis was special counsel at the Department of Defense, where he served as a special counsel in the Office of General Counsel, advising the secretary of defense, the deputy secretary of defense, and the general counsel on sensitive legal and policy issues. Vatis served as a law clerk for U.S. Supreme Court Justice Thurgood Marshall and for then-Judge Ruth Bader Ginsburg on the U.S. Court of Appeals for the District of Columbia Circuit. He practiced law with the firm of Mayer, Brown & Platt in Washington, D.C., specializing in Supreme Court and appellate litigation, and subsequently was an attorney with Fried, Frank, Harris, Shriver and Jacobson.

SEAN WILENTZ is the Dayton-Stockton Professor of History and the director of the Program in American Studies at Princeton University. He studies U.S. social and political history, specializing in the early nation and Jacksonian democracy. A contributing editor to *The New Republic*, Wilentz lectures frequently and has written some two hundred articles, reviews, and op-ed pieces for publications such as *The New York Times, Los Angeles Times, The New York Review of Books, London Review of Books, The American Scholar, The Nation, Le Monde,* and *Salon*. He is the author of *Chants Democratic* (1984) and *The Kingdom of Matthias* (1994). Wilentz is also the coauthor and coeditor of *The Key of Liberty* (1993) and the editor of several other books, including *Major Problems in the Early Republic* (1992) and *The Rose and the Briar* (2004, Greil Marcus coeditor), a collection of historical essays and artistic creations inspired by American ballads. His most recent book is *The Rise of American Democracy: Jefferson to Lincoln* (2005).

INTRODUCTORY REMARKS BY KAREN J. GREENBERG

EXECUTIVE DIRECTOR OF THE CENTER ON LAW AND SECURITY

I'd like to say a few words about my expectations for today. John Dean asked me what we would like to accomplish. What we would like to accomplish with this conference, and with The Center on Law and Security, is to create a sustained, engaged dialogue, something that there is much too little of in the United States today. We call ourselves non-partisan, but we do not really mean non-partisan. We mean facilitators in getting people to let go of their biases and their angers and to talk to one another.

In preparing for today, and thinking about all of the presidential histories and theories of presidential power that I've come across, none of them seemed perfectly appropriate for the event. But one novel did. It is a novel written in 1971 written by Wallace Stegner called *Angle of Repose*. I do not know how many of you have read it, but I recommend that if you want to understand this country, and not just from the point of view of the East Coast, you should read this book.

The central metaphor describes the falling of trees and the way in which they come finally to a stop, on a hill perhaps, there to find their angle of repose. That angle is an angle of comfort, of least resistance, and an angle in which the environment can continue to function around the fallen trees. Today, in this country, we are in search of that angle of repose, and we have yet to find it.

In fact, we are currently in a state of free fall. And the purpose of today's conference is to begin to think outside of the discrete issues of presidential powers and towards the broader issues of what our country stands for, what our country is, and where it is going. You can pick your own clock. It could be 9/11, it could be the end of the Cold War, it could be the Kennedy assassination, but something did happen in the latter half of the 20th century or the beginning of the 21st which unpinned the moorings of this country.

This period of instability – which is what *Angle of Repose* is about, regaining stability – is the question that we confront. Whether we call it insecurity, whether we call it national security, what we are really looking for is our own angle of repose.

★★★

"We have many events at the law school that bring very, very distinguished speakers, but it is hard to imagine something that was better put together and has brought more of the relevant players to a more important debate than this one."

– RICHARD REVESZ, Dean of the New York University School of Law

KEYNOTE ADDRESS BY JOHN DEAN

The debate over presidential powers was one of the most contentious issues at the Constitutional Convention, and has never been resolved. I did think a few issues had been settled along the way; for example, in the aftermath of Watergate, I thought the concept of the imperial president was something that had made its way to the history books. I was quite wrong.

When I first started at the White House, I wasn't sure what the counsel to the president did. I had a good idea of the general process of the White House counsel's office – clearing conflicts of interests and handling questions that would come up from various departments and agencies, as well as preparing materials, including the rules regarding contacts with independent regulatory agencies, which we would distribute to all of the staff. I did not know, however, what the president specifically had in mind. By the time I got there in July of 1970, Mr. Nixon had been thinking about exactly what he wanted his counsel to do.

He had sent me a memo, although I did not know it until I made some inquiry. The memo had been sent by the staff secretary, a fellow by the name of John Brown, who was younger than I, and lower in the pecking order, so to speak. Brown's memo asked me to take a look at a newly published magazine called *Scanlon's Monthly* which had a made a heavy charge against then-Vice President Spiro Agnew, claiming that Agnew was going to repeal the Bill of Rights and cancel the 1972 election. After a bit of investigation, I found that this was not a request from John Brown, but rather that he was passing on a request from the president that I take a look at the *Scanlon* charges against Agnew. By having Brown pass on the assignment, of course, it gave the president some deniability given what he asking for.

President Nixon wanted me to "do something" about these false charges about Agnew. So I thought about my first assignment from my client, the president of the United States. The charges against Agnew struck me as ludicrous on their face. So I thought, "Well, good counsel tells you when not to do anything as well as when to do something." So my first memo to the president said, "This is pretty absurd. I've looked at the magazine. It's got a very limited circulation. Don't worry about it. Don't do anything."

A few days later I got another memo from the staff secretary, saying that my memo did not deal with the problem. This time, the president suggested that I should start an IRS tax audit against this magazine. Well, for openers, I did not have a clue how anybody could start a tax audit. Secondly I thought, "Isn't this a little bit of an overreaction? Here's a new magazine that has no circulation for all practical purposes, and was causing no harm." But clearly the president thought differently, and had given this his considered thought. I didn't quite know what to do next.

Not long after receiving that note back from the president, I went over to the staff mess in the lower level of the White House for dinner. The only person seated at the table was a person I knew had been with Mr. Nixon for a number of years. He was an attorney, and he had been at the White House since January of 1969, so he knew the way things operated. I did not arrive until July of 1970. His name was Murray Chotiner, a name some might remember. I explained the assignment to Murray. He said, "Wait a minute, John. First of all you shouldn't even be talking to me about this."

"How so?" I asked. "Well, there's an unwritten rule of 'need to know' around here, and I don't need to know this," he said. "Think about it. The president is the chief executive officer, the head of the executive branch. If he wants his IRS, also a part of the executive branch, to start a tax audit of any taxpayer, that's totally within his power to do so. So go on back and see what you can do about it because, John, if you don't do it, I promise you, he will find somebody who will do it."

That was my first lesson about presidential power. As I walked back to the office thinking how much I liked my new title of counsel to the president, which I was anxious to keep for a few more days, I was still not quite sure quite what to do. And to this day, I am not sure what I would

have done next had Jack Caulfield, a former NYPD detective assigned to my staff, not provided a solution. Caulfield had hooked up with Mr. Nixon during the 1968 campaign as part of his security detail. He was on his way to the Department of Treasury, and was temporarily parked in my staff until those details were worked out. I said to him, "Jack, I've got this request and I don't have a clue about how to handle it." He said, "Let me take a look at it for you." So I gave him the memos I had received, and he left. A few days later he stopped by my office, and said, "John, you can send a note to the president, and tell him that the tax audit on *Scanlon's Monthly* is under way."

Right then and there I had clearly crossed the line for the first time, and it had been very easy to do. With hindsight, I can see that it was an abuse of presidential power. I had been uncomfortable with it, and when Caulfield came along, he provided a solution. I thought that I had kept my hands clean, since someone else had done the dirty deed. I still don't know how Caulfield started the tax audit, and never asked him. Nor did I bother to pass on his information to the president.

This was the kind rationalization process that was frequently engaged in by members of the White House staff, particularly young people at the White House. This is how we got ourselves into trouble. No one wanted to question the president. No one wanted to tell him what he was doing was wrong. In fact, no one wanted to believe it was, in fact, wrong. This was particularly true when you got into the gray area of national security, a truly fuzzy area of law where the limits and lines of presidential authority are less than clear. Over the years I've talked to people like Egil "Bud" Krogh, who was one of my contemporaries at the White House, about his role in heading up the infamous "plumbers' unit," a "special investigations unit" that was designated to track down leaks after Daniel Ellsberg leaked the Pentagon Papers. The plumbers, of course, would break into Ellsberg's psychiatrist's office looking for information to publicly discredit him. Not too long ago, Krogh and I were talking about those days, and I said, "Bud, I think if we'd have thrashed some of these things out you might have come to a different conclusion about some of the decisions you made." He said, "Well, John, you know why you weren't asked about any of these things?" I responded that I did.

Not long before the plumbers unit was set up, but after Ellsberg had leaked the papers, I got another peek at Nixon's vision of presidential powers. Jack Caulfield was not frightened by very many things, but one day he came into my office and said, "I've just been down in Chuck Colson's office and Chuck wants me to break-in and fire bomb the Brookings Institute."

"What?"

"Colson," he said, "is convinced there are a set of the Pentagon Papers there, and that the Brookings Institute is planning a study based on these documents. But President Nixon wants these papers." In fact, years later, I would listen to several tapes with Nixon literally pounding on his desk, demanding that somebody break into the Brookings Institute and get those papers for him. But I didn't know this at the time.

"Jack," I said, "do nothing." The president was at the western White House for his summer stay. I jumped on the next courier flight to California, figuring I'd better make a direct appeal of this situation, as strongly as I could. So I flew to California and the next morning went to John Ehrlichman, who was the titular supervisor for both Colson and I. I explained what Caulfield had told me; that the plan was to fire bomb the Brookings Institute and then send burglars in after the fire department arrived, and during the chaos, the burglars, dressed as firemen, would crack open the safe. I said, "John, this is absolutely insane. Can you imagine if somebody's killed or dies as a result of this? It's a capital crime, and it's going to be traceable right back to the White House."

Ehrlichman, as he was wont to do, looked over his glasses, picked up the telephone and said to the White House operator, "Get me Chuck Colson." Colson was instantly on the line and Ehrlichman continued, "Chuck, our young Counsel Dean is out here. He doesn't think the Brookings plan is a very good idea. Cancel it." He hung up the phone, looked over at me, and said, "Anything else this morning, Counselor?" I said, "No thank you, John. I'll go back to Washington."

Because I injected myself into this scheme, it ended. But Krogh later told me that because of my actions he was forbidden to discuss his work at the plumbers unit with me. In Bud's words, "A lot of people around here think you've got a little-old-lady outlook."

I mention these exercises of presidential power, the *Scanlon's Monthly* and Brookings incidents, because they were typical of the mentality at the Nixon White House. While I rationalized my way around one incident, and tossed a monkey wrench into another, there were many occasions when I was not sure whether at my age, being in my early thirties, I was just naive about the way this place worked.

Today I do not believe I was naive. I think it was just wrong. Every instinct told me that, and I was troubled by it. While I found myself rationalizing various things, at the time I really was not sure how far presidential powers reached. One of the lessons that is quite clear is that the president can pretty much get anything he wants done by somebody who works for him. People who work at the White House are extremely loyal, extremely close, and very closed-mouthed. As it happens, I was none of those things.

But until I was under a subpoena, I never talked to anyone about anything at the White House. I did not talk to the press while I was there; in fact, I never talked to the press during the totality of Watergate. As counsel for the president I was just high enough in the pecking order to see most everything that was happening below me as well as above me, and the only people above me were Haldeman, Ehrlichman, Kissinger and Nixon – and Spiro Agnew, who was not in the day-to-day loop. It was a good vantage point from which to watch the operations.

In thinking about the exercise of political power, one of the things that became apparent very quickly was that first-term presidents filter everything they do through the expected political reaction. I cannot think of anything that Nixon did during the first term that I was aware of that he didn't carefully look at the political implications of. Nixon, of course, introduced what is now known as the permanent campaign. Everything at the White House is judged by its politics.

Everything from Trisha Nixon's wedding, which was planned for its political impact, to Nixon's thinking about how to deal with the leak by Daniel Ellsberg of the Pentagon Papers. As it happens, those two events are directly linked. When Nixon first heard of the leaks, it was the morning after Trisha's wedding. She was married on a Saturday. On Sunday, June 13, 1971, the first in the series of the Pentagon Papers appeared in *The New York Times*.

The president had gone to his office to look at the coverage of the wedding, which was on the front page, and he just happened to notice this other story on the front page, which was a report about the study undertaken by the Pentagon into the decisions that had resulted in the ever-increasing commitment of American troops to Vietnam. Nixon had no serious reaction to the story. Rather he thought, "This doesn't hurt me, this doesn't hurt my presidency. It's pretty hard on the Democrats. Let's have more of it." But the next morning he would change his mind. On Monday, Henry Kissinger returned from a foreign trip, and he immediately changed the president's thinking about the leak of the Pentagon study. He said, "Mr. President, this is going to hurt my ability to deal with the North Vietnamese. It's going to hurt and hinder our ability to open channels with China."

Henry, who knew Daniel Ellsberg and had a sort of personal animosity against him, thought it was pretty typical and pretty unseemly of Ellsberg to do this. But Henry also knew how to operate presidential power, and he knew the button to push on Richard Nixon that would start this up. He said, "Mr. President, if you don't deal effectively with Dan Ellsberg the world is going to think you're a weakling." As soon as Nixon's manhood got involved in this, everything changed.

In fact, those of us who have compared notes about the Nixon White House in the years since all look to that event. That's when everything changed. That is when it became really dark. That was when Nixon started pounding on his desk, calling for the break-in at Brookings Institute, on repeated occasions. That is when he created the plumbers unit; that was when he instructed Bud

Krogh to put polygraphs on anybody and everybody that might be leaking at the State Department or in the National Security Council. So it was a dramatic moment, and it was essentially political. Nixon was suddenly looking at the politics of his manhood being threatened by this, and that was not what he wanted, for he wanted to be seen as a strong president. I see the same thing in Bush II, and I'll turn to that next.

Let me tell you why I have all these years later written a book called *Worse than Watergate: The Secret Presidency of George W. Bush*. As the title suggests, it is a book about presidential secrecy. Evidence of the secrecy that would be a hallmark of the Bush/Cheney presidency first came to my attention during the presidential campaign in 2000. It came up in a very odd way. After Cheney appointed himself to be vice president, everyone expected that his health records would be forthcoming. The Bush administration repeatedly promised to release the information, but it was never released. The handling of Cheney's health records started my antenna quivering.

But what really got my attention was when Bush and Cheney arrived in the White House, and one of the first actions was to issue an executive order that for all practical purposes repealed the 1978 law on preserving presidential records. (The law, in essence, makes presidential records available to the American people, who really own them. Twelve years after a president leaves office, his papers are to be made public. Former presidents are given ample time to write a memoir based on those records before they become public. After twelve years, the burden shifts to the former president if he or she wishes to keep them secret.)

When George W. Bush arrived at the White House, there were some 60,000 contested Reagan papers, as well as his father's papers as vice president, which required a presidential decision to either keep the papers private, or release them pursuant to the 1978 law. Reagan was the first president to fall under the 1978 law. Bush asked for an initial 60-day delay, then another 60-day delay, and finally he issued an executive order in which he literally gutted the law, effectively making it a nullity. After several historians filed a lawsuit, the White House made a token production of the contested Reagan papers. The issue has been sitting in federal court since 2001, and the judge has not resolved it. But Bush's executive order gutting the law remains very much in effect.

As it stands, the law remains gutted. A lot of work has been undone by a president deciding that he will nullify the law with the flair of a pen. It was striking. This sparked my desire to write columns about the Bush White House, thinking maybe I should send some signals to these guys from somebody who knows about secrecy, and who has seen how secrecy operates in a White House, which is typically not for good but for ill.

After 9/11, I watched the activities of the Bush administration, and its secrecy only became exacerbated. I think everybody would agree that during the first few weeks after 9/11, we were all pulling for Bush. He had a great unifying effect. He was hesitant for the first few days, but then he suddenly became almost eloquent, as he gave some very helpful speeches. For example, his speech to the joint session of Congress and his speech at the National Cathedral were absolutely articulate and captured the national mood. I thought, "My God, he's like Lincoln, he's rising to the occasion."

Then I suddenly saw something different. I realized that Bush and his advisers had seen the political potential of the situation. Ever since, they have used the tragedy of 9/11 and the fear it engenders for political purposes. They do everything possible to keep Americans frightened; they have used it for political excuses and justifications with great success. Since nobody in the mainstream news media was writing about the really excessive secrecy that had been imposed by this White House, where they virtually pull the shades and slam the doors, I decided that I should do it. I had some good inside information that I would write about it. I assembled a catalogue of what was going on behind closed doors, and I made what turned out to be prescient predictions about how some of these matters were not likely to turn out well. It was very easy.

I didn't pick the title of *Worse than Watergate* lightly. No one died as a result of Nixon's so-

called Watergate abuses. And no one was tortured. These were distinguishing features for me. I certainly did not use my title as an apology for Watergate, but rather because I believe the evidence is overwhelming that the situation today is worse.

I was not part of the national security community. Nonetheless, it took me no time at all to deconstruct Bush's State of the Union address before we went to war. I dissected it, if you will, based on readily available public information. Frankly, I was stunned by how easy it was to show that what the president was saying was either false or highly contested. Everyone was buying it, however, and the same would happen with Colin Powell's presentation to the U.N. I deconstructed General Powell's remarks too, and I found them very disquieting. Familiar as I am with how the Nixon White House worked, I had never seen a major speech filled with knowing falsehoods produced by Nixon's speech writers.

I had seen, to the contrary, that Richard Nixon was always highly insistent on getting the information in his major addresses absolutely right, and if he had any doubts, or if he had any questions, the matter would stay out. Nixon's lies about Watergate were almost all extemporaneous, until they were assembled at the end and he was stuck with them. I found a very different mentality emerging across the national security apparatus of the Bush White House, and it was a very troublesome one. In writing *Worse than Watergate*, I wrote it not as a partisan, because those juices are long gone. My only partisan interest now is in good government.

I find it remarkable that Bush and Cheney are recreating a bulked-up "imperial presidency." Why is this happening? The best I can figure out is that Dick Cheney was sitting right outside the Oval Office as President Gerald Ford's chief of staff while Congress was deconstructing the imperial presidency. When Cheney became chief of staff, I still knew many who had stayed on from the Nixon staff, and Cheney had a very difficult time in that post.

He had a serous problem with leaks. Many of the old Nixon people were saying that they didn't realize how good Haldeman was until he was gone and the like. Things were falling through the cracks, so it was a bad time for Cheney. I think it singed him, as he sat there while the imperial presidency was being deconstructed; he has never gotten over it. When he was later elected to Congress, he would certainly be more of an executive branch man than a congressional man, even when he became part of the congressional leadership. Of course, that continued when he left Congress to become a cabinet officer – secretary of defense.

There is something unique about the Bush/Cheney presidency. I've been looking to see if I can find a precedent for a presidency that has made it a part of the president's agenda to expand presidential powers. That is an announced part of the Bush/Cheney agenda. It was mentioned during the 2000 campaign. They started with small steps pre-9/11, and big steps following 9/11. It has clearly been part of the agenda of this presidency from day one – including Cheney's task force on oil, which caused the Government Accountability Office to issue a subpoena and to bring the first lawsuit against a federal officer – ever – since the GAO was created in 1921. I talked to the top people at the GAO about why they didn't pursue an appeal when they lost in the district court under a ruling from a duly appointed Bush district judge. They had good reasons – they might lose even more, for the law in this area is very settled.

The GAO loss was a serious hit. We have a situation where the existing precedent really cuts the GAO off from even getting information from the executive branch. That, of course, is their job as the accounting arm of Congress. During the height of Watergate I convinced Haldeman that we should let the GAO audit our White House books. It was government money and they had a right to know how it had been spent. They did, and they found nothing. There was no problem. I am sure there would have been no problem had there been a GAO audit of Cheney's energy task force and other things. So Bush and Cheney are doing lots of little things – as well as big ones – to gather power for the presidency.

Secrecy is another form of power, and it is being used for that purpose as well. There is no

question that no one can govern in a fish bowl, and that there are areas where some secrecy is necessary, but I think we have gone to such an extreme that it has become a troubling development.

Nothing is surprising about what is happening, because we are in a very typical pattern of occurrences during secret presidencies. I wrote a column in April, 2006, looking at information developed several years ago by political scientist James David Barber. Barber summed up Nixon's personality perfectly, and made similar analyses of other presidents. He predicted what Nixon was going to do.

Barber studied how presidents attack their job. Do they attack it aggressively or passively? Nixon was clearly an aggressive president. Barber also studied the kind of satisfaction that presidents get from their work. Is it positive or negative? He found that for Nixon it was a generally negative experience. He labeled presidents who were aggressive in pushing their plans and policies, but who did not get personal satisfaction from doing so, "active/negative" presidents. His other active/negative presidents were Woodrow Wilson, Herbert Hoover, and Lyndon Johnson.

While I am cautious about typologies, I am convinced that George W. Bush is another active/negative president. That is not good. Active/negative presidencies – as you must realize from my list – do not end well, regardless of the powers involved.

PANEL ONE: **THE STATE OF THE DEBATE**

Moderator: Professor Richard H. Pildes
Panelists: Sidney Blumenthal, Professor Viet Dinh, Donna Newman, Judge Richard Posner, David Rivkin, Jr.

Richard Pildes:
Power inevitably flows to the presidency during times of war or major security threats. Whether we look at Woodrow Wilson in World War I, Franklin D. Roosevelt in World War II, HarryTruman in Korea, John F. Kennedy during the Cuban Missile Crisis, or Vietnam, this has been the pattern in the way American institutions work, probably even moreso since the nuclear age than before. This shift in power includes both the practical exercise of power and subtle shifts in the legal understanding of the powers of the presidency by other actors like courts and the Congress. There are deep structural and institutional reasons why we see this pattern recurring in these circumstances. Rather than deny this fact or rail against it in the abstract, I believe that taking it as a fact is the only credible starting point for serious analysis of presidential powers during wartime or times of threat. Given that power will flow towards the presidency in these periods, the question is, what are the risks associated with that? What are the strategies or devices for managing that risk?

I want to suggest, in particular, two very different kinds of strategies for this situation. The first strategy is one of institutional design. The second strategy focuses on what I would call the political culture of the executive branch itself. One of the great questions here is whether institutional strategies for managing this reality are likely to be effective, or whether instead all we can depend on in these circumstances is this much softer notion of the political culture of the executive branch itself.

On institutional design, the standard answer about how the American system manages this risk during wartime, or security-threat periods, or crises, is the system of checks and balances and the separation of powers. That is the original constitutional design for managing these issues. We repeat the mantra of separation of powers during these periods, but there are at least three major problems with this means of checking presidential power that have become apparent, and that we haven't fully confronted in thinking about these issues.

The first is that the checks and balances idea assumes that Congress wants responsibility

for engaging these issues. For the most part, it does not. Indeed, Congress wants to run away from responsibility for sharing the risks of making these sorts of decisions. The plural-headed structure of 535 members of Congress, the diffusion of accountability, the diffusion of responsibility, generally leads to Congress sitting back and waiting to see how things go, and then jumping on the bandwagon if they go well, or distancing itself from the president if things go badly. The need here is not for more forceful moral exhortations and abstract appeals to Congress to fulfill its "duty." Instead, the task is to determine how to structure institutions so as to make Congress actually take responsibility for policymaking and oversight during these periods.

Second, the Constitution did not anticipate the rise of political parties, nor how parties would dramatically shift the relationships originally imagined between the branches of government. Once you have political parties that generate unified political interests across the branches, at least during unified government, it is much less likely that you will get ambition counteracting ambition in the Madisonian vision. Instead, the ambitions of political figures across the branches are linked through their shared interest in the success of the political party with which they are affiliated. Thus, one critical question we might think about here is whether there is a way of recreating checks and balances in an age of political parties. In particular, we might think of means by which to empower the minority party in Congress, particularly during unified government, to do things like call hearings, obtain information, participate in oversight, and the like. If checks and balances is the vision animating our institutional design, we have to realize that the formal separation between the House, Senate, and presidency will not necessarily – in an era of political parties, particularly strongly unified parties – provide effective checks on or oversight of presidential powers during wartime. It is not enough to indulge in familiar myths about "separation of powers." We must be more realistic about the dynamics of actual political power in modern democracy, which means recognizing the effect of political parties and shared party affiliation on the way these institutions operate in fact. If we seek to enhance checks and balances through institutional design, we should consider empowering the oppositional political party in the House and/or Senate – particularly the Senate – to play a more effective oversight role.

Third, we should keep in mind that Congress was a major institutional player on foreign policy issues between World War I and World War II. Yet its record during those long years was pretty bleak, as the Neutrality Acts and similar measures reflect. So with any historical perspective in mind, even a more active and engaged Congress is not a panacea here.

Courts are the other conventional institution for checks and balances. They do have a role, but it is a mistake to invest too much in the courts as major institutions for addressing these issues. Courts tend to be reactive. They are, at best, negative checks on certain exercises of executive power; they act only after long delays; they do not have very full information about all the consequences at stake, and are institutionally limited in ways we do best to keep in mind. Whatever role courts play, in any event, it is going to be more at the margins than at the center of these issues.

Another possibility for strategies of institutional design is to imagine more vigorous checks and balances within the executive branch. We could try to force that in various ways, creating entities inside the executive branch to provide conflicting diverse views. Of course, that's what was tried with the CIA, for example, which was meant to be independent of the political power of the presidency, and that hasn't worked all that well. But this is a brief typology for different institutional mechanisms that might be created or modified to manage the inevitable reality of more concentrated executive power during times of threat and the concerns that concentration of power raises.

I want to shift, now, to a few words about political culture. If you look at presidencies like Kennedy's during the Cuban missile crisis or Roosevelt's throughout WWII, both of these presidents created structures for them-

selves, like Kennedy's Executive Committee during the Cuban missile crisis, that were designed to bring in consultation and very strong diverse viewpoints within the decision-making process of the executive branch. Congress played virtually no role in the Cuban missile crisis, yet that moment is pointed to as the model of a well-handled political crisis during times of a security threat.

Franklin Roosevelt was famous for giving different parts of his executive branch the same instructions without telling them. He would get a lot of information from different sources and decide what to do about it. That is checks and balances as a cultural matter within the executive branch, because of the nature of the president himself in those contexts. More generally, Arthur Schlesinger – whose book on the presidency is still, in my view, one of the best – after studying the presidency for many years ultimately concluded that much in this arena depended on the personality and belief structure of individual presidents. Checks and balances function, in his view, when, but only when, particular presidents believe in the discipline that the need for broad consent generates, and that checks and balances will operate in practice only to the extent their value has been internalized in the mindset of individual presidents.

The question I want to pose is whether, for better or worse, that is the best we can do? That is, are there effective institutional mechanisms for managing the inevitable flow of power to the presidency during these times? If not, are we left with little more to depend upon than the political culture in the executive branch itself, and ultimately the nature of the particular person occupying the office?

Judge Richard Posner:

My interest in presidential power grows out of work I have been doing in recent years on national security intelligence, and my particular concern about the relationship between the presidency and Congress has to do with Congress's intervention in the management of the executive branch.

I am not talking about oversight. I am talking about how Congress tries to limit executive authority by the laws that it passes, prescribing details of organization for executive branch agencies. This issue is often discussed in law under the rubric of the unitary executive. That is, is the executive branch meant to be a unit controlled by the president, or is Congress entitled to break up this unitary executive and create a kind of dismembered executive?

The usual way in which this issue is approached by a lawyer or by a judge is to look at several things, including: the text of the Constitution and the deliberations that led up to it; the actions of the early Congresses, which included people who had been in the Constitutional Convention; the historical circumstances in which the Constitution was promulgated; and the judicial interpretation of the text since the Constitution. That is not how I approach legal issues. My approach is actually heretical.

I first ask, in dealing with any legal question, "What is the sensible result? What is the result that a person who has not been imbued with legal culture would think would be the right result, the practical result, the result that would be best for the country, the reasonable result?" Then I look at the conventional legal materials, the text and the precedents, the history and so on, and ask whether they are consistent with this practical, sensible result. Can they be made consistent? Usually the answer is yes, sometimes no, sometimes one is blocked by these conventional materials but usually not.

But I will reverse the order and say just a few words about the conventional legal materials. They seem to me completely useless in dealing with these issues. The Constitution grants broad and overlapping powers to the president and to Congress in the area that I am particularly interested in, which is national security. The president is given the traditional monarchical prerogative of command of the armed forces, but his powers are not spelled out. He is also given the responsibility for executing the laws of the United States, which suggests some broad power of protecting the nation. But then Congress, in Article One, is given very extensive powers, two of which are

of particular note. One is the mysterious power to declare war. A declaration of war is not defined or explained; it is obvious that declarations of war are not required in a defense situation. And in particular, Congress is given the power to make rules for the government and for regulation of the land and naval forces, which sounds encompassing and obviously overlaps the commander in chief power, so the text is not helpful.

One can look at the behavior of the early Congresses, full of members of the Constitutional Convention. I think it has been established very convincingly by Larry Lessig and Cass Sunstein that the early Congress didn't really have a sense of a unitary executive or of a clear line between executive and congressional powers. For example, there was a thought that the Treasury Department was really sort of an arm of Congress rather than of the president. And Congress, the early Congresses, established sort of independent executive officials in various areas.

All this seems to me really uninteresting, because, after all, that was the eighteenth century, and we're in the twenty-first century. It is a completely different world we live in. The country has a hundred times the population, and is vastly different in the problems it faces, the resources it has and the enemies it confronts. At the same time, the early Congresses did not seem to have a conception of a unitary executive in the national security area, particularly with regard to national security intelligence. Until the 1970s, Congress basically wrote a blank check to the president. Congress granted George Washington a sum of money, unvouchered money that didn't have to be accounted for, to conduct intelligence. I attach no significance to this. The fact that this was done 1790 or something does not bear on what we should be doing today. But it is true until the Seventies, and neutralizes any historical analysis.

Until the Seventies, the tendency was simply to authorize the president and fund the president to engage in national security intelligence without further ado. A major intelligence agency such as the National Security Agency was established simply by executive order. In fact, the Defense Intelligence Agency was simply established by the secretary of defense. Then later they were funded by Congress and eventually some kind of statutory authorization was granted.

You can look at the relatively few Supreme Court decisions in this area; they don't really add up to anything. There is a fascinating opinion from 1936, *United States v. Curtiss-Wright Export Corporation*, which suggested that the government of the United States, in particular the president, has extra-constitutional powers. The reasoning is that when the United States broke away from England, before the Constitution was promulgated, the United States obtained, inherited, and succeeded to all the powers of the sovereign government, and those powers were vested. The Constitution can add additional powers, tinker with them, and so on, but there is some substratum of inherent sovereign power exercised by the president.

If you want presidential power, you can run with the *Curtiss-Wright* case or *Cunningham v. Neagle*, another famous case which questioned whether the president could, without statutory authority, appoint a bodyguard for a Supreme Court justice. The Supreme Court said the president has comprehensive power to defend the nation, which includes defending officials, and does not need congressional authority. On the other hand, of course, you have *Morrison v. Olson*, which upheld the independent counsel law and gave us, as a result, the Clinton impeachment. I think it is a good example of the lack of any sort of real consistency or helpfulness in what I'm calling the conventional legal materials.

Suppose we approach this then in functional terms, and say that we have a clean slate to write on from the legal standpoint. It seems to me that from a functional standpoint, although it's a rough analogy, we can think of the president as the chief executive officer of a large corporation called the "Executive Branch of the Federal Government," and Congress as a board of directors, representing the shareholders, who are the American electorate. When you take that oversimplified view, you see that

you would want the executive, the CEO, to have very broad control over the organizational details and the personnel of the executive branch. You would want to focus responsibility on one person. You would want that unity and focused responsibility. You would want to enable swift, decisive action and to be able to draw on the expertise of a fulltime civil service.

All sorts of implications flow from this. I think, for example, that senatorial confirmation should not be required of any officials below the cabinet officers themselves. They should be able to pick their own subordinates, get them into office immediately, fire them, control them, and not have to go through the senatorial confirmation process.The big delay discourages people from government service and enables senators to put holds on people as a result. This leads to huge unfilled vacancies in important jobs. Congress exerts increasing power over the executive branch by making more and more officials subject to senatorial confirmation.

If you look at the laws that Congress has passed in the area of national security intelligence, they have a level of detail which is completely inappropriate, and which causes strains and encourages presidents to claim and exercise inherent powers. The Intelligence Reform Act of 2004, a particular interest of mine, is 270 pages with the minutest detail. The director of national intelligence is told he shall appoint four deputy directors of national intelligence – not five, not three, not how many he needs, but four. The FBI is instructed that it shall move its special agents back and forth between criminal investigation and intelligence. The budget is allocated in little tiny pieces to particular units and is very difficult to move. The director of national intelligence is authorized to create centers like the National Counterproliferation Center, and he can take up to 100 people from other intelligence agencies and assign them to those centers – not 101 people, just up to 100. It just so happens that this nice round number corresponds perfectly to the needs of national intelligence. He is allowed to transfer officers and employees from one agency to another, but only for up to two years and only after consultation with the agency heads, and so on.

Finally, there is my favorite provision in the terrible Foreign Intelligence Surveillance Act from 1978, a statute that I am sure you will hear a lot about today. The statute is antiquated, almost unintelligible, and excessively detailed, but my favorite provision is a clause that says that although the act imposes extensive requirements for getting a warrant in order to conduct foreign intelligence surveillance, following a declaration of war by Congress (and they're careful to put in "by Congress," a little redundancy), the president may engage in warrantless surveillance for fifteen days. If you take it literally, if the United States is attacked, the president cannot engage in electronic surveillance until Congress is assembled and declares war. If Congress finally gets around to declaring war, the president must suddenly stop surveillance fifteen days later, even if there are foreign troops in Chicago. Here is an instance in which Congress seems to be encroaching, or should be thought to be encroaching, on the commander in chief's responsibilities. Whether or not you think there is a constitutional problem, there is a problem of sensible administration. Is it sensible for Congress enacting laws periodically to place this kind of straightjacket over the exercise of national security activities? It seems to me an unsound approach to congressional responsibility.

Sidney Blumenthal:

I recall being in the West Wing during the transition to the Bush White House, and as Condi Rice walked in to get her first briefings, she looked around and said, "You know, it looks exactly the same." She had been in the Bush One White House, and it always looks exactly the same, despite the fact that these presidencies happen to be very different. In the Oval Office, you can still see the cleat marks of President Eisenhower, who wore his golf shoes. Yet how the presidents actually step varies.

Last time I was here in Greenberg Lounge was in September 1998 when I had organized a meeting for a conference on "progressive governance," as we called it. Seated right over

there were President Clinton, Prime Minister Tony Blair of Great Britain, and Prime Minister Romano Prodi of Italy. It was a very different era. That very day happened to be the day that the independent counsel had released the videotapes of President Clinton's testimony to all of the networks. And it was also the day of the opening session of the General Assembly of the United Nations, addressed by President Clinton, so all of these events coincided. As you recall, the videotapes were made because the independent counsel, Kenneth Starr, had said they must be made in case a grand juror was sick and couldn't watch the president's testimony. Instead, they were made and then released to the news media for political purposes. While they were unreeling on television, the president was over at the U.N. I was here at NYU with then-First Lady Hillary Clinton, participating in a seminar somewhat like this. President Clinton came down and we met upstairs. He told us about the session at the U.N. He had been greeted by a standing ovation of the various heads of state. A Latin American leader had grabbed him by the suit jacket and whispered in his ear. He said, "You know it's like a coup d'état in my country."

Judge Posner raised the question of the impeachment. It was, in the explanations of those who conducted it, a very strange affair. Henry Hyde, who had been chairman of the House Judiciary Committee, said later, in public, that it was payback for Nixon. Unlike the Nixon impeachment, the committee conducted the Clinton impeachment without establishing any standards. Tom DeLay had, as we all know from Republican members of Congress, coerced them, under threat of running primary opponents against them and threats to their contributors, to support the impeachment. We in the White House believed that at least 35 House Republican members would have voted against impeachment without DeLay's coercion.

DeLay said that the president was impeached because he had the wrong world view. All of this suggests that a matter of sheer partisan power was behind it. It was certainly not, as the Senate made clear, presidential conduct in office, unlike with President Nixon. It was a very different matter.

I believe that there is continuity between what happened then, which involved congressional abuse, and the abuse today of presidential power. It rests in the same impulse for unaccountable power and partisan power as the modern Republican Party has developed. It is political in character fundamentally. During my time in government I had many dealings with the career staff professionals, particularly in the national security area. I have found that they, particularly those who, I later learned, consider themselves Republicans, have emerged as the most penetrating, active and harshest critics of what is going on in terms of presidential power under Bush.

These range from General Anthony Zinni to Joe Wilson, who was not a partisan Democrat but in fact considered himself part of Bush One's team, part of Jim Baker's team, the last acting ambassador in Baghdad during the Gulf War. He prided himself on being called a hero by the elder Bush and keeps a framed portrait of the first President Bush in his private office to this day. This group also includes Dick Clarke, who was the first head of counterterrorism at the National Security Council under Clinton, and Colonel Lawrence Wilkerson, Chief of Staff to Colin Powell, who has attacked the "Cheney-Rumsfeld cabal," as he calls it. There are more of them, including the generals who have now stepped forward, those who planned and conducted the war in Iraq in the field operationally, who feel that they'd been subjected to abuse by the executive through the secretary of defense. The army itself, particularly the army, has been abused. They were not hostile to George W. Bush when he entered office. Most of them voted for him. They were willing and eager to serve under him. But they observed firsthand, far more than any opponents on the outside, the radical changes that Bush was making within the government. As Republicans more than Democrats, they understood which of the traditions that they cherished were being traduced.

In summary, Bush has, in my view, deliberately sought to institute radical changes in the character of the presidency and the American

government that would permanently alter the constitutional system. He has used what he calls the global war on terrorism to impose a unitary executive of absolute power, disdainful of the Congress and brushing aside the judicial branch when he feels it necessary. The Bush White House concept of the executive is the full flowering of the imperial presidency as conceived by Richard Nixon. It has deep political roots. It involves personality and political history. These actions are not sudden impulses. They are not wholly the response to 9/11.

As to the idea that we are living in a wartime situation that requires permanent emergency powers – was not the Cold War wartime? Would it have been declared such had George W. Bush been president? Was Vietnam wartime? Would it have required these sorts of emergency powers? Many of these actions have their roots, in fact, in what Richard Nixon, in a sporadic way, tried to do during the Vietnam War.

This idea of the executive is based on deliberate decisions, fundamentally political, intended to change the presidency and government fundamentally and forever. It is no accident that Dick Cheney and Donald Rumsfeld served under Nixon and regard what happened then and the thwarting of that idea of the presidency as something they are trying to correct now under this Bush presidency.

Viet Dinh:

We started off the conference with a very positive note from our organizer and leader, Karen Greenberg, who gave us a wonderful metaphor of the state of leaning repose. I think it is an idealized state that those of us who work in governance, either in constitutional governance, political governance, organizational governance, or even corporate governance, always try to achieve. We think that if an organization is in such a state of repose it means that we are in harmony and that everybody gets along together.

Unfortunately, I do not think that that vision, that idealized state, is readily ascertainable, nor should it be, with respect to constitutional governance, and in particular to the separation of powers and the checks and balances dealing with national security matters of which Judge Posner has outlined the parameters. Richard Pildes has done a wonderful job of outlining the cultural and the institutional interactions in that process.

Taking the metaphor a little bit further, it looks not like a tree in a state of leaning repose, but rather a sapling being caught in the whirlwind of politics. The sapling, our Constitution, stands upright when the wind blows one way and there is a counteracting wind blowing another way. Quite often, they all end up in a cyclone that we call "divided government" or "Washington politics." I see this as a largely political process whereby the Constitution gives each branch of government the authority and tools necessary to counteract the other branches; as Professor Pildes puts it, "ambition counteracting ambition" in the *Federalist Papers* vision. We see that happening in a number of areas throughout history. There has been a lot of talk regarding the imperial presidency. The counteracting rhetoric is congressional supremacy.

We have heard a lot about the imperial presidency, and we all know the wonderful work of Raoul Berger with respect to congressional ability, what he called the "grand inquest," to check and restrict that tendency of the executive to act with secrecy and dispatch. We go through ebbs and flows in terms of interbranch authority. Professor Pildes points out that perhaps one of the reasons why our Constitution has turned out to have given more authority to the executive in dealing with foreign relations and national security matters, and why the people have acquiesced to such authority, is that Congress is a highly imperfect and certainly inadequate institution for conducting activities with the "secrecy and dispatch" that we need in order to deal with the outside world in diplomatic matters, or with the outside or internal threats with respect to national security matters.

It really does take two to tango. That is, the president's ability to push the institutional envelope, the institutional authority of the presidency, requires the acquiescence of the

other branches of government. Generally, Congress would stand up and seek to limit that authority. Where it does not do so, resort is often made to the Court. But as Justice Powell said in a very prescient concurring opinion in a case called *Goldwater v. Carter*, if Congress does not stand up to the president, why should the Court? There is a classic reticence of the judiciary to get involved in such interbranch disputes, especially since it is recognized that the branches have the tools and authority to counteract each other, and only in a case of clear impasse, where there is proper jurisdiction, should the Court expend its own institutional authority and capital in order to resolve these thorny interbranch political issues.

With respect to the current state of the debate, I would only make the general observation that the president's ability, at least in this administration, to expand the scope of executive prerogative and power has been largely unanswered by the Congress. This may well be explained by the fact that we do not have a party divide, but I do think that the institutional players within Congress are also very cognizant of their underlying authority and their ability to counteract the president. Even the Democratic minority in the Congress has not made very much stride, or even significant rhetorical challenges, to the president's assertion of presidential authority. In that sense, we need to think about what exactly it is and whose responsibility we put to bear.

Do we blame a president who seeks to expand his authority to do that which he has taken a constitutional oath to do, to uphold and defend the Constitution, and to defend this country against threats foreign and domestic? Or do we blame those who do not wish to enter into the political fray in order to stand up to those institutional challenges of authority?

We see this in several particular areas; for example, the so-called "NSA intercept" or the terrorist surveillance program and the alleged infringement of the Foreign Intelligence Surveillance Act or Title III of the 1968 Omnibus Crime Act, which seek to prohibit unauthorized wiretaps. The Congress has a very good rhetorical point; that is, no man is above the laws that Congress passes, including the president because he is not King George. The president also has a very strong rhetorical answer, in which he essentially says, "The question is not whether any man is above the law, but whether anybody is above the Constitution, including Congress. Congress has sought, in my opinion, to limit that which it does not have the authority to do, which is to limit my presidential authority under the Commander in Chief Clause and under the Vesting Clause of Article Two of the Constitution, and I took a hit for it. I stand up from January until this day and I say, 'Yes, I authorized this personally.' Very few people review this program. Only five people in the White House were read in. I made the decision that this was in the national security interest of the country, and also that it is within my constitutional authority to authorize it."

So the president has effectively stood up and said, "I am making the argument to the American people. I am pushing the wind one way." Congress certainly has ample tools to push the wind back the other way, which include, of course, congressional hearings, and which also include the cessation of funding to any program or agency, and ultimately to the censure and impeachment of the president. If all the hue and cry and all the concern is that great, I think the congressional critics should change the playing field and say, "Wait, this program is illegal under our law, and we will put an appropriations rider in to prohibit any federal funds from being used in this manner." And then we elevate the constitutional dispute to a different level, the Boland Amendment level, rather than just a straightforward executive authority level. That is the way you escalate the fight. There is that sense that you take your fight to the American people if you have it.

My read of this, and I am certainly no political strategist, is that one of the impediments to a successful interbranch standing up to the president on this type of issue is that the polls indicate that anywhere between 65 and 70 percent of the American people think it's okay to spy against an enemy in a time of war. The president has successfully redefined the debate according to his own terms, and if Congress

wants to stand up to the president, it needs to redefine it back and take action thereafter.

The second indication of this is with respect to the treatment of enemy combatants, the Jose Padillas and Yaser Hamdis of the world. There was great concern regarding how the president would exercise his authority with respect to these enemy combatants, especially the ones who are U.S. citizens being held on U.S. territory. For several years the president was going at it alone, because neither of the other branches would speak up, until the Supreme Court issued its opinion in *Hamdi v. Rumsfeld* suggesting that Congress had implicitly granted some authority to the president to do this, and suggested some procedures for the president to follow. At this point there was an invitation to Congress to enter into the political debate and establish some guidelines, and elevate the discussion so that all three branches would be engaged in it. None of the legislative proposals went anywhere because there was no political will.

The third example is, of course, what is going on in Guantánamo Bay. In 2004, the Supreme Court held in *Rasul v. Bush* that the courts have jurisdiction to review the challenges to detention in Guantánamo Bay of the 600-odd prisoners being held there. The Court fairly openly punted the ball by saying that if this is a concern for Congress, it can of course revise the Court's habeas jurisdiction in order to limit it, and that's what Congress did with the Graham/Levin Amendment. There is a question pending before the Supreme Court now as to whether that withdrew jurisdiction only in future cases, or also in pending cases, including cases like *Hamdan v. Rumsfeld*. But the surprising thing, coming out of that oral argument, was that retroactivity was not really the issue of the conversation, nor were the technicalities of the drafting of the legislation. Rather, the justices were expressing extreme surprise – "How could Congress do this? They mean to limit our jurisdiction? I can't believe that Congress would come in and act in this way." So you see, in a very live way, the branches are engaging in this conversation. The only fault I see with it is that the people who are complaining the loudest are the people with the greatest, and indeed the sole, ability to counteract the winds of institutional ambition, as we may well characterize the current advent of presidential power.

My final note was touched upon by Mr. Blumenthal's remarks, especially the various voices coming out of the woodwork in order to participate in this debate. There will always be personal and bureaucratic tension within the executive branch, just as there will always be, and there should be, interbranch tension between the executive branch, and Congress, and the courts. That is a fact of life in any organization. When the organization is the United States of America's executive branch, you expect that. There will always be debate, there will always be very strong debate, and there will always be better bureaucratic players and those who convince the principal better. There will always be winners and losers, and also there will always be an incentive for both the winners and losers to advocate their position outside the context of that particular controversy. Just because some people, even half of the former corps of bureaucrats, come out in favor of half of the population's conversation, does not necessarily make that half right. It just means, and we should take comfort in it, that there are good internal and external winds swirling around in order to ensure that our constitution and our polity stand straight.

Donna Newman:

I come from a different perspective; I come from the trenches. I have to use the Constitution every day when I defend my clients. I do not come here as an academic. I do not have lofty ideas. I stand up before the court, and I quote the Fourth Amendment, and I believe in due process, as I have to in order to argue my clients' cases.

So to me, what happens with the president trickles down to all of us, as I found out in 2002 when I was appointed to represent Jose Padilla. After all, I was just a criminal defense attorney doing her job. But when the executive, the president, took my client from me, without a courtesy call, I was angry, and I really stood up.

When Viet Dinh said "we," he meant that it is Congress that should be blamed if there's a failure, a lack of action, or that we should blame those who failed to stand up. I really believe that it is not just Congress who has failed to act in these important issues, but the American people. I believe you all should have been as angry as I was because a fundamental right was being abused and set aside by the president essentially asserting, "I have the power. You want to fight me? Fight me." Well, I did. But I couldn't believe it. "You mean you're taking my client, without calling me, without asking, without telling me where you're taking him, for interrogation? And you're saying that's why you're taking him?" What happened? Maybe I failed law school and didn't know it, but that is not what I learned.

The idea that a president has more power in wartime is far from novel. There is no question that there are people on the battlefield, and our boys are getting killed. September 11th happened. Things have to be done, and there are important decisions to be made. I do not discount that there are national security issues at stake. That would be foolish.

What is novel is this administration's contention that the war on terror is a license to extend military power, battlefield power, and strategic battlefield decisions to the domestic sphere. I do not buy, as the government has argued time and time again, that the battlefield has now moved here. Certainly on 9/11 it did, but not after. It could come back, and we know that, but it is not here today. It is not a license, then, for the Bush administration to say, "I made the decision. I carry out the orders." The administration cannot be the prosecutor, the judge, and the jury, and that is what it claims to have the power to do.

Presidential power is limited, purposely limited, under the Constitution. That's something which I still think is viable, which I still think is something we have to adhere to, all of us, including the executive. The framers rejected the assertion of a unilateral, unchecked power. They created structural and procedural provisions to constrain the government's power to deprive citizens of liberty. That's an important concept that I will not throw away willy-nilly and say "Well, that's old." It is not old. It exists and it is important.

The framers were wary of military power in the domestic sphere, and they sought to subordinate it. Habeas corpus, the Suspension Clause, which prevents executive arbitrary detention, provides that the right to suspend the Clause is exclusive to the legislature. There were reasons behind this. It was not just that they picked lofty ideas. They had experiences that taught them that this is the way the government should be run. It can still be run that way.

We cannot offend the rule of law or allow it to be offended, and by "we" I mean the citizens, because that would violate our tradition. How could we now, in the world that we live in, stand up for democracy, and say that we are democratic, if in fact we do the things that are happening in this country today, such as the executive detention of citizens caught on U.S. soil, and the NSA's secret eavesdropping on citizens? I do not see that the president has stood up and told us anything. All he has really said is, "I authorized it, so it's okay." I do not believe in that. I believe we have to question it and find out more. I cannot sit here and tell you what it is about because he has not told us.

I'm concerned about so much secrecy. Obviously I agree that we cannot conduct government in a fishbowl, but on the other hand, there is the amount of secrecy, the amount of documents that have been declared classified for no reason other than someone in the administration saying "Classify it." Why am I concerned? Because this is perpetuating an atmosphere of fear.

I am a child of the Sixties. I confess that I did not go out and picket, but I appreciated what everybody else was doing. I understood it, I was proud of it. I do not see that now. You know why? I think that it is because of fear. There is a fear of liberty, not a fear of terrorism, or at least there is a use of the fear of terrorism to say that somehow freedom is the cause of our vulnerability. I don't buy it. Freedom makes us strong, not vulnerable. It enables us to perpetuate our image. It makes us proud of who we are. It gives us strength

because it shows the world that we can do this and it works. And it has worked. I do not like redefining patriotism. I do not like that those who stand up and disagree are called unpatriotic. I think that that also is a mentality of fear that we must fight against.

Sandra Day O'Connor recently observed that the framers created three separate and equal branches of government because they knew that preserving liberty requires that no single branch or person can amass unchecked power, and she reportedly noted that Republican court-stripping efforts are examples of dangerous overreaching. "It takes a lot of degeneration before a country falls into dictatorship, but we should avoid these ends by avoiding these beginnings," she said.

David Rivkin:
I'll state frankly that I'm depressed about the state of the debate. I think the reason for my depression is manifested in a nutshell by the evolution of a debate, a discourse, concerning the United States surveillance program which, while important in its own right, is a nice facsimile of the broader debate.

If you reflect upon it briefly, at the time the surveillance program was revealed in *The New York Times*, the critics, including members of Congress and the media, had all been focused on the legal architecture of the program. There was a certain clear sense of consensus that we were as interested as the administration in listening to all aspects of al Qaeda communications. That pretty quickly turned out to be an illusion, which became clear in the course of congressional efforts to hold hearings on the FISA reform.

By now, a number of critics have advanced arguments that it is not essential to listen to the entire spectrum of al Qaeda communications. They have more elegant and more liberty-protective ways of preventing future al Qaeda attacks. The reason for this evolution is pretty clear to me. It is because the critics insist that, in all instances, NSA surveillance must be blessed by the courts. That, of course, can be done with a fairly narrow spectrum of overall al Qaeda communications, namely the ones with regard to which you can demonstrate to a FISA judge that there is probable cause to believe that al Qaeda-based operatives are talking to their U.S. agents. To me, the willingness of the critics so soon after the savagery of September 11th to abandon any efforts to surveil comprehensively the entire spectrum of al Qaeda communications, and suggest other things such as better computers and better interpreters, is nothing short of stunning.

Unfortunately, that tendency is replicated across the entire range of legal and policy issues related to the war on terror. The critics wildly, and I emphasize the word wildly, misstate and misperceive the facts. The common perception is that the Bush administration is practicing with gusto the imperial presidency paradigm, stretching executive power to its limits and beyond, and threatening liberty in the process. To put it mildly, that is bunk. I think the Bush administration's post-September 11th record, whatever you think of it, if you actually objectively compare it to the record of all predecessor wartime administrations – Lincoln, Wilson, or Roosevelt – it just does not compare. Incidentally, for those of you who may have derived an impression that abuses of power are unique to Republicans, I wonder how many serious American historians think that Nixon's grasp of presidency was that fundamentally different from that of Lyndon Johnson. But, leaving all of that aside, I don't think that you can make a serious argument that Bush has done more than Roosevelt, Lincoln, and Wilson.

The second thing that depresses me is that, instead of featuring a number of specific confrontations between the president and the Congress, which is indeed endemic in our history, there is a broader unifying anti-executive theme that provides the philosophical underpinning for various congressional actions. That theme is a very robust hostility towards unchecked exercise of discretionary power by the executive, which is viewed as unconstitutional, violative of checks and balances and threatening civil liberties. I also detect a more fundamental aversion to the political handling of key policy issues, coupled with concomitant belief that the judiciary is the best venue for

resolving all difficult policy issues, particularly for balancing individual liberty and preserving public security.

I think the framers would chuckle if somebody questioned the premise that certain core aspects of governmental power, especially when managing national security, can necessarily and only be done at the discretion of the executive. They would have told you that the way to prevent abuses of that power, which was certainly very much on the forefront of their minds, is fundamentally through political accountability. It is not by having Congress or the judiciary partake of those exercises of executive discretion.

To me, the notion that you can drive national security decision-making through sort of antecedent rule creation is silly. Even if you had the best, the most Solomonically inclined Congress, the notion that it could create framework statutes that sufficiently can take account of the complexity of the external environment we're facing in the twenty-first century, or any century, is absurd.

Now, the third point I would make to explain my depression is that the debate about the constitutional prerogatives of the president is not new. Ironically enough, precisely because it's not new and because the republic has managed to survive for 200-plus years, there is a view that, "Well, there's nothing new under the sun. It happened before. It will continue and everything would be fine."

I do not personally share this optimism because I think that the current assault is qualitatively different. The original Congresses gave the president pretty much a blank check, things changed a bit after that, but really, congressional criticism and micromanagement did not become a norm until the Seventies, when we had a wave of statutory activities largely stemming from Vietnam, Watergate, and the collapse of the Nixon presidency. Congress tried to do a little bit more in the 1980s with the Boland Amendment. Things receded in the 1990s, but fundamentally Congress, during most periods, tried to get itself a seat at the table institutionally. They were interested in acting politically. Congress, whatever you think about the Boland Amendment, was willing to stick its neck out and say, "We do not think the Reagan Administration should be supporting the Contras, and if bad things happen, we will pay. Because that policy was blocked by us, we will pay a political price for it." That is fundamentally not what is happening now.

What is happening now is that Congress – and I do agree with some of the critics' observations – is not interested in acting in an accountable, transparent fashion. I agree with Professor Dinh. If Congress feels that the NSA warrantless surveillance program is unconstitutional and illegal, it should, I would urge it to, cut the spending and pay a political price. If it turns out, God forbid, that we have another 9/11, that thousands of Americans die, and that we have another 9/11 Commission, we will not be debating what would have happened if Moussaoui's computer were searched, we'll be debating whether or not a given conversation would have given a clue to it. That move by Congress would be commendable. I think it would be foolish, but commendable. But they would not do it. They would not do it whatsoever because they love their jobs so damn much.

Instead, what it is going to do, and is doing with enormous gusto, is asking the judiciary to micromanage the executive foreign policy functions, because then if something goes wrong, they could say, "We were for it before we were against it." If there is one branch which is even less suited to managing effective foreign policy, because I agree with Judge Posner, looking at the functionality is important, it is the judiciary.

Now, why the pessimism? By the way, I do not read the *Hamdi* decisions or even anticipate the *Hamdan* decisions to be bad in a sense of going fundamentally against the executive. In fact, if you look at the entire range of cases, both preceding and following *Curtiss-Wright*, the judiciary has been remarkably restrained, and properly so.

My fear is the judiciary, after decades of aggrandizing its power domestically, and after being quite influenced by the sentiments of the chattering classes, may well be on the brink, if

this debate – if this anti-executive tendency, the philosophical hostility, the aversion to all things political, particularly aversion to the discretionary exercise of executive power – continues, then the judiciary may well break its tendencies. If that were to happen, it would be an unmitigated disaster, both in terms of the Constitution and in terms of undermining national security. I wish I felt it was just limited to this administration. That would make me feel better. I think we're really teetering at the precipice of fundamentally warping the constitutional balance. I hope I'm wrong, but that is a real possibility.

PANEL TWO: **PRESIDENTIAL POWERS: PAST AND PRESENT**

Moderator: Professor Stephen Holmes
Panelists: Mickey Edwards, Nat Hentoff, Jeffrey Toobin, Professor Sean Wilentz

Nat Hentoff:
I'm going to focus on the further expansion of the president's powers in the increasing investigations – and some may be criminal investigations – of the press for, in the president's terms, "aiding the enemy," and publishing leaks of classified information. The White House is now insistent that the press is getting in the way of the unitary executive, having been advised by a covey of lawyers in the Justice and Defense Departments that since 9/11, as commander in chief, the president has the power to bypass Congress and bypass the courts when it is necessary for national security.

CIA Director Porter Goss testified before the Senate Intelligence Committee in February. Porter Goss was persuaded by the president and Dick Cheney to become the director of the CIA. Vice President Cheney, shortly after 9/11, mentioned the necessity to cultivate the "dark arts," and he wanted to make sure, with all the leaks going on, that those arts would become even darker. In testifying, he said, "We will witness a grand jury investigation with reporters present being asked to reveal who is leaking information about the CIA's classified material."

The charge against Mary O. McCarthy is that she was a source of Dana Priest's *Washington Post* report (from November 2, 2005) on the CIA secret prisons in Eastern Europe. She has denied not only the charge but also that she even had access to the information that Dana Priest was printing. Dana Priest (I am so pleased that she won the Pulitzer in 2006) has been writing about the CIA's "black sites" since late 2002. Pat Roberts, chairman of the Senate Intelligence Committee, who continually refuses to authorize an investigation into the CIA's violations of American and international laws in its prisons (wholly hidden, obviously deliberately, from our rule of law), is now applauding the firing of Mary McCarthy.

Dana Priest is already subject to a Justice Department investigation, as are *New York Times* reporters James Risen and Eric Lichtblau for their disclosure of the president's secret approval of the National Security Agency's warrantless surveillance of Americans. Those reporters also received Pulitzers in 2006, despite the president's characterization of their reporting as "shameful." The administration's position has been clearly stated by FBI spokesman William Carter: "Under the law, no private person, including journalists, may possess classified documents that were illegally provided to them. These documents remain the property of the government."

The law cited by Mr. Carter is this administration's expansion of the Espionage Act of 1917, which is now before the courts. Woodrow Wilson was very disappointed in what finally became of the Espionage Act. He was insistent that there be a provision that would punish the press which was, after a very spirited debate, extracted from the Espionage Act of 1917. It is now expanded by this administration. There is a case currently in the courts that could greatly diminish the First

Amendment rights of the press and the rights of Americans to receive information about such lawless practices as the CIA secret interrogation centers and the president's violation of the Foreign Intelligence Surveillance Act. This espionage case, which has not been reported sufficiently in the media, *United States of America v. Franklin, Rosen, and Weissman*, is the first in which the federal government is charging violations of the Espionage Act by American citizens who are not government officials for being involved in what until now has been regarded as First Amendment-protected activities, engaged in by hundreds of journalists, not every day, but quite often.

Steven Rosen and Keith Weissman, former officials of the American Israel Public Affairs Committee, who have since been fired, are accused of receiving classified information from a Defense Department analyst, Lawrence Franklin, about American strategy in the Middle East and in counterterrorism. Rosen and Weissman are charged with providing information to an Israeli diplomat and a journalist. Lawrence Franklin has pleaded guilty and has been sentenced to prison.

Defense attorneys for Rosen and Weissman declared, "Never until now has a lobbyist, reporter or any other non-government employee been charged for receiving oral information the government alleges to be national defense material as part of that accused person's normal First Amendment-protected activities."

In an amicus brief to the U.S. District Court for the Eastern District of Virginia, the Reporters Committee for the Freedom of the Press (with which I'm affiliated) says, "these charges potentially eviscerate the primary function of journalism: to gather and publicize information of public concern, particularly where the most valuable information to the public is information that the government wants to conceal so that the public cannot participate in and serve as a check on the government." After all, that is one of the reasons why the First Amendment was added to the Constitution in 1791.

T.S. Ellis III, the judge now hearing this espionage case, said in March (although he's backtracking a little now) that "persons who come into unauthorized possession of classified information must abide by the law. That applies to academics, lawyers, journalists, professors, whatever" – "whatever" being a rather broad and vague term. Recently Judge Ellis is beginning to realize, it seems, that this is a more difficult case than he first thought. As Steven Aftergood, head of the Project on Government Secrecy at the Federation of American Scientists, says, "To make a crime of this kind of conversation that Rosen and Weissman had with Franklin over lunch would not be surprising in the People's Republic of China, but it's utterly foreign" – the question is, is it? – "it is utterly foreign to the American political system." This censorship of the press was cut out of the Espionage Act of 1917. If the Supreme Court agrees with the Bush administration, and Judge Ellis's position in March, we will, as Mr. Aftergood says, have to build many more jails and disarm the First Amendment.

What is happening in the secret prisons (not only in Eastern Europe where two of them have been closed as a result of *The Washington Post*, and one has been moved to Morocco) is outside any concept of American law so far as we know. We do not know very much, but there is an important Amnesty International report, "Below the Radar," that was released on April 6th, 2005. It contains one of the first testimonies from people, three citizens of Yemen, who were released from these secret prisons, and who were tortured in ways that have been otherwise documented by Jane Mayer in *The New Yorker*, by Dana Priest in *The Washington Post,* and by reports by the Center on Law and Security in their invaluable book *The Torture Papers.*

This is all a matter of record by now. What really struck was a question asked on *Nightline* by a former FBI agent, a senior agent on the FBI's bin Laden squad in New York, who headed the investigations of Khalid Sheik Mohammed, a senior al Qaeda official. The question still has not been answered. I have heard other ex-CIA people and ex-FBI

people ask this, some of them on *60 Minutes*. The question was, "What are we going to do with these people in the secret CIA prisons when we've finished exploiting them? Are they going to disappear? Are they stateless? What are we going to explain to people when they start asking questions about where they are?" I wish there were more people asking these questions, "Are they dead? Are they alive? What oversight does Congress have?" I would ask that of Senator Roberts.

Earlier, Jack Cloonan, the FBI agent, said, "We're trying to change hearts and minds in certain parts of the world. That's arguably one of the reasons for going into Iraq. I find this frankly to be counterproductive, let alone criminal."

I wish the press, threatened as it is now may be, would get into this much more deeply. I never thought I would celebrate so ardently the Pulitzer awards as I did this year for Eric Lichtblau and James Risen and the invaluable Dana Priest.

Jeffrey Toobin:

I'm going to focus a little more narrowly. I'm going to talk a little about what I think of as the intellectual and historical origins of the Patriot Act, and what that tells us about the current environment. As Judge Posner said earlier, up until the 1970s the Supreme Court had never really focused on the issue of what kind of oversight there should be on government wiretapping by the executive branch. It simply had not come up very much. And then in the Seventies, because of the disclosures about the FBI, and the CIA, and because of the Church Committee, the issue started to get on the national agenda, and you had a very mysterious case called *U.S. v. United States District Court*, known as the *Keith* case, which started to address the issue. Congress started to address the subject of the sort of controls there should be over wiretapping.

Congress, I think reasonably, decided to draw a distinction between two kinds of wiretaps. There are law enforcement wiretaps, which are known as "Title III" wiretaps. When you want to wiretap the Ravenite Social Club and see what John Gotti is up to you use Title III. When I was an assistant U.S. attorney, I used Title III. They were the law enforcement wiretaps, and those you had to get approval from the Department of Justice, and then you had to go to a federal district court judge, and it was very much like a search warrant. That was one route.

But then, for national security, they said, "Well, we don't want to have that kind of process, where there might be disclosure, but we do want some oversight." They set up a mysterious body called the FISA court (the law was called the Foreign Intelligence Surveillance Act), and if the government wanted to wiretap the Soviet embassy, as we certainly hope and expect that they did, they had to go to the FISA court. This was something close to a rubber stamp. There were thousands of applications made, and virtually none of them were turned down, but it was at least some sort of institutional check on the government from wiretapping for political purposes or untoward purposes.

That system worked fairly well for the ten years until the Berlin Wall fell, and then this distinction between foreign intelligence surveillance and domestic surveillance started to break down. The most dramatic illustration of this distinction, where we no longer had big black telephones in Soviet bloc embassies, instead we had cell phones in the hands of mysterious non-state actors, was in August of 2001, when some intelligent, industrious, honorable FBI agents uncovered a mysterious character called Zacarias Moussaoui in Minnesota. They said, "We want to get a search warrant on this guy, we want to find out what he's got on his hard drive." The FBI supervisors, in their bureaucratic cowardice, did not know which slot this would fall in, and basically the request fell through the cracks.

In a very peculiar trial that has been going on in the Eastern District of Virginia, one of the most chilling pieces of testimony was by the FBI agent who found Moussaoui in Minnesota, who said this was criminal negligence on the part of the FBI. As we weigh the consequences and causes of what happened in this country on 9/11, I think the FBI has gotten away with a lot

less criticism than it deserves. The CIA has gotten a great deal of criticism, but if you look at how the FBI neglected this problem, which was, after all, inside the United States, there is a lot to answer for by Louis Freeh and the people who ran that agency in the nineties.

In any case, they did not get the search warrant in time. Whether the 9/11 attacks could have been stopped or not is very much an open question, but certainly there should have been more investigating done right away. Moussaoui was arrested in August, about three weeks before 9/11.

But after 9/11, Congress started to decide, "What are we going to do about this?" They looked at the distinction between national security wiretaps and domestic wiretaps, and said that this distinction was increasingly meaningless. While they preserved the two tracks, they made the possibility of information-sharing between the two of them easier. This passed the Senate 99 to one.

Frankly, I think the 99 were right and Russ Feingold was wrong. This aspect of the Patriot Act makes a lot of sense. I don't think the distinction between national security and domestic investigations is meaningful anymore.

I think that those of us who followed this debate, and those of us who care about this issue and thought that the Patriot Act was a reasonable compromise, were especially disappointed to learn about the warrantless wiretapping by the NSA, disclosed by James Risen and Eric Lichtblau in *The New York Times*. This was an issue that Congress considered right after 9/11, and Congress was in a position to look at and say, "How can we address this issue of wiretapping, and how can we make law enforcement decisions and national security decisions that respond to what people need, and to what the administration needs, but that protect a modicum of privacy?" And they frankly cut a deal that was very favorable to law enforcement.

About these national security wiretaps that you can get from the FISA court – in the first place it's very easy to get them, but in the unlikely event that you don't have time to get one, or, in the incredibly unlikely event that they're turned down, you can go after you start wiretapping. You can just start the wiretapping and get an *ex post facto* warrant, so this is not exactly a rigorous check on law enforcement, but it is some kind of check. Yet even that check was too much for the administration when it came to the warrantless system that we still know relatively little about. We do know that it exists, and we do know that President Bush has said, "I endorsed it and I am proud of it."

I think Viet Dinh is right that it is the responsibility of each branch of government to follow the Constitution, that the Constitution is an independent obligation of each branch of government. That's why I think it is not enough to say, "Well, if the other branches don't stop us, we're going to continue to do this." The Patriot Act was a reasonable accommodation of these competing pressures, but what the Bush administration did with it was disappointing, and we'll see what happens now.

Sean Wilentz:
The attacks of September 11th, 2001, and all that has followed, seem to have opened up new debates about presidential powers in foreign affairs, especially with respect to war-making. In fact, these debates are very old, virtual perennials in our history. We are just looking at them in a dramatically new light following the al Qaeda atrocities.

A few comments I have heard since September 11 seem to avow that the United States is an essentially malevolent force in the world, and that its government had no legitimate right to wage war even in national self-defense. These wild, extremist claims get picked up by extremists on the other side who use them to smear as treasonous any dissent, no matter how slight, from the current administration's policies.

Amid such passionate polarization, it is all the more important to step back and recall that debates over the president's powers in foreign policy, and especially with respect to war-making, date back to the earliest days of the republic. There weren't nuclear weapons back then, but there was the United States Constitution,

and the United States Constitution had better count for a lot. The most basic question in these debates is pretty simple: "Where do the executive's powers end and those of Congress begin?"

As early as the administration of George Washington, when the Senate approved the controversial Jay Treaty, there was a small crisis when the House of Representatives demanded executive papers and the Washington administration refused to provide them. The House came within a single vote of refusing the appropriations to implement the Jay Treaty. There have been numerous subsequent struggles, from the tussles over Abraham Lincoln's suspension of habeas corpus in 1861 and 1862 to those over implementing the War Powers Act.

To understand our current situation in historical context, we need to draw some distinctions that are very often blurred – especially the distinction between making war and responding to terrorism. (It is a distinction that gets lost in the unfortunate new phrase, "war on terrorism.") We also need to distinguish between the president's powers under the Constitution and those under international law. Finally, we need to consider what constitutes the wise and prudential use of acknowledged executive power under the Constitution.

First, with regard to terrorism: Ever since the nation's founding, presidents have responded swiftly, resolutely, and unilaterally to terrorist attacks. Thomas Jefferson, in one of his very first acts as president in 1801, took preemptive action in an effort to halt the Barbary pirates' attacks on American shipping. More than a century and a half later, in 1986, the Reagan administration lobbed missiles at Libya ten days after U.S. intelligence learned of Libyan diplomatic comments regarding the bombing of a West Berlin nightclub in which two people were killed (including an American soldier), and 230 were injured.

In 1993, when the White House received confirmation of a foiled Iraqi-sponsored plot to assassinate former President Bush in Kuwait, President Clinton ordered warships to the Persian Gulf. The warships proceeded to destroy the Iraqi Intelligence Service's offices in Baghdad. Five years later, following the al Qaeda bombings in Dar es Salaam and Nairobi, President Clinton attacked Osama bin Laden's forces and fired on both bin Laden's Afghan compound and a Sudanese chemical factory. (We remember those as the "wag-the-dog" attacks because they came in the middle of the impeachment crisis.)

There's long precedent, then, for American presidents to take direct executive action to combat terrorism. Given that precedent, I doubt that the moves to get congressional authorization were even necessary before striking back against al Qaeda after September 11. It is true that Article I, Section 8, of the Constitution gives Congress the war-making power. But some would say, and I think it's a reasonable argument, that under Article II, Section 1, which gives executive power to the president, the president has the authority to deal with terrorism unilaterally.

Although Congress could at any time have handed the president blanket powers to take military action in response to September 11th, it is by no means clear that congressional action was necessary with respect to attacking al Qaeda. War-making is a congressional function, but combating terrorism is an executive function, as foreign policy generally falls under the executive's purview. Madison acknowledged as much, Washington acknowledged as much, and Jefferson acknowledged as much.

By the same token, though, partly because Congress has the power of the purse, a wise and prudent president will always consult thoroughly with Congress and take a bipartisan approach to foreign policy, even in those instances where the executive is empowered to act unilaterally. A wise and prudent president certainly will not try to politicize his actions – including those which, like fighting terrorism, belong to the president. On these counts, the current administration has displayed neither wisdom nor prudence.

As for international law, there is now a debate over whether it limits the president's powers in any way. The overwhelming weight of authority holds that the White House is indeed subject to international law. And under

international law, the president cannot take unilateral action to reprimand or punish terrorists. But the president does retain the power to respond to armed attacks in the name of national self-defense – and even to engage in anticipatory self-defense. Traditionally, though, presidents who have done so have also sought to build international coalitions through diplomatic actions – and since 1945, they sought authorization from the U.N. Security Council. Even in 1998, when President Clinton took swift action after the Dar es Salaam and Nairobi bombings, he also took great care to justify his actions.

As for the killing of individual terrorists, and particularly sending people out to "get" Osama bin Laden, international conventions bar assassination or murder, but they do not preclude killing in self-defense.

In all of these respects, I believe, the Bush administration conducted itself correctly, in the strictest legal sense, in its responses to the attacks of September 11th, including its own attacks in Afghanistan. But whether the administration acted wisely or prudently by pursuing these efforts in a highly partisan way is another matter altogether. And almost everything the administration has done since then is also problematic. Even holding aside matters of international law – above all whether the United States should obey the Geneva Conventions or summarily and unilaterally reject them as "quaint" – the administration's conduct has raised the old basic question once again: What are the president's powers to make war?

Those who take a minimalist approach would prohibit any executive action specifically barred by the Constitution of the United States. We've heard a great deal lately from minimalism's advocates, some of whom have protested all of the Bush administration's military actions. But there is another position – the one Abraham Lincoln took in the midst of the Civil War. Lincoln quite openly (and not secretly) violated the Constitution – not simply in suspending habeas corpus but in signing the Emancipation Proclamation, which was an unconstitutional wartime measure.

Here is what Lincoln said in his own defense – call it in a prospective refutation of the minimalist position – in a letter to a Kentucky newspaper editor in 1864 about the Emancipation Proclamation :

> I did understand, however, that my oath to preserve the Constitution to the best of my ability imposed upon me the duty of preserving, by every indispensable means, that government, that nation, of which that Constitution was the organic law. Was it possible to lose the nation and yet preserve the Constitution? By General law, life and limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I feel that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the Constitution, through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it.

There are many who think that having taken that position, Abraham Lincoln was a perfect despot – and so he is remembered in many parts of the country. (I cannot tell you how many e-mails I get from people – not all of them, by any means, from the South – who are amazed that I think highly of Abraham Lincoln the despot.)

Far beyond Lincoln's position, there is also a maximalist position – and it is this position that I fear the current administration is advocating. According to the maximalist view, a wartime president – including a president who pursues a war on terror, a war against a tactic rather than a state or any other particular enemy – is free to do whatever he pleases in order to wage that war. Moreover, if the president deems it proper, he can do whatever he pleases in perfect secret.

The maximalist position is without precedent in American history. Whether or not the position has merit, we at least ought to recognize that its adoption by the Bush administration marks a fundamental departure from precedent. No wartime president has ever claimed, as a matter of constitutional right, the

grandiose powers claimed by President Bush.

The administration had compounded its maximalist wartime claims with its attempts to dictate which laws (or which portions of laws) it will execute and which it will not – and how it will interpret any given law, regardless of the expressed will of Congress. I'm thinking in particular of the recent run of signing statements that the president issued. As promulgated by President Bush, these statements amount to line-item vetoes – and thus represent a seizure, by the executive, of power not granted it, implicitly or explicitly, by the Constitution. Basically, President Bush has said "I'm going to enforce the law however I see fit," even if his preferences flagrantly violate the will and intention of the Congress. This usurpation extends far beyond debates over the president's war-making authority. The signing statements indicate that the current administration lacks a proper respect – and perhaps any respect at all – for the constitutional separation of powers designed by the framers.

To say that this seizure is justified by the demands of conducting a war on terrorism actually makes the administration's actions all the more dangerous. When Abraham Lincoln violated the Constitution, he knew the violation would last only as long as the Confederacy was in rebellion. We are now in a situation where the president has claimed that, in order to fight a tactic he believes threatens national security, he can abrogate the Constitution for as long as he pleases. Conceivably, these abrogations could last for a year, or four years – or forever, depending on who is president.

Left uncontested, this state of affairs is, I believe, patently unconstitutional – and it invites further unconstitutional expansion of executive prerogatives and power. But no matter how you view the situation, the current administration's claims, and the imprecise grounds invoked to justify its claims, call for a profound and urgent debate about where we are headed as a nation.

Mickey Edwards:

The circumstances today are different from previous conflicts of this kind over presidential power. Presidential power ebbs and flows, but has generally flowed in a fairly circumscribed way. Presidents have a short period after an election, a honeymoon period, in which they receive deference. They receive deference in other specific circumstances, sometimes in wartime. But generally, over a period of time, the circumstances change, the honeymoon ends, and the traditional constraints on presidential power are re-imposed. The disequilibrium is short-lived, and we go back to the kind of system of checks and balances, separated powers, and constrained powers that are mandated under the Constitution.

Presidential power can be enhanced in a lot of ways, such as by the courts declaring that the Congress cannot exercise a legislative veto or upholding the right of the executive for executive privilege. But those are enhancements only of traditional presidential power, like adding shutters to the upstairs windows. They are not fundamental, and their ramifications are minor.

That is not what is happening today. How does a president become "the decider?" How does the president become the decider, whose decision making authority extends even to the ability to ignore clear legislative declarations as to what is legal and what is not? That covers a wide range of things in the Constitution.

The Constitution does not, in fact, give clear and sole authority over foreign policy to the president of the United States. That is why the Boland Amendment during the Reagan years, which I did not vote for, was clearly within the authority of Congress to check the foreign policy activities of the president of the United States. Much of the current unease over presidential declarations of almost unlimited authority is focused on the overreaching of President Bush. I too think the president has overreached significantly beyond his legitimate powers.

But presidents overreach. I am from Oklahoma, part of the old Louisiana Territory. If presidents did not overreach, I would not be here, because I would not be an American citizen. But if it is not human nature (and it may be human nature) to try to expand whatever

authority you have to do what you want, having spent a lifetime in politics, I know that it is at least political nature to try to expand your authority. What makes this president's overreaching more dangerous and potentially a greater, and very real, threat to our very system of government is congressional acquiescence.

That is what is different. I think that the notion of congressional acquiescence understates what has led to this particular expansion of an imperial presidency. To a large extent, our system of checks and balances has become an Americanized version of a parliamentary system in which the two parties have superseded the three branches. Many members of Congress no longer see themselves as constitutionally obligated to function as a completely separate and completely equal branch of government. They are charged with serving as the voice of the American people. They are charged with determining what the laws of the country are. Because they have the power of the purse, they are charged with setting the national priorities, and they are charged with maintaining a check on the presidency. None of those functions are being carried out as they were constitutionally designed.

I have very deliberately used the phrase "they are charged with." This is not a matter of congressional power or congressional authority. It is a matter of congressional obligation. Just as the president may in the minds of many be guilty of malfeasance, the Congress may be guilty of nonfeasance.

Members of the president's party increasingly act as members of the White House staff, and when they do act contrary to the president's wishes they use neither subpoena nor oversight nor the power of the purse to enforce their decisions. This is beyond the problem that has existed previously. When Franklin Roosevelt (a Democrat) was the president of the United States and Harry Truman (a Democrat) sat in the United States Senate, Harry Truman investigated Roosevelt's War Department. Historically, members of Congress have taken their obligations seriously.

Judge Posner spoke about the micromanagement of government by the Congress. It is true that Congress does micromanage, but the executive branch is not the same as the government. It is one of the three branches of government, and the Congress is equally one. Members of Congress seem to have forgotten this. This is a Congress in which the majority leader of the Senate was hand-picked by the president of the United States, which should have been reason enough for senators to vote against selecting him as their leader. It is a Congress in which, both in the House and Senate, the leadership of the majority party has seen it as its primary function to enact the president's agenda.

In conclusion, let me just make two points. First, this is a more dangerous period of presidential expansion precisely because of the acquiescence of Congress and the failure to have another branch of government serving as a check on this power. We could use *Marbury v. Madison*, or any other example you want to use, that once power is surrendered, once a branch of government cedes power, it is almost impossible to retrieve that power. That is one of the things that makes this period so dangerous, the confluence of an overreaching president with a Congress unwilling to say, "No, this is a function of the legislative branch." The answer to the problem before us is not merely to chastise the president for what he is doing, but to chastise the Congress because it is at the heart of the expansion of presidential power that troubles so many of us today.

EXCERPTS FROM THE QUESTION AND ANSWER SESSION:

Stephen Holmes:
Secrecy is obviously necessary in this kind of conflict that we're engaged in, but is there ever too much secrecy? Does secrecy have any pathologies? Can it ever lead to self-defeating decision-making? Can't exposure of things that the administration wants to keep secret ever help national security? In conditions like this, where we have a government that naturally has made mistakes, the problem is new. It is inevitable that mistakes will be made, and to improve the performance, it would seem incumbent upon us to allow those policies to be

criticized. So what role is there here for criticism?

In regard to Jeff Toobin's remarks, I think there's a similar point to be made. There are good reasons for avoiding public trials of those who are believed to be engaged in terrorist acts. But the event in the Moussaoui trial to which Jeff referred, the exposure of misbehavior, of incompetent national security actions by the FBI, came out during trial. They had been hidden. This is something that had been looked into carefully, but we learned new things about executive branch incompetence because of a public trial. There obviously were good reasons why the real perpetrators of 9/11, including Khalid Sheik Mohammed above all, were not brought to trial. But it is also possible that if he had been brought to public trial, executive branch incompetence would have been exposed in a way that would help us improve our performance in the future. It seems to me that trials, as a tool of democracy, are a very important thing.

To Sean Wilentz (and this is a little bit addressed to Mickey Edwards too), Congress's role in approving a war is, of course, an ambiguous thing, because if Congress is fed false or misleading information, like in the Tonkin Gulf case, and on that basis approves of a president's drive to war, they will be embarrassed later when the disaster is apparent to all. They will be embarrassed to admit that they were fooled, to admit that they were dupes. So congressional checking may actually play into the hand of the president, perversely. We've seen that in the last election.

Finally, to Mickey Edwards, it is clear that if there's anyone responsible for the existence of a one-party government, it is the American electorate. And here again, the American electorate may have voted for a Congress that is of the same party, supporting the president, on the basis of false information fed to them by an executive branch. That's another reason why the role of the press is so crucial in a democracy.

Nat Hentoff:
I'd like to tie a few things together here. There was a member of Congress who certainly motivated me as a reporter to expose secrecy. His name was Frank Church, of Idaho, and he was instrumental in exposing the excesses (to say the least) of J. Edgar Hoover's COINTELPRO. Also, in 1975, he was the first member of Congress to look into the National Security Agency and was horrified. Consider what has happened since then in their technological powers. He said, "This can never happen again." But there are very few Frank Churches in the Congress now.

Jeffrey Toobin:
I just want to ask a question, and I really hope my press pass is not taken away when I ask this. I really do mean this as a question, not as an answer. I seek out leaks. I do not cover much that is classified, because it is not what I write about much, but I cover controversial stories where I get information from people, and sometimes it is not in accordance with the rules that they tell me. But, if we're going to have classified information, what should be the rule about whether you can give it to a reporter? Do you just sort of trust it to the good sense of each person who possesses classified information?

I thought Dana Priest's story about the secret prison was fabulous, and I'm glad she wrote it, but I'm also somewhat uncomfortable that I don't know what the rules are regarding what is appropriate for a person in possession of classified information to give to a reporter.

Nat Hentoff:
Well, we don't know what the rules are for classifying information. It now has been found out that the CIA has been taking material that has been declassified out of the archives and reclassifying it. We do not know why that is being done. So you're right, there is no clear rule for a reporter. So what you do is what Dana Priest did, and as a number of us keep trying to do – it's like Potter Stewart talking about obscenity – you know it if you see it.

Jeffrey Toobin:
I'm not worried about the reporter. If you're the reporter, you just publish it, you don't worry about it. I'm talking about the sources. What is

the rule for the sources who know what is classified and what is not? Are we just to say, "Please give it to us, it's okay to give us classified information because we're reporters?"

Nat Hentoff:
Most importantly, a reporter's job is to tell the public what is going on, and especially now, because all of these panels are indicating that our lack of knowledge about what is going on makes this the most dangerous period of American history. What we do know indicates how much more we have to know to remain a republic.

Prof. Sean Wilentz:
On the question of the Congress and the parties, it is not the White House and the Congress being in the control of the same party that is the issue. It is this party particularly, this Republican Party. As Mickey noted, there have been lots of cases of people of the same party investigating a president of their party – that's not going to happen with this Congress because of this Republican Party.

Prof. Stephen Holmes:
It is still the American public who elected this party.

Prof. Sean Wilentz:
Oh, I don't disagree, but understand that there is a difference.

Joshua Dratel *(from the audience)*:
With respect to transparency and the virtues of public revelation (and this goes beyond just what is beneficial to the republic as a whole, but is also beneficial to this administration), the most comprehensive and revelatory and convincing material about Osama bin Laden and his responsibility for terrorism prior to 9/11, which I think was essential to a quick response with respect to assigning responsibility to al Qaeda, was a public trial – the embassy bombings trial. If you look at the 9/11 report, virtually the entirety of the history of al Qaeda is sourced from that trial itself, so that was a tremendous advantage that obviously the government no longer wishes to acknowledge.

Prof. Richard Pildes *(from the audience)*:
I disagree with at least three of the panelists in what I heard. The appeal to these romantic individual figures, the Frank Churches, the Lowell Weickers, fails to come to terms with the nature of political parties today. I don't think it's about the Republican Party by itself. We've gone through a major change in the way political parties work these days. They're more unified, they're more polarized. I think there's no reason to believe that circumstance won't continue for the foreseeable future. To appeal to individual great heroes, as opposed to recognizing the problem and then trying to think about solutions (such as the minority party perhaps having investigative powers), seems to me to miss the nature of the problems that we face in terms of the structures of political institutions today.

Jeffrey Toobin:
I'd like to respond to a general sentiment that I've heard that we're at a moment when civil liberties face their greatest threat in however many years. I don't think that's true. I think there are some bad things going on. I think some of the Bush administration's policies are misguided, but do you remember J. Edgar Hoover? He was in charge of vast parts of the government, and he was a monster. The FBI is nothing like that now, to say nothing of tens of thousands of American citizens interned during World War II. George Bush does not compare. I think a sense of perspective is useful in terms of what's going on now.

What you could do about it is vote for Democrats. End of story. This would not be going on if there was a Democratic Senate, to say nothing of a Democratic president.

Nat Hentoff:
I have to say that as my Freedom of Information Act file consists mostly of what J. Edgar Hoover's people said about me, almost all of it wrong. He was a monster, but he was a very visible monster. A lot of people fought

against him in and out of the press. What's happening now is that the head of the FBI is getting e-mails from FBI agents in Guantánamo saying, "What they are doing to prisoners is appalling. We don't want to be part of that."

Robert Mueller, director of the FBI, has never acted on those e-mails. He's not very visible. That's the problem now. It is more than the monstrous J. Edgar Hoover. It's a government, an executive part of the government, which believes it is the law.

Sean Wilentz:
I never thought I'd be quoting Richard Nixon approvingly, but Richard Nixon once said that there's little about America that can't be changed with one good election. Maybe that's an exaggeration, and it's not just electing Democrats. There are honorable Republicans, and it means talking to them at town meetings.

PANEL THREE: **CHECKS AND BALANCES***

Moderator: Professor David Golove
Panelists: Barton Gellman, Marty Lederman, Jeffrey Smith, Suzanne Spaulding

David Golove:
The topic of this session is the system of checks and balances: what it is, how it is supposed to operate, how it has operated in the past, and whether or not the system as it has operated in the past is being undermined by the policies of the Bush administration. To frame the discussion very briefly, we can distinguish between three types of checks and balances that impact upon executive branch policy-making: checks that come from the legislative branch in the form of oversight; checks that emerge from within the executive branch itself in the form of internal institutional processes that influence policymaking judgments about facts and other matters; and checks that originate in the public sphere, particularly from the press.

Barton Gellman:
President Bush gave a good peg for this panel on April 18th, 2006. He said "I hear the voices. I read the front page. I know the speculation. But I'm the decider and I decide what's best." That is not exactly *l'état, c'est moi*, but it is a pretty frank statement of his governing philosophy: there are voices, but most do not count all that much in the decision-making process. News accounts purport to offer facts, but are filled mainly with speculation, and that is often framed as wild speculation or wildly off-the-mark. Some people, including Garry Wills and Ron Suskind, have observed that there is something missing from that picture, which is acknowledgment of a common body of facts that inform and limit political choice.

Suskind was working on a story for the October 17th, 2004 *New York Times Magazine* when a high-ranking White House official he did not name told him dismissively, he says, that he as a reporter was a member of the reality-based community, whereas, and this is the quote from the official, "We're an empire now, and when we act, we create our own reality. And when you're studying that reality – judiciously as you will – we'll act again, creating other new realities which you can study too."

In some ways, what I have found is that the Bush administration has treated news media as something like another special interest, akin to trial lawyers or union bosses, and equally to be kept at arm's length. That is new in my experience. Every president I have covered since the first Bush has grown weary of the press, but what is new here is a tendency to de-legitimate news media as a vehicle of truth, or even an attempt at truth, and the casting of reporters as partisans in a highly polarized debate. Now what we think we're trying to do,

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at *The Washington Post* at least, is what my editors call "accountability reporting," revealing what powerful people do with their power and exploring the consequences.

In that sense only, we belong in a discussion of checks and balances, but it is not our job to check or balance anything that a president or a member of Congress or a judge wants to do. We're not a loyal opposition. I do not believe that the idea of a fourth estate gives us any special status in the governing process. What does have special status is truth and facts. They are the fuel for the public debate that is the ultimate check and balance of a self-governing society.

Right after President Bush said that he decides what's best, he said, "What's best is for Don Rumsfeld to remain as Secretary of Defense." Why did he have to say that? Because there were a lot of political actors, from editorialists to elected officials and influential citizens, who were calling, "off with Rumsfeld's head." Each had their own reasons, but all of them depended on facts or asserted facts the Bush administration had worked assiduously to conceal from the public debate – dissent of military commanders from the secretary's war plans, the abuse of prisoners, the growing success of the Iraqi insurgency, and so on.

In the modern press era, secrets have been kept or broken by a process of competition. Governments tried to keep them, journalists tried to find them out, and intermediaries with a very wide variety of motives performed the arbitrage. No one, and this is crucial, effectively exerted coercive authority at the boundary, and that is changing.

At the same time, there was a process of collaboration that most people do not know about. I work often on national security stories, and have for some years now. What used to happen is that if we found out something that seemed sensitive, or that we knew to be classified, we would go to the appropriate government authority and discuss it. We wanted to make sure that they knew we knew it, and we wanted to know whether they thought it was accurate or had context to provide. There was an unspoken invitation to let us know if they thought something was especially sensitive or difficult or damaging, and to let us know why. Those conversations took place quite frankly in many cases.

My most frequent interlocutor at the CIA used to say that his job was to shed light and to shed darkness when he spoke to me. There were lots of times when we agreed, based on government representations, to remove something from a story. That depends on the government acknowledging that there are some things that we learn that, although they prefer we not publish them, are not going to bring the heavens down or end the security of the nation. That process has nearly stopped in the Bush administration, although it operated early in the first term.

Here's what's changing. Number one, when we come to them with stories like that, they simply say, "You should kill the whole story. We're not going to discuss what's more or less sensitive, or why." And two, they immediately take the questions as the opportunity to try to find out how we know what we know, so they are much more frequently and much more aggressively launching what they call "leak probes."

There are all kinds of instances in the public discussion now. There is Mary McCarthy's firing. There is the routine requirement that executive branch officials sign waivers so that if they've been promised confidentiality by a reporter, they waive it compulsorily. There is more aggressive use of polygraphs; there is, in general, a more politicized environment in the career bureaucracy. My colleague has reported that when the CIA was choosing a new Baghdad station chief, White House officials asked Langley what political party this case officer belonged to. That is not something that would have happened before to my knowledge. The CIA, the FBI, and the Justice Department are brushing aside longstanding self-restraint on investigating journalistic sources. My sources have been interviewed by the FBI on occasion and asked about contacts with me. Under the Patriot Act, the government has a much lower standard of so-called relevance that enables them to use national security letters and get transactional records. I have reason

to think that they have been using those in some of the leak probes.

You have reporters being asked in many cases (civil or criminal), under threat of jail, to reveal their confidential sources. The AIPAC case is very disturbing. It alleges that two lobbyists committed an act of espionage by receiving classified information orally. There's also a conspiracy count in which the overt act to mark the conspiracy is the provision of a fax number to a source. The government has stated explicitly in its legal pleadings that this has not yet been, but for good reason could be, applied to reporters doing their work.

What I want to make clear is that the status quo is changing. The methods we use to do our jobs are now at risk, and it is becoming much more difficult to use them. That is what we're struggling with and grappling with in my part of this equation.

Marty Lederman:
Are we misguided in focusing so much on checks and balances, on process questions? Would we be better off if those checks and balances were working the way many of us insist they ought to, or would the substantive results be more or less the same as they are now?

Should we be devoting more of our energies and our debates to the substance of the questions at hand – What sorts of coercive interrogations ought to be legal? What sorts of surveillance ought the NSA to be permitted to engage in? – rather than the meta-questions of whether the president has the power to do these things; whether his power ought to be checked by the legislative branch, and if so, how; and whether creative statutory construction is appropriate when emergency needs are present in the war on terror?

I haven't focused much on the substantive questions, in part because I do not have much knowledge about them. I've been fairly consumed by what I call the process questions. I've been challenged by folks from all different perspectives on that, and I want to play devil's advocate here. I continue to believe that the process questions, the checks and balances, are extremely important, but I think we need to think much harder about the meta-questions, and about the challenges that are being put to us.

My work in the Office of Legal Counsel had almost nothing to do with national security, international law, interrogation, or surveillance. I knew nothing about FISA, and I was very grateful for that. I worked on free speech and religion clause issues, on federalism questions and the like. I was actually in the office when the first wave of opinions was being written justifying torture, other coercive forms of interrogation, and NSA surveillance outside the confines of FISA. I did not know that those things were going on, and I do not think that most people in the office did. Some did, but not many, and I do not think that many people in the administration knew that these opinions were being written.

I am not going to go into great detail about the problems in the torture memorandum (there are blogs devoted to it), but I and several of my colleagues from the Clinton administration issued a public document setting out what we thought were the best processes, the best procedures, by which the Office of Legal Counsel might fulfill its role. The Office of Legal Council has a very unusual role in the executive branch. Its role is to advise the president, so that the president may comply with his constitutional obligation to faithfully execute the laws. One meta-question that we do not have time to get to here is, "faithful to what?" The president has a constitutional obligation to faithfully execute the laws. What does that mean if he thinks the laws are pressing up hard against what he thinks are very important policy objectives, particularly where the nation's security might be at stake?

These are interestingly difficult questions, but we thought, at the very least, OLC's role could be sustained only if certain process-based standards were met. I'll mention the three most important, and these are the internal checks that David was speaking of.

One is the internal process itself of coming up with the conclusion within the executive branch, consulting with other lawyers and policymakers who know something about the law – the State Department, the Criminal Division,

the INS, all of whom had a vast experience with the torture statute, none of whom were apparently consulted. The OLC opinion did not reflect any of the wisdom or considered history of these issues within the executive branch.

Secondly, there is consultation, or briefing, which is basically the same way a court comes up with good legal analysis – by inviting contentious briefs on both sides. There should be candor in the opinion itself. It should be balanced; it should deal with all the opposing arguments and not reflect any inappropriate confidence in the conclusion if the conclusion is contested. It should be a fair, balanced and complete set of legal analyses, because the purpose is to advise the president on what the law truly is, and the opinion should give him a full view of that question.

Finally, there should be transparency. If the OLC issues a memorandum saying that a proposed course of conduct is lawful, there should be a very strong presumption that that opinion will be made public soon, and that the legal justification for the administration's policies will be subject to transparency, and therefore to public critique. Transparency is the best disinfectant. The OLC opinion itself will be much more rigorous and much more careful if those preparing it know that it will be subject to public critique. That is demonstrated by the contrast between the 2002 torture memorandum, which I do not think was expected to be made public, and the 2004 memorandum which replaced it, which is more careful, balanced, and serious in my view.

This leads to the interbranch or separation-of-powers questions, the constitutional checks and balances rather than the internal ones. If the current law, faithfully construed, prevents what the president considers to be important methods of engaging and detecting the enemy, the proper response, under this traditional view, is not to pretend as though Congress has authorized what Congress has plainly prohibited, and it is not to assert a commander in chief power to supersede enacted statutes. It is certainly not to do both of those things in secret, all the while trying to convince the public and the Congress that it is business as usual, that we are abiding by FISA, that we never torture, and that we abide by our international obligations. If an administration is going to take a fairly idiosyncratic, emergency view of the Constitution and the statutes, it ought to do so publicly in a way in which accountability is possible, which is not the way this administration has worked.

So far, I've focused my attention, as have many of my colleagues, on these process questions; checks and balances, internal checks, and the like. We're subject to several recent critiques, many of which are related, that I want to mention.

The first critique is one that Judge Posner has made. I wrote that it was outrageous that the administration engaged in wiretapping prohibited by FISA. I had no opinion whatsoever on whether this program was a good or a bad idea, I do not know anything about NSA capabilities or about what would be a good statute. Judge Posner had written quite eloquently that forms of data-mining should be permitted, with certain checks, and this would be the best policy. I said, "okay, that is all fine, but let's put that aside. If you think that is right, the proper course is to go to Congress and ask for a statute to allow you those authorities, not to pretend as though you already have them."

Judge Posner's response, as he wrote in *The New Republic* in January, 2006, is that this concept is putting "the cart before the horse." The determination as to whether a course of action is legal should come after determining whether it is advisable and whether it is a good policy. So the first response is that these process questions, these checks and balances questions, are arid questions, somewhat abstract, and ultimately I think (although I do not want to overstate his critique) somewhat irresponsible; that these are serious questions about what interrogation should be permitted, what forms of surveillance should be allowable, and serious lawyers and policymakers should first decide for themselves what the optimal policy should be, and then the law is capacious enough to get to that end in 99 cases out of 100. Good lawyers should then work to make the case in support of those policy judgments.

I've heard a form of this critique coming from my colleagues on the left, some of whom I work with, former critical legal scholar types who also think the law is fairly indeterminate and can certainly be either twisted or carefully massaged to reach many of these different policy conclusions. They come to me and say, "Why all of this obsession with process and checks and balances? If this were the Clinton administration and the policies that were being reached by the OLC were those that you approved of, you might have some trepidation and lose a little bit of sleep over the craftwork of OLC, and about not telling Congress, and of asserting presidential power, but not much. You've seen plenty of bad OLC opinions written and you haven't spent months blogging about them when they lead to decisions that you do not generally disapprove of." I can cite chapter and verse from the Clinton administration that they cite to me all the time of cases where it asserted commander in chief authority or executive branch prerogatives to ignore duly enacted statutes.

These critics on the left say, moreover, that the process-based critique is irresponsible in a certain way, because it pretends as though, if good lawyers simply sit down and do the process work the way they ought to, there will be a right legal answer. That is obscuring the fact that these are very contentious choices that have to be made, and that the law is being manipulated to reach those choices.

The next series of critiques holds essentially that even if we had all the process we wanted, and the checks and balances were working the way they ought to, we wouldn't be very happy with the results. My friend and another fine OLC lawyer, Jack Goldsmith, has pushed me on this repeatedly, suggesting that if OLC had done its job the way I think it ought to have done it, and had Congress been consulted and asked for legislation, it is very possible that we would be substantively in the same place we are now. OLC would write opinions like the Levin Memorandum, like the White Paper justifying NSA surveillance. They would go to Congress and Congress, I am afraid, in a time of crisis, would basically give them just about everything they wanted. They have done so. They gave them the Patriot Act. Right now, after it was revealed that the NSA is violating the law left, right and sideways, without telling Congress for four years, Congress's response is that they're all standing up trying to top one another to give the president the statutory authority that he has been asserting all along. We're not getting a congressional response that suggests that checks and balances would be worth very much substantively. This big fight might lead to a state of the world that is very similar to the one we find ourselves in now.

I want to mention, very briefly, three other objections, one of which I do not think is very important, but two of which I do. The first is Judge Posner's other point, which is that when Congress does enact statutes, it does a miserable job of doing so, and we shouldn't trust the legislative process because of the micromanagement of statutes like FISA and the torture statute. I want to suggest, but do not have time to argue here, that those are actually two wonderful examples of statutes that show Congress working at its best, and that we should honor those examples.

The other two objections are fairly serious. One is secrecy, and you hear this increasingly from the Bush administration. They ask, "what if an amendment to the law would reveal capabilities or sources and methods that we cannot reveal, either because we want them to remain secret," or, and you hear this argument increasingly, "because we actually want the enemy to be of the view that our laws are very restrictive? We want them to have false security in the fact that we do not torture, and we do not wiretap, and so the best of all possible worlds is a public law that says you cannot do all these things and a private or secret law that says you can." Secrecy questions are very important.

The final objection is that all of our checks and balances arguments, our yelling and screaming about it, have had very little political salience, either in Congress or with the public. So the question is, are our energies better spent doing something else? Like I said at the outset, I am still a supporter of argu-

ments in favor of checks and balances and the separation of powers, but I want to open the discussion so that we can defend those postures more persuasively.

Suzanne Spaulding:
Like David Rivkin said this morning, I, too, think we are on the edge of a constitutional crisis of significant magnitude. The difference, I suspect, is that when David peers down into the abyss, his vision of that nightmare is different than mine. My nightmare is of courts and a Congress that have become irrelevant, and of an American public that has been coddled into childhood by an administration that sees its role as being one of simply taking care to keep them in the dark.

I think that this administration has adopted what I call "the Jack Nicholson" view toward government. Do you remember Jack Nicholson in that movie *A Few Good Men*, when he tells Tom Cruise, "You can't handle the truth?" I think there is a certain degree to which this administration feels that the American public can't handle the truth. I think that a lot of their behavior reflects, sadly, a fundamental lack of faith in our system of government; a fundamental lack of faith in democracy and in checks and balances; and a lack of understanding of the ways in which those are not a vulnerability, or a luxury for a time of peace.

That system of government was put in place by framers who had just survived what really was an existential threat. In a time of grave uncertainty, at the outset of a very speculative venture that they had no way of knowing would succeed, with crisis looming, they put together this form of government as the best hope for this new nation to stay strong and to survive, and that is the system of checks and balances.

Part of the argument has been framed in terms of, "Well, don't you think that in a time of crisis or a time of war we need to have a powerful president?" I think part of the problem has been equating the avaricious accumulation of power with strength. What we need in this time of crisis is a strong and determined nation, not necessarily a powerful president. Mickey Edwards said earlier that the government does not equal the president. When I was on the Hill, we had witnesses who would testify about the notion that the Constitution is not a suicide pact, and who would ask, "Don't you think the Constitution gives the president all the power he needs to protect the nation?" I always thought the Constitution gives *the government and the people* all the power needed to protect this nation, and I think that is a fundamental difference.

It is not a fuzzy-headed, idealistic notion of civil liberties making us strong. I'm concerned about the way we discuss the balance between national security and civil liberties as if they were mutually exclusive objectives on opposite sides of the scale, as though if you took away from one, you'd automatically add to the other and vice versa, when in fact they really are mutually reinforcing. This is very real. What makes this nation strong is the relationship between the government and the governed. When things begin to drive a wedge into that relationship, that is what weakens our nation.

So, Marty, in picking up on your questions, I do not necessarily concede that we'd end up in the same place substantively if the process were different, but even if you were to concede that, the process, I think, is critically important for the sustainability of that end result. And so, ironically, I think the process might be more important if you liked the policies; that, in fact, you should have some concern if a president that you like is coming up with policies you like, but is doing it in as legally questionable a way as this administration is, because it undermines the credibility and sustainability of those policies.

I think we see that in the Patriot Act. There are lots of pieces to the Patriot Act, so it is hard to talk about it as if it were one provision of law, but if you agree with it, then you should be very concerned about the way in which it was enacted, which was done in a very rushed manner, in an environment that did indeed stifle robust public discussion and debate, and that ultimately led to an ill-informed public. Only after the enactment of that act have we had the kind of

public discussion debate we should have had leading up to it, and I think the failure to have that informed debate earlier has led to the lack of public support for provisions that I think the public would otherwise have supported.

I think that in the NSA eavesdropping instance there are very specific ways in which the administration went about pushing the envelope, and adopting that program without going through the appropriate process, and thus, I think, weakened national security.

First of all, the program was leaked to the press, and the administration claimed that the leak presented a significant threat to national security. Why was it leaked to the press? Because dedicated professionals at the National Security Agency had serious qualms about the way in which that program had come about. They questioned the legality of the program. If the program had been put on a stronger legal footing, if they had gone to Congress first to get approval, I wonder whether those NSA professionals would have had the same qualms, and whether we would have had this leaked to the press.

The program was shut down for several weeks at one point when they tried to seek certain approvals for it and those approvals weren't forthcoming. They stopped the program for a while, while they worked on strengthening some of the oversight. Again, if this program is so vital to national security, the fact that it had to be shut down for several weeks was a detriment to national security that would not have happened had they been more careful and cautious in the process leading up to it.

There's pretty clear evidence that the program has diverted vital investigative resources. There were reports early on that the FBI was given leads from this program and ran them all to ground, and turned up nothing. Think about this program. We're listening to a suspected al Qaeda terrorist talking to someone in the United States. If that pans out, if in fact that is a conversation between a suspected terrorist and somebody who is helping him in the United States, there should be from that lots of domestic-to-domestic connections made and conversations that you want to listen in on from the domestic end. Yet we are told that this program has led to maybe ten FISA warrants – and they've claimed that if they're going to do domestic-domestic, they do go in front of FISA and get a FISA warrant – ten a year of the thousands of intercepts that have occurred under this program. So it has diverted resources with apparently few leads panning out.

The intelligence community I think has been demoralized, and one of the things I find most offensive about the process used here is that in pushing the boundaries, in pushing the envelope in order to expand presidential power, they chose to do so in this context, where the individuals who are implementing the program face personal criminal liability. That is what FISA provides for. It is not just the person who makes the decision. It is every single person who is involved in implementing that intercept. If a court does not agree with the sort of unusual or creative legal reasoning that has been used to support this program, if a court decides that that is wrong and they disagree with it, and that this is in fact illegal, all of those individuals are facing criminal liability. I think that is a real problem.

It also creates then, I think, questions in the minds of the individuals in the intelligence community when they are asked to implement future programs – questions as to whether they are on a solid legal footing or not. We saw this in the torture debate where the individuals did what they were told or asked to do, or authorized to do, with the understanding that there was a legal basis for it. Then all of a sudden it came to light, and DOJ revoked that legal opinion. These are individuals who are out there doing what they were told was legal. And suddenly DOJ changes its mind? I think that is a result of a faulty process that puts individuals in jeopardy.

It complicates our efforts to get future support from Congress. Members of Congress have indicated that they will be less likely to give the president a broad authorization for the use of military force if they know that this is how he is going to interpret it, and that comes from a Republican Congress.

So I think there are some very real national

security implications to the process. I think the bottom line, the ironic result of this overreaching attempt to expand presidential power, is that we have one of the weakest presidents in our nation's history today, with approval ratings of 32 percent, with no political capital on the Hill, and with members of his own party who are in many districts running away from him, rather than with him. I think it has indeed shown, in a very dramatic way, the wisdom of the framers. Having an informed educated American public that has reached consensus behind a strategy for combating this threat of terrorism that can be sustained over the long term is what is going to lead to our ultimately prevailing over this threat.

Jeffrey Smith:
I am delighted, Suzanne, that you've said what you said, particularly your last point. It is sort of the political counterpart to Justice Jackson's famous comment about the president's powers being at their lowest ebb when Congress is active. The president's powers are also at their lowest ebb when his political standing is at its lowest ebb, and that is what we face at the moment. And that is, in no small measure in my view, attributable to the manner in which he has treated the Congress and the law.

Whenever I think about presidential powers, I am reminded of how the founding fathers were really street-smart politicians. We tend to study them as great intellects and great theorists, but they knew that politics was all about power, a struggle for power, and the genius of the system they created with its checks and balances reflected their own experiences. They truly designed a stunningly successful system.

Having been embroiled in a lot of political combat over the years, I'd like to talk for a few minutes about how politics influences checks and balances. Most presidents think that there are many checks and few balances, and they feel very constrained by a lot of laws and many of the checks. For a long time at the State Department I had a *New Yorker* cartoon taped on my door in which a king is looking down on a couple of his advisors, asking very plaintively, "Do we have enough might to make this right?" This president has answered that question very aggressively by saying, "Yes, we do. And maybe I am not so sure about what's right anyway, except I know what I want to achieve, and I am going to be very assertive and try to do it."

The question is, has he used these powers wisely? Has he overstepped his powers? Will his actions lead to a reaction by Congress and the courts that will ultimately undermine the very powers that he is trying to assert? It is too soon to tell of course, but the pattern over history is that Congress will reassert itself – witness the Congress refusing to approve the League of Nations after President Wilson; the trimming back of presidential powers during the Cold War, largely by adding legislative constraints on presidential actions; and then of course Watergate, Vietnam, and the Church and Pike Committees' investigation of intelligence. From the perspective of a person who has been in the trenches for 30-some years in Washington, it is hard to overstate the importance of the president's popularity in terms of trying to achieve what he has been trying to achieve.

I was working for Senator Nunn when Reagan was president and the Democrats had the Senate. We used to see lots of polls in which the president's particular policies on Nicaragua, on dealing with the Soviets, on all manner of things, would be 65 to 35 against a particular policy, and yet President Reagan's popularity was always north of 65 percent. When he wanted to do something, he could, simply because he had such tremendous power. Even the Democrats in the Senate who did not like him felt constrained because the political forces in which they acted made it very difficult to deal with the president.

Suzanne very nicely made the point about the linkage between following a law and presidential powers. Let me talk about some particular checks and balances that I think illustrate this a little bit, and I'll begin with the legislative branch. In the late 1980s the administration decided that it had a new way of reinterpreting the ABM Treaty, contrary to what the Senate had been told when it ratified the treaty. The

Senate rose up in anger about that and said, "You told us it was going to be interpreted in a particular way. You've now changed your mind." And so there was a fairly unpleasant episode for many weeks. But what happened was that the next time a treaty came up for ratification the Senate said, "Everything that the administration tells us about the manner in which the treaty will be interpreted is locked in." Now is that good or bad? I'm not sure, but it certainly limits future presidential flexibility.

David asked me to talk for a second about internal executive branch checks and balances. There are many, most of which fall into the category of guerilla warfare among bureaucrats. That is a skill that is refined and applied by a lot of very skilled people. The best expression of that I've ever heard is a statement attributed to President Truman, who said about President Eisenhower when he came in, "Poor Ike. He's going to come to this job, give an order, and think something will happen." I think that point remains true to this day.

I said a moment ago that it is hard to overstate how important the president's political standing is to his ability to get something done. I believe it is also hard to overstate the role of the press in all of this. The press in many ways sets the agenda. The editors decide what goes on the front pages, which is the first thing that people read in the morning. Stories in the press, how they're treated, how they're written, have an enormous impact on what is important to us as a nation, what we choose to put on the agenda. Leaks tend to be the oil that lubricates this system.

As angry as I have been about leaks when I've been in government, I also appreciate their value, because they can serve as an enormously valuable method to communicate back and forth – sometimes within the executive branch, and with different agencies leaking their own points of view. Congress leaks because it is trying to maneuver things. And as we've seen very recently, the president, apparently, directed a leak of classified information because he wanted to get out his version of events, contrary to what my former colleagues at the CIA thought. So leaks, however unpleasant, remain an enormously important piece of the way we do business. I understand that there may be some effort in the Congress to beef up the criminal laws to make it easier to prosecute leaks and to criminalize conduct that had not previously been thought to be criminal.

This is a very important time in our nation to think hard about these issues. We face terrible threats. The president has chosen to act on his own. In my view, I agree with Suzanne, I think he has undermined his effectiveness. He may well ultimately undermine presidential powers at a time when a strong president is needed.

I am hopeful that somehow or another we can find a way to enact legislation to give to the president some of these authorities, so that when he acts in the future he will act under the authority of law, and with the full support of the American people. I think the same thing can be said of international law. The president is strongest when he acts with allies, when he acts consistent with international law. You can bully for a little while, but it does not work in the long run, and the price that is paid for that is quite significant.

EXCERPTS FROM THE QUESTION AND ANSWER SESSION:

David Golove:
I just wanted to begin by asking a question, and pushing on the notion of internal executive branch checks a bit more. I had a conversation over lunch with Bart Gellman about an incident which he wrote about in *The Washington Post*, and which struck me at the time as a possible example of an important internal executive branch check.

I'm wondering whether this is the right way of thinking about this incident and this procedure, and whether or not there has been a decrease in some respects in the effectiveness of these kinds of internal checks during the past few years. Everyone will remember the great controversy over the aluminum tubes that the administration alleged were to be used for centrifuges in Iraq. Bart reported on a sharp disagreement internally between CIA analysts

and DOE scientists about the nature of these tubes and whether they really were for centrifuges or not.

Apparently there was some kind of internal procedure, a kind of arbitration, which could be invoked, and perhaps was invoked, when there was a dispute of this kind between different agencies. The idea was to have a kind of internal executive branch trial to get at the truth of the matter. But the decision was made, I gather by George Tenet, not to allow the procedure to go forward in the case of the aluminum tubes. Perhaps that decision was consequential in the mistakes that were made on this crucial issue.

I'm wondering whether or not this incident provides a good example of a potential internal executive branch check that could play an important role in improving decision-making within the executive branch, whether or not there's a way to strengthen internal checks and balances of this kind, or, alternatively, whether these kinds of procedures and checks are ineffective because they tend to be jettisoned whenever there's a strong political agenda at play?

Barton Gellman:
In a nutshell, in August, 2002, Vice President Cheney said that Iraq was reconstituting its nuclear weapons program. In September, four cabinet-level officials, and eventually in October the president, said that the heart of the evidence for this was that Iraq was trying to buy specialized aluminum tubes, which they said it wanted to use for centrifuges to enrich uranium. This was a matter already of significant dispute inside the intelligence community.

At the procedural level, several things had happened. The CIA had intercepted some of these tubes and believed initially that they were going to be used for centrifuges. The expertise in the U.S. government, the physicists who know how to enrich uranium, the Energy Department (which had its own intelligence branch), and the Energy Department centrifuge physicists unanimously had said these tubes were not suitable for enrichment. Being scientists they refused to say it was impossible that one could find a way to make these tubes into centrifuges, but as Houston Wood (probably the dean of centrifuge physicists) finally agreed to tell me on the record, "If there's a way to do it, I'd like to know how." He said, "I won't say it is impossible, I'd just like to know how."

Now there are two levels of arbitration here. One is that when you prepare a national intelligence estimate, it is supposed to be the consensus of the intelligence community, so 15 agencies sat around the table, and they voted. The Energy Department said "They're not for centrifuges." The State Department's Bureau of Intelligence and Research said "We agree with Energy," and nearly all the rest were either neutral or said, "Well, we think they're for centrifuges." Now you had, essentially, agencies that had no expertise on the subject with equal votes and they outvoted the experts.

There is, on the other hand, a board or a panel of experts. They are eminent scientists and technologists who have high clearances, and who are supposed to resolve analytic disputes about the technical meaning of something – are these or are these not centrifuge-capable tubes? This board was not convened during the course of this debate.

Now again, let's just review the sequence. The vice president says they're for centrifuges and Iraq's reconstituting them. The president, the secretaries of State and Defense, and national security advisors then say the same thing. In October, they ask the intelligence community, "Is Iraq reconstituting its nuclear programs?" It is a very difficult thing, at that stage, to tell the president no.

Jeffrey Smith:
I do not know the facts beyond what Bart has said. It is not clear to me, by the way, that it would have made an ultimate difference in the president's decision to go to war even if the intelligence community had come to a consensus that these tubes could not be used to enrich uranium. I think that was made on other grounds. But I do know that the aluminum tubes were handed around among members of Congress, and cited as examples of why we had to go to war. I've had a couple of members of

Congress tell me that physically handling those aluminum tubes was one of the principal factors that caused them to vote in favor of the war.

I've also had other members of Congress tell me that they will never again vote to use force without seeing the raw intelligence, because they are so distrustful of the intelligence community now after this last vote.

Suzanne Spaulding:
As I listened to your question about internal executive branch checks and oversight mechanisms, I was thinking, one of those mechanisms is the inspector general's office. I was thinking about Mary McCarthy, who is the CIA official who was fired in April, 2006, and who was working in the inspector general's office.

She has worked for over 30 years in the intelligence community in a variety of positions, including at the White House for the National Security Council. Most recently she has been in the inspector general's office. We do not know what the facts are. There are all kinds of conflicting reports. We do not know what went on there, but it is striking to me that this is not just somebody who was buried in the bowels of the intelligence community who did not see any other way to get information out. This is someone who was in the inspector general's office, which is supposed to provide one of those checks in the executive branch itself. I do not know what that indicates. I do not know what happened, but it worries me that it may be an indication that the system is broken.

Mary knows all the staff people on the oversight committees up on the Hill, and I've known Mary for many, many years. I find it hard to imagine that if she felt that these concerns could be addressed either through the inspector general's process, working its way up to the Hill, or by going to the Hill, that she would have been inclined to talk to a reporter.

She's saying she did not reveal classified information. She's not denying that she had discussions with reporters. As I say, we do not know what the facts are there, but I can't help but wonder whether some of those oversight mechanisms are indeed really broken.

Judge Richard Posner *(from the audience)*:
I have a question for Ms. Spaulding. This morning we heard from speaker after speaker how Congress had become utterly impotent, neutralized, that the president with his extravagant belief in presidential powers had cowed the Congress, and that the Republican Party is so disciplined that Republican members of Congress have no independent voice with which to stand up against this presidential juggernaut.

Now we hear that the president is the weakest president in our history. How could it be that the president has crushed Congress, but that at the same time his actions in conducting surveillance in apparent violation of the Foreign Intelligence Surveillance Act so offended Congress, so offended the American people, that it has rendered him the weakest president in history?

Suzanne Spaulding:
I think Congress's failure to step up to its responsibility in this regard is not so much a reflection of their being intimidated by the power of the president. It is hard to deny that the president is at a particularly weak point now.

I think your question really goes to whether the fact that Congress is failing to challenge him is a reflection that the American public strongly supports what he's doing in the war on terrorism. Is that a correct understanding of your question?

Judge Richard Posner:
Can he be at once a dictator and the weakest president in history?

Suzanne Spaulding:
Yes. He can be at once an avaricious accumulator of power and very weak. One leads to the other. As to why Congress isn't then stepping in, I think Congress should be outraged from an institutional standpoint at the way in which they are being rendered irrelevant by the president's interpretation of the Constitution which allows him to ignore the statutes that they draft.

John Brademas *(from the audience)*:
To respond to Judge Posner's question, I do not

think the president is weakened by virtue of the way in which he's handled the issue of surveillance. I think it is Katrina, it is Iraq, it is the attack on Social Security, it is the rising cost of oil. Those are what's weakening him.

I served with six presidents, and I did not hesitate to oppose Democratic presidents if I thought they were wrong, in respect to Vietnam for example. I remember taking part in a conference in England some years ago in which we were discussing the same issue we're discussing at this symposium. I said at the conference that, as a member of Congress, if I were not willing to spit in the eye of the president of the United States, whether he was of my party or not, I wasn't doing my job. Part of my job was to think for myself.

It is hard work, winning election to Congress, if all you are doing is going to Washington to wait for the White House to call and tell you how to vote.

PANEL FOUR: **THE NATIONAL SECURITY PRESIDENCY**

Moderator: Professor Noah Feldman
Panelists: Bob Kerrey, Anthony Lewis, Patrick Philbin, Michael Vatis

Anthony Lewis:
The framers of the Constitution did not have the corporate model in mind – a president and a CEO are not one and the same thing, as Judge Posner has suggested. Rather, the framers had one concern above all others: concentrated power. So they limited powers – with the separation of powers and with checks and balances and with everything else we've heard about today. The touchstone of the law on issues of presidential power is *Youngstown Sheet & Tube v. Sawyer* from 1952, in particular Justice Jackson's opinion, to which reference has been made.

I think it is interesting to look at the trial of the case before Judge David A. Pine. The government was represented by Holmes Baldridge, who argued in support of President Truman's seizure of the country's steel mills.

Judge Pine asked, "So you contend the executive has unlimited power in time of an emergency?"

Baldridge: He has the power as is necessary to take such action as is necessary to meet the emergency.

Judge Pine: If the emergency is great, it is unlimited, is it?

Baldridge: I suppose if you carry it to its logical conclusion, that is true, but I do want to point out that there are two limitations on the executive power. One is the ballot box, and the other is impeachment.

Judge Pine: So when the sovereign people adopted the Constitution, it limited the powers of the Congress and limited the powers of the judiciary, but it did not limit the powers of the executive? Is that what you say?

Baldridge: That is the way we read Article II of the Constitution.

Judge Pine: I see.

Anyone who has read the legal claims of John Yoo, David Addington, and other contemporary proponents of unrestrained presidential power will find Holmes Baldridge's argument familiar, but what is striking to me is that his performance before Judge Pine aroused great outrage in the country. People saw it as a claim for dictatorial powers, unlikely as that would have been from Harry S. Truman. But today, it seems to me, there is relatively little public outrage at claims for presidential power that go much, much farther. Let me indicate why I say, "much farther."

First, President Bush and his lawyers argue that he can do what he wants in fields where Congress has explicitly pre-empted the process, the field where Justice Jackson's analysis said the president's power was at its

lowest ebb. The Foreign Intelligence Surveillance Act of 1978, for example, which was passed by Congress after extensive debate and long experience with the problem, says that it "shall be the exclusive means by which electronic surveillance may be conducted." In the teeth of that rule, which, by the way, is enforced in the statute by criminal law, President Bush maintains that he can order surveillance without following the statutory rules. Or consider the torture of prisoners. Torture is prohibited by a treaty to which the United States is a party, by a criminal statute enforcing that treaty, and by the Uniform Code of Military Justice. But the president's lawyers argue that it would be unconstitutional to try to stop him from ordering torture, and that those legal rules, to the contrary, would be unconstitutional if applied to him.

Second, the unrestrained, unilateral powers sought by President Bush would have far longer-lasting consequences than the power sought by President Truman in 1952. I think this is an important point that hasn't been fully explored. The steel mills were seized to prevent a strike during the Korean War. Like all previous wars in our history, that one had an end. But the war on terror, as President Bush defines it, is hard to imagine coming to a definite end. Supporters of terrorism have struck around the world, from Bali to Madrid. Osama bin Laden and his followers are not going to board a United States warship and sign a surrender. It's hard to see how the war on terror is ever going to end, when we will be able to say there are no more terrorists in the world. So, power successfully claimed by Bush today will be available to presidents for an indefinite time.

Finally, I think the menace of unrestrained presidential power is greater today because the claims are being pressed far more seriously, more tenaciously, than they were in 1952. Professor Yoo has written a whole book maintaining what amounts to the proposition, preposterous to me, that the framers of our Constitution did not have the president in mind when they embraced the idea of the separation of powers. What was dismissed as a grotesque legal argument when Holmes Baldridge made it has become an industry.

These are not abstractions. Our freedom is at stake, yours and mine. George W. Bush, as you heard from Donna Newman today (I thought very powerfully), claimed that he could have American citizens arrested on suspicion of a connection with terrorism, and held indefinitely in solitary confinement, without a trial, and without access to a lawyer. That seems to me to fit precisely the contours of a tyrannical state.

One American who was detained in precisely that way, Jose Padilla, Ms. Newman's client, remains in prison four years after his original arrest. In a series of maneuvers, the Bush administration's lawyers have avoided a judicial judgment in his case. He now awaits a criminal trial scheduled for September. As you know, as you heard today, the other American detained without trial who was captured in Afghanistan, Yaser Hamdi, won his case in the Supreme Court, which held that he was entitled to a hearing before a neutral fact-finding body.

Rather than provide that hearing, the Justice Department let Hamdi go back to Saudi Arabia in return for giving up his citizenship. In announcing the deal, Attorney General John Ashcroft still referred to Hamdi as an "enemy combatant," the very charge that the attorney general had been unwilling to have tested before a neutral tribunal. I'll leave the last word to Justice Jackson, and his opinion in the *Steel* case.

"With all its defects, delays, and inconveniences," he said, "men have discovered no technique for long preserving free government, except that the executive be under the law."

Bob Kerrey:

First of all, in general, I think people have to be careful for what they ask for when they are angry, and that's particularly true if you find yourself angry with the president of the United States. You have to be very careful what you ask for, because you may end up getting exactly what you ask for, and then, when there is a Democrat in the White House, say, "Oh, my God, what have we done?" So I urge caution in that regard.

I can offer evidence where Democrats in the past have made change happen when there has been a Republican president, and then regretted it afterwards once a Democrat has become president of the United States. I participated in a trial in the United States Senate where Republicans overreached, and Democrats quite objected to what was going on during the impeachment of William Jefferson Clinton, as did I. I've got enough experience in this to watch people, as we say in baseball, "overrun the bag" and then get tagged out as a consequence.

Secondly, I share what Oliver Wendell Holmes, Jr. once said about the Court – that it is a mirror of society. The Court is the final arbiter of what is constitutional or not, fortunately for us. It has the independence to make judgments about what is constitutional or not, fortunately for us – sometimes against public opinion, and I say fortunately for us, since I share the view of the famous jurist who once said that the most dangerous thing in America is public opinion.

The Court is essentially a mirror. It, in essence, has been our constitutional convention. I simply lack confidence in American society to say that we ought to convene a constitutional convention. I trust, in fact, the Supreme Court, even under its current configuration, more than I would trust a general gathering of the American people. What I'm saying to you is that I do not believe in a strict constructionist view of the Constitution, and that the Court merely interprets the law. I believe you've got to bring judgment based upon what's going on in the world around us today.

Thirdly, I do not believe that the war resolution that was passed by Congress in 2002 gives the president of the United States an unlimited amount of authority to engage in the war on terror. I would go further to say that terror is a military tactic, and that to declare war on terror would be like declaring war on bombers. It will, in the end, be very unsatisfying to those of us who are trying to wage a war against individuals and groups who use terror as a tactic to disturb, disrupt, and in the end, hopefully bring down democratic governments. So I do not believe that the resolution gave the president the authority that he claims. I believe, secondly, that by using war as a metaphor against terror as a tactic, we will find ourselves in a very unhappy set of circumstances coming out of this.

The last thing I would say is that I think the biggest change that is going on, the one that is going to put both democracy in the United States and our Court to a considerable test, are these forces that are generally described as "globalism." I believe it is very likely that over the next 20 to 25 years those nation-states that could be enormously dangerous if they fail, will fail. I think it is likely that Pakistan will be a failed nation-state. It is possible that Russia could fail as a nation-state. It is even possible that China or Saudi Arabia could do so as well. This gets me back to my objection to saying that we are fighting a war on terror. Not only will it be unsatisfying to rally our military against this tactic, I think it will lead us to a monolithic policy and to the presumption that we can solve every single act of terror in the same possible way.

Michael Vatis:
I'll start off by recapping one point around which, somewhat surprisingly, there seems to be consensus, and that is that if people are upset about the administration's expansive interpretation of presidential power, they shouldn't just blame the president and his administration. At least equal blame belongs to Congress for acquiescing in this for the last five years.

If you read the *Steel Seizure* concurrence of Justice Jackson, you'll see that it is often misread. People read the part of the opinion describing three situations in which a president exercises power – ranging from situations where the president is strongest because he acts with congressional authorization to those where "his power is at its lowest ebb" because his actions are "incompatible with the express or implied will of Congress"– and they act as though there are three very distinct categories, and that you can pigeonhole a certain assertion of presidential power into one of those little

boxes, and everything will make sense from there forward. I think that is a complete misreading of the opinion.

The central message of Justice Jackson's concurrence is that it all comes down to a very messy political resolution. Presidents are going to assert power, and they will take as much power as Congress is willing to give them. When Congress is willing to give the president all the power he is able to take, then you find yourself in a situation like the one we have today. People have talked about the torture memos, and Congress's utter failure even to hold meaningful hearings into what's gone on – not only at Guantánamo and in Afghanistan and Iraq, but at secret detention sites around the world. Congress also has yet to do anything at all regarding the NSA domestic surveillance program, which, in contrast to the way the traditional media has portrayed it, is not merely a circumvention of the Foreign Intelligence Surveillance Act, it is a direct violation of it. It is illegal by any reasonable reading of the law. And yet Congress is still sitting on its hands.

The Patriot Act, passed within six weeks of 9/11, is actually the pinnacle of Congress's involvement in the war on terrorism. And I think, as such, we should give it faint praise, because at least Congress did something there. At least it saw its role as relevant, and so it passed a law. But I say "faint" praise because the exceedingly rushed way in which Congress passed the Patriot Act was really quite shameful. Congress seemed almost to acknowledge the fact that it was derogating its responsibility in passing the Patriot Act without adequate deliberation and debate when it enacted sunset provisions on certain parts of the Act that it knew would be controversial. That is, Congress said, "Well, we're not going to take the time to debate these now, so we'll make these authorities last only for a limited number of years, and then we'll hold hearings down the road."

Interestingly, one of the provisions that was *not* sunsetted, that was made permanent, was a drastic expansion of the FBI's authority to issue what are called "national security letters," or NSLs, which are basically administrative subpoenas that the FBI can issue to banks, credit card companies, Internet service providers, and telecommunications companies for records. Before the Patriot Act, the FBI could issue national security letters for information pertaining to someone who was a suspected terrorist or a suspected spy. The Patriot Act expanded the FBI's NSL authority greatly, so records now can be obtained with an NSL as long as they are deemed relevant to an espionage or international terrorism investigation, even if the records don't relate to a suspected terrorist directly. They just have to be "relevant" to an investigation.

Well, not until November of 2005, apparently, did most members of Congress understand what this change in authority actually entailed. That was when Bart Gellman wrote an article in *The Washington Post* describing what the change in NSL authority meant, and reported that the number of NSLs issued per year increased a hundredfold after passage of the Patriot Act. I understand very palpably what this means, because when I served at the FBI I had to sign stacks of NSLs after reviewing them to make sure that they complied with the law. I can't imagine how officials who sign NSLs today can go through the vastly increased numbers of them with any sort of meaningful review.

What this boils down to is that Internet service providers, telecommunications companies, and financial companies are getting served with these demands for any information that the FBI certifies is relevant to an investigation. There is no judicial review. And until the very recent amendments to the Patriot Act were passed, there was no opportunity for a recipient to contest an NSL.

I bring this up as a concrete example to show that even the Patriot Act, the pinnacle of Congress's involvement in the war on terrorism up till now, was, in some ways, just a shadow dance of real congressional involvement. Indeed, many in Congress apparently didn't even realize what they were passing until five years later, with Bart Gellman's article.

There is one other point I want to make. When we talk about Congress, a lot of people

may hear me and others as complaining solely about the Republicans. But this is not just a problem with the Republicans. Many Democrats have also shirked their responsibilities by not taking on these critical issues.

Think about the reaction to Representative Jack Murtha's call for withdrawal from Iraq. Think about the Democrats' reaction to Senator Russ Feingold's introduction of a censure resolution. Even if you disagree with their proposals, at least they're talking about issues that are fundamentally important to our country and to our constitutional system. For too long, our congressional leadership from both parties has not made these issues a top priority. So we have been deprived of the serious legislative attention and debate that one should expect in a constitutional democracy.

Judge Posner this morning made an analogy about the relationship between the president and Congress. He said the president is like the CEO of a corporation and Congress is like the board of directors. But if that's the analogy you want to use, then what's the analogy in the political process to Sarbanes-Oxley? What recourse do we, the "shareholders" in this collective enterprise, have to make sure our board of directors is doing what they're paid to do on our behalf?

There is no recourse other than the ballot box. And so, unless the electorate does its job, performs its own constitutional responsibility and votes members of Congress out of office when they're not performing theirs, then we will not have true political accountability.

Professor Richard Pildes asked the right question at the beginning of the day: that is, is the system now structurally flawed because of the way our political parties operate? Are checks and balances not possible in the way the framers envisioned them? Are there changes we need to make in the structure of our system of government, such as giving the minority in Congress subpoena power or things like that? Or is this really just a matter of one good election? Can things be drastically different come the midterm elections this fall? I'm not sure I know the answers. I think we'll have to see if the Democrats succeed in taking one or both houses of Congress, and if that success makes them feel emboldened to be true leaders and to exercise their own constitutional responsibilities rather than just acquiescing to the executive branch.

But there is one structural change that could encourage Congress to perform its responsibility to engage on these difficult issues. There is something the courts can do in the way they approach separation of powers questions, questions that involve a constitutional struggle between the political branches.

The Supreme Court's decision in *Hamdi v. Rumsfeld* two years ago is a perfect illustration of what I mean. Liberals were greatly heartened when the Supreme Court rejected the administration's extreme assertion of executive power to detain U.S. citizens as "enemy combatants." Justice O'Connor's opinion essentially said to the executive branch, "No, that's too far, and we're going stop you right there." But she then went on to prescribe the legal process that she thought must be afforded to detainees. I think that Justice Scalia was correct in calling her to task for that and saying, essentially, "Look, it is Congress's responsibility to determine what procedures should be accorded to detainees, to balance detainees' rights against the executive's needs in fighting a war. And every time the Court steps in and does Congress's job for it, it's simply enabling Congress to abdicate its constitutional responsibilities." In other words, when Congress doesn't act and the Court steps in and says, "Well, if you don't do your job, we'll do it job for you," that actually just facilitates legislative dysfunction and compounds the problem.

I think Justice Scalia had his finger on one way to reinvigorate checks and balances. That is, the courts can simply say "no" to an unconstitutional act by one of the political branches and leave it to them to devise a constitutional solution to a problem. So, if the executive branch wants to detain someone without criminal charges and Congress hasn't passed legislation to authorize it, and hasn't suspended habeas corpus, then the courts would require that the detainee go free unless charges are

brought or appropriate legislative authorization is enacted. That would get Congress's and the president's attention in a hurry. And ultimately it would compel politicians to do their jobs and devise an appropriate legal solution, rather than leaving it to the courts to do their jobs for them. So in this way, judicial restraint-saying what the law is but not then going further and doing Congress's job by dictating the solution to the problem – would have the salutary effect of encouraging the legislative branch to perform its constitutional role.

Patrick Philbin:
I'm going to disagree with a lot of what I think has been the overwhelming majority sentiment today, about there being an extraordinary overreaching of executive power during the Bush administration, something that is a sea-change from the past, that breaks with all tradition, that has brought us to the brink of the extinction of civil liberties and a crisis from which the republic might not ever recover. I disagree with that.

I'd like to try to sketch out why I think that, yes, we're in a time of change, as Karen Greenberg pointed out at the beginning this morning, but in a time of change that is perfectly consistent with the sort of crises that the framers expected would arise, and that they expected the Constitution would be able to withstand. This is something that they planned for in the way they allocated power in the Constitution, and as a result things are generally functioning the way that they should within the constitutional framework. Checks and balances, in fact, are operating and can address any imbalances that might arise from the current crisis of what is really a national security crisis.

The attacks of 9/11 and the subsequent situation in which we find ourselves dealing with international, non-state terrorist actors who can wreak havoc on the mainland United States creates a national security crisis, a national security issue, unlike one that has ever been faced before in the country's history. This puts a lot of special focus on what the national security powers of the government and of the president are. It puts focus particularly on the commander in chief power in a way that we haven't had to consider in great detail in the past, that is, in conventional wars against states. This just means that as we further develop our understanding of the Constitution, we need to focus more on the Commander in Chief Clause, and to understand what powers it gives the president, and what powers it doesn't give him. Each era has its own constitutional issues to work through, and this is one for us to face now.

It's certainly true that, in a time of crisis, power tends to flow to the executive. As an empirical matter, that's certainly true. Power does tend to flow to the executive, because the executive can respond to a national security threat. I think that, normatively, under the Constitution, that is what the framers expected. They set up the executive and understood the executive to be the branch of the government that would deal with foreign threats, with crises of national security. It's apparent throughout the *Federalist Papers* that the executive is conceived of as being the branch best able to act with secrecy and dispatch and to array the forces of the United States. That is why the president is made commander in chief of the armed forces. It is why, since the administration of Washington, the president has been given funds to use for secret intelligence purposes. Those are functions that the executive is best able to deal with.

This current crisis, I think, particularly demands those traits of the executive – that it be able to act with secrecy and dispatch and decisiveness, because this is not like a conventional war where there is a great battle going on, on a foreign battlefield. That is the way Americans usually tend to think of wars, or we have until now, because we had World War I, we had World War II, we had Korea, we had Vietnam. War became something that happens overseas, with big armies in the field, with Congress behind it, with there having been a declaration of war – all of it handled in a way that is largely in public view.

Today's war is a very different kind of war, but a war nonetheless. And I'd like to take

some issue with those who have talked about it being a war on a tactic. The war on terrorism is a rhetorical tag-line that may not be the most precise way of describing things. But it is a war nonetheless. It is a state of armed conflict with al Qaeda. There is an organization and there are terrorist groups affiliated with al Qaeda that are capable of inflicting damage on the United States, as we saw on 9/11, as we saw on the attack on the U.S.S. Cole, and as we saw in the bombings of our embassies in Africa – damage that amounts to that which creates a state of armed conflict.

So we are in an armed conflict with an organization capable of killing more people on the mainland United States than have been killed since the Civil War. This brings into play powers of the executive as the commander in chief to protect the nation from attack. Now, because it is not a war that involves large armies in the field, but a secretive foe that operates by stealth, that operates by secreting people into the country, so that they can lie in wait, and then launch an attack unexpectedly, this is mostly a war that relies on intelligence.

It is a war where it is more important than in any other war that there be good intelligence on the enemy, because it is the whole name of the game. And, to some extent, I don't think that people realize that people in the government, every day, every week, are presented with the threat information showing that every day there is a group of people out there who are very intelligent, very highly motivated, and very skillful, who are staying up late and getting up early figuring out the best way to kill 100, 1,000, 10,000 Americans; whether there is some way they can get somebody into the country; or if there is some way they can get a delivery vehicle to bring biological weapons; or how to find anything that will work to create mass panic and havoc in the United States. This is going on all the time.

That is what the powers of the executive are expected now to address. And that puts a lot of special focus on the meaning of the Commander in Chief Clause. What is it that the president as commander in chief of the armed forces can do to protect the United States?

I want to disagree with Judge Posner about the idea that the historical materials don't really tell us much. I think there *are* historical materials. We have to look at the debates around the framing of the Constitution, at early decisions of the Supreme Court, and at the few occasions on which the Supreme Court has said something about what the Commander in Chief Clause means, and what the powers of the executive are.

Drawing on these sources, one can see that in the realm of confronting the enemy (what the Department of Defense would call the "battle space," which is three-dimensional and includes cyberspace, the space where the enemy is engaged), the president has complete control to determine how the United States will confront and defeat the enemy. He can array the forces of national power to defeat and confront the enemy.

That is something different from what appears in the broader rhetoric today; namely, the idea of unchecked executive power to do anything. As Tony Lewis suggested, it is instructive to look at the district court decision in the *Steel Seizure* case. That case was about the expansion of executive power on the claim of commander in chief power, based on the claim that in a time of war, a state of emergency, the president has to be able to do something to control an industry. He has to control the steel industry because the steel industry makes weapons, and armor for tanks, and other things that are then sent overseas to support the armies in the field. That's expanding the commander in chief power from the space of actually confronting the enemy, where you are in contact with the enemy and doing something to defeat the enemy, to one, two, three steps removed, to the situation where there is a general emergency that needs the commander in chief power to be extended in order to address that emergency.

That is not what is going on in any of the claims of power by the Bush administration. Everything that has been talked about today – NSA surveillance, interrogation issues, detention issues for enemy combatants – those are all related to engaging directly with the enemy.

And so I think there is a much more limited and focused issue of the executive powers allowed in the Commander in Chief Clause than some of the broader assertions would tend to suggest. I don't think that the powers that the president has asserted have given rise, at all, to what seems to be a general consensus here today, that we are on the brink of the extinction of civil liberties.

I will try to use three examples to make the point and show what I am talking about. First, there have been many assertions that the president has said he can ignore the law, or that he can override the law, or that he is above the law, or that no matter what the Congress says, he is going to do something anyway. As a general matter, all administrations, Republican and Democrat, all Offices of Legal Counsel have taken the view that the president is not bound by a law of Congress that is unconstitutional. If Congress passes an unconstitutional law, the president is not bound to enforce it, or to be governed by it. That is an unremarkable proposition.

It doesn't indicate the breakdown of the constitutional structure. In fact, it's the position taken by every administration, every president, and is one that depends on the president's oath in the Constitution that he faithfully execute the laws. The executive has an independent obligation, as some of the speakers said earlier, to determine what the Constitution requires, and that includes determining when Congress may have overstepped its bounds.

The second point I'd like to make about civil liberties has to do with the detention of individuals, and in particular, Jose Padilla. There have been a number of suggestions that it is outrageous that a U.S. citizen could be detained in the United States without being put on trial, and without access to a lawyer. In 1942, when German saboteurs entered the United States, they were stopped by the FBI in New York and in Chicago. They were transferred to military control, tried by a military commission, and within the space of two or so months, six of them were executed. The Supreme Court in *Ex Parte Quirin* determined that this was lawful.

In exactly similar circumstances, Jose Padilla – after conspiring with al Qaeda and determining on a couple of plots to destroy buildings in the United States – entered the United States, was picked up by the FBI in Chicago, and was transferred to military control. Since then, because he had a lawyer while in FBI custody, he has been able to challenge his detention, and to have his case go up to the Supreme Court. The Supreme Court ruled on it once, sending it back down to the lower courts. Ultimately, because criminal charges could be brought against him, it was transferred to Justice Department control for a subsequent criminal prosecution. That is a standard assertion of executive power in wartime to detain enemy combatants, and it should not be deemed remarkable that the same power that was asserted in 1942 was asserted again after 9/11.

The third subject I will touch on is the NSA surveillance program. People have not focused on the fact that the administration's explanation for the program focuses primarily on the congressional authorization for use of force. The primary justification is not that the president has the authority to ignore law or override law, that FISA is unconstitutional, but that the Authorization for Use of Military Force, as interpreted by the Supreme Court in *Hamdi*, is broad enough to allow the president to use all ordinary incidents of war-making power to conduct that surveillance.

I think that there is legitimate debate to be had about what power Congress has to restrict the authority of the commander in chief in wartime to conduct signals intelligence. Judge Posner asked earlier, what if there were troops of a foreign enemy in the United States who had their communication system going? Would FISA prevent the president from intercepting their communications? As written, it would. As written, the president could not deliberately intercept their communications. But that would be absurd. It would be clearly unconstitutional.

How far different is it, if there are al Qaeda operatives in the United States planning another attack, for the president to want to

intercept their communications? That is a question for serious legal debate and not something that is to be swatted aside.

Finally, I will say a couple of words on checks and balances. I think that checks and balances are functioning today. One good example is the Supreme Court's role in the *Rasul* decision. The administration had argued that there was no habeas corpus jurisdiction over detainees held at Guantánamo Bay, Cuba. The Supreme Court disagreed with that. (I personally think that decision was wrong. I think that *Johnson v. Eisentrager* was a clear precedent, squarely on point, establishing that there was not habeas corpus jurisdiction to entertain petitions from enemy aliens who were being held overseas as these detainees clearly were, in Cuba. But the Supreme Court made its decision.)

The administration abided by the decision, and started to set up a system to allow the habeas cases to go through. And then Congress thought that the Supreme Court had gone too far and that there were good policy reasons for the fact that *Eisentrager* had been the rule for 50 years. So Congress passed a statute that then tinkered with how much habeas review there could be. That is exactly the sort of system that one would expect that the framers anticipated and would approve of. The Court came up with one decision. Congress didn't like that decision and acted quickly to alter it.

This shows both the role of the courts and Congress. And I think generally I would say people complained a lot today about the complacence of Congress, that Congress is just laying back and not doing anything, and letting the president run rough-shod all over them. But I think what that reflects is not that Congress is weak or that Congress is not living up to its role, but that Congress does not think in a lot of these instances that what the president is doing is wrong.

It reflects the belief that the president is taking appropriate action to defend the nation from potential enemies. If Congress has that assessment, that's just a reflection of what happens in a democracy. It is reflecting that (as several people have pointed out) the American people, when polled, are not opposed to the NSA program. They do not think that it is a problem.

The American people and their representatives in Congress are reflecting the way that the checks and balances would work out in a democracy. As several panelists on this panel have said, ultimately, as Justice Jackson was saying in his concurrence in the *Steel Seizure* case, checks and balances do come down in part to something political, particularly when it is an issue of power between the executive and congressional branches. When Congress is reflecting what it senses is the mood of the nation, that the president is taking appropriate action in exercising his commander in chief authority, then that is how the checks and balances are meant to work.

EXCERPTS FROM THE QUESTION AND ANSWER SESSION:

Noah Feldman:
I'm going to direct some questions to particular members of the panel. Senator Kerrey, I wonder if we could start with you. The question was raised earlier – where are the Democrats? And I saw you writing down, "Where are the Democrats?" I wonder if you'd address that issue.

Bob Kerrey:
I disagree with Michael's representation of what Chuck Schumer, Hillary Clinton and others are doing. It's a pretty common practice, actually. It's unfortunate in a democracy, but it happens. It's a very common thing to assert that, because somebody disagrees with you, they're unprincipled, that they're courting public opinion.

I barely survived after voting for NAFTA, after voting for the assault rifle ban, after voting for the Brady Bill, after voting for President Clinton's budget. The president then trimmed hard to the right in order to get elected himself. On the other hand, I'm glad that he did, because had he not been president of the United States, we would not have been able to increase the minimum wage, expand the

income tax credit, and pass the children's healthcare. We did a lot of things because he trimmed to the right in order to survive in the election.

There are two kinds of people in Washington, DC: those who can count and those who lose. If you do not like that about democracy, it is a really difficult thing to survive in it. You can sit on the sidelines and object that people are following public opinion too much, or trimming this way or that way, but that's how the Missouri Compromise was put together.

I love it when the left objects and people compromise, and the right objects and people compromise, and then both of them object because nothing gets done. How do you think things get done? People come together and they say, "We're going to settle this by giving up some of the things that we had demanded in our arguments."

Noah Feldman:
I wonder, Tony Lewis, if we could turn to you. I want to ask you specifically about *Youngstown* – and this view of *Youngstown* that both Patrick and Michael espoused – of Jackson's concurrence as advocating kind of a political-reality oriented compromise. I think it's clear that the opinion can withstand that reading, but I wonder if you do read it that way.

I also wonder if you think the historical context for the opinion might be relevant in trying to make sense of what it means. I have a view on it, but I would like to hear yours. The reason I'm particularly interested in this is that there's a very crucial question of whether the *Youngstown* opinion applies at all to this full range of issues. Patrick pointed to it. John Yoo has also written about this.

That is the view that *Youngstown* is only speaking about the president operating in what Patrick called the "battle space," that *Youngstown* draws the distinction between what the president can do in the battle space where he's commander in chief and what the president can do domestically, which Jackson really emphasized in the opinion where he says, this is a paraphrase, that the president is commander in chief of the armed forces, he's not commander in chief of the country.

If you interpret *Youngstown* as saying that the president is limited in what he can do outside the battle space, and then you move on to say that the whole country, including cyberspace, is the battle space, then the truth is that the *Youngstown* opinion is an interesting opinion with no applicability to any of the issues that we've been discussing over the course of the day.

Anthony Lewis:
I think you've answered your own question, Professor Feldman. But I don't think you can explain Jackson's opinion as entirely thinking these matters should be left to politics because, after all, he made what was a very difficult decision, and a very controversial one at the time, to use the power of the Court to intervene on the issue, and to hold the action of President Truman unconstitutional. That was the bottom line. And the court exercised a power that is rarely exercised. And it was a very large power, indeed.

As Jackson said, the president is not commander in chief of the country, its inhabitants and its business. The difficulty is in exactly where you ended up, Professor Feldman, that the line isn't so secure. If you follow the Bush administration's thinking, then anything to do with the war becomes a battlefield matter for the president's sole decision and the Authorization for the Use of Military Force allows anything that remotely can be considered relevant to the struggle. I personally regard that argument in this instance, the NSA instance, as a frivolous argument. But it was made, that's true.

I thought Mr. Philbin had a lot to say, but I disagree with him quite fundamentally on *Padilla*. I do so in part because he misrepresented what happened. He said Padilla plotted this, that and the other thing. No such finding has ever been made. That's an assertion by the United States government, which, indeed, it has dropped in the criminal phase of this matter. It is no longer even asserting those things.

The Nazi saboteurs had a trial, which

Padilla has not had. And even then, the case, *Ex Parte Quirin*, was correctly described by Justice Scalia in *Hamdi v. Rumsfeld* as "not the Court's finest hour." It was a rush to judgment in which the saboteurs were executed before the opinion of the Supreme Court was written and published. It was not the Court's finest hour, and I wouldn't rely on it for anything. But, in any case, it wasn't the same as this.

Patrick Philbin:
The *Quirin* decision, I think, is a correct understanding of the commander in chief power, an unassailable understanding of the commander in chief powers. And I would rely on it, I do rely on it. I think that the *Quirin* decision is correct.

Richard Pildes *(from the audience)*:
I want to express my frustration with the way some of this discussion is going and also my frustration with the larger public discussion. Let me put it in concrete context of issues about whether, for example, we need some sort of policy of preventive detention in the United States in the context of terrorism today. I think that's a hugely serious and difficult issue, and we've had almost no discussion about what intelligent policy about an issue like that would be, nor has Congress gotten involved in any way on so many of the novel and difficult policy issues terrorism poses.

So, on the one hand, we have lots of discussion of *Padilla* and that form of executive detention. Now, of course, it is one case in five years since September 11th of an American citizen detained in the United States, so you might think that it is a rarely used form of executive power to use detention during these circumstances, but there's been an enormous amount of criticism of it without any discussion about possible alternatives.

I don't know, and I don't have the information to know, whether we need a system of preventive detention. I do think that it would be much better if Congress engaged an issue like this, and was forced to take some responsibility for such an issue. If we did have a system that was created by Congress on any of these novel policy issues, such a system would have *more* oversight and much more accountability than the executive detention system we now have. The current system was created in part because when executive-branch lawyers were scrambling around to look for how to do this they had the old case from World War II on the books and that was closest thing to an off-the-shelf model.

So, that's the big issue. What is sensible policy about preventive detention or any of these other issues? And I think the question of sound substantive policy gets lost in the focus on the unilateralism of the exercise of detention power in the one case involving an American citizen that's occurred, without any general public discussion about whether there is in fact a need for something in between unilateral executive detention and nothing but the ordinary criminal trial process.

Anthony Lewis:
It's a rather frightening idea to me that we should be discussing generalized preventative detention. Of course, it was only one case as you say, but it is one case that made a claim of power that could apply to anybody; an undisclosed basis for detaining somebody forever who never gets a chance to argue the facts of the case before an impartial tribunal. That's the reality of the situation. If it could be done to Jose Padilla, why not to anybody else? It's only an assertion by the executive of charges which are never tried.

I want to call something to your attention historically that might make you less eager for congressional resolution of such matters. I'm a bit more of a cynic about Congress than you are. Just as in the old days when the word "communist" was mentioned, Congress ran in the opposite direction as fast as possible, I think that's true of the terror issue today, and I think it's why *Rasul* was overruled in the nasty and hasty way it was by Senator Graham's amendment.

In 1954, Congress passed a communist control act, and liberal Democrats, wanting to show how they were even more anticommunist than the Republicans who sponsored the bill, proposed an amendment to call for detention at

the president's wishes whenever there was a declaration of emergency at the president's wishes. The amendment was added to the bill, and the Democrats all faithfully voted for the bill as amended and it passed. I think it would be a very bad idea to fool around with the notion of detention in advance of any possible claim of necessity.

Michael Vatis:
I have two points. The first one is just a short clarification to respond to a couple of comments Senator Kerrey made about my views. I don't criticize Democrats as being unprincipled because they disagree with me. My problem is with those who might agree with me on the substance of important issues but who have not doing anything about it. In fact, the people who disagree with me on these issues, as Viet Dinh said this morning, are being principled in the sense that they are saying what they believe, and they're now undergoing the consequences. But many Democrats are simply making a tactical decision not to make a big deal about NSA surveillance, or torture, or other issues we're talking about because they think it will cost them votes. I disagree with that as a matter both of principle and of tactics. I think it's their responsibility to take action on issues fundamental to our country and our constitutional democracy. And I also think they are going to lose elections if they continue to be shy about national security.

As to the point that Rick Pildes brought up, *Padilla* is not the only case of executive detention. Remember, there were hundreds, some say thousands, of people preventatively detained as material witnesses and then silently released. That's preventative detention in everything but name. And the problem is that we've allowed this to occur because we've treated the last five-plus years as something that Patrick Philbin described (and David Rivkin described earlier) as a crisis. The government has asserted that we're still in a crisis, that we are in wartime. People have accepted those descriptions unquestioningly. The problem is that if you don't unpack those descriptions, you're left with false analogies to World War I, World War II, and the Civil War as though today is analogous to those times when it's not.

I do not underestimate the threat. I start where Judge Posner did this morning. I think the threat, not just of conventional terrorist attacks but of ones using weapons of mass destruction, is very real. It is existential. Hundreds of thousands, even millions of people could die, and the threat is only going to grow as technology puts more and more destructive power in the hands of individuals, not just nation-states or organized groups.

The question is, how do we deal with this over the long term? We first have to realize that this is not a short-term crisis. It's really going to last the rest of civilization. So, how do civilizations deal with the destructive power that technology puts in the hands of individuals? Do we leave it to the executive branch as we have tended to do in short-term crises? Or do we apply all the instruments of our democracy, including legislation? I would submit that that is what we need to do. Put this back into the traditional modes of policymaking and don't just say we're in crisis, let the executive do whatever he thinks is necessary and be done with it.

Patrick Philbin:
On the question of preventative detention, I think it's right to focus on that concept as being the issue, to abstract it from just the individual case of *Padilla* and to say there is an issue, a problem, that the executive is trying to deal with. How should we best address that overall problem?

I am not sure where I would come out ultimately. I am not sure I have an answer, but I think, and for the sake of argument, I agree with Mr. Lewis that it is better not to have Congress institutionalize or create a mechanism for it. I would say that once you start to pass statutes that allow something, and you have a regular process for it, it becomes a lot easier to do it, and it becomes something that is less extraordinary.

At one point, I think it was when I was still working in OLC, there was an official

from the British government who came in. He was doing a sort of review of their terrorism laws and had come to the United States to find out what our legal approaches were.

He was asking me about enemy combatant detentions and why we did things that way. I was explaining that part of the view was that we have a lot of restrictions in our criminal laws that are set by the Constitution, and we don't want to change any of those. The criminal law is going to stay the criminal law; we are not going to reduce any protections. We're not going do anything else.

When there's an extraordinary case that we cannot proceed with criminally, but there is a threat presented and something has to be done, we have this other set of authorities under the war powers, and those are extraordinary. As was pointed out, there has been one case in five years. You proceed under the war powers, then, recognizing that it is the president himself who is going to make a decision about detention, that this is an extraordinary action. That by itself ends up being a check on it because you just don't do that kind of thing very easily.

Bob Kerrey:
On this issue of preventative detention, I think it is a very complicated issue and you have to broaden it. You cannot just talk about people who are an existential threat as a consequence of their decision to use terrorism as a tactic against us. If you are a woman in New York City and your husband has beaten you almost to death, and you go to the police department, the law does not allow him to be preventatively detained. You can get some action but you basically have to wait for him to come back and really hurt you so badly that he is obviously a danger. So there are preventative detention issues beyond this issue of terrorism.

The problem I have with what the president is doing right now gets more into a cost/benefit analysis. I think Guantánamo and the renditions have damaged our capacity to make a case that modernism and democracy are the best choice. I think it damages it and, moreover, I think the evidence is there that in federal court we've done a pretty good job of bringing people to justice.

Noah Feldman:
I just want to say in closing, and this goes to Rick Pildes's point and some of the responses to it, there is a natural tendency in the wake of something like 9/11 towards collective denial; denial specifically of the possibility that it could happen again. That makes certain kinds of debates extremely difficult.

One thing in particular for which Karen Greenberg is to be complimented is that through the Center on Law and Security, for the last several years and particularly today, she has made sure that we are not in denial about the difficulty of the kinds of problems that are crucial to our nation and to its future.

Karen J. Greenberg:
I have but two closing remarks. The first is that with thoughtful, candid, courageous, and polite panelists such as today, I do not have as many worries about the country as I had when I woke up this morning. And my second comment is thank you. Thank you to the participants. Thank you to the moderators. And thank you, most particularly, to the audience.

TABLE OF CASES

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Hamdi v. Rumsfeld, 542 U.S. 507 (2004)
Johnson v. Eisentrager, 339 U.S. 763 (1950)
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Morrison v. Olson, 487 U.S. 654 (1988)
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Rasul v. Bush, 542 U.S. 466 (2004)
Rumsfeld v. Padilla, 542 U.S. 426 (2004)
U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)
U.S. v. Rosen (*AIPAC*), 445 F. Supp. 2d 602 (E.D. Va. 2006)
U.S. v. United States District Court (*Kieth*), 407 U.S. 297 (1972)
Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952)

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Peter Bergen, Sidney Blumenthal, Paul Cruickshank, Amos Elon, Tara McKelvey, Dana Priest, Michael Sheehan, and Lawrence Wright

Publications

For the Record: The NSA Wiretap Program, January 2007; *Terrorist Trial Report Card: U.S. Edition*, *2001-2006; NYU Review of Law and Security*: Volumes 1-7, 2003-2006 (including *Al Qaeda; Crime vs. War: Guantánamo; Torture, the Courts, and the War on Terror;* and *Prosecuting Terror: The National Challenge*)

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AN INTRODUCTION TO THE JOHN BRADEMAS CENTER FOR THE STUDY OF CONGRESS

Several colleges and universities in the United States have established institutes named for former senators and representatives. These institutes are customarily dedicated to housing legislators' papers; studying the federal government generally; or focusing on a particular subject or policy, such as issues affecting the elderly, or encouraging young people to go into public service. Few of these institutes pursue the study of Congress as a policymaking body. Given the great challenges confronting our country and the responsibility of the leaders of our national government, including senators and representatives, for dealing with them, I think it imperative to encourage more understanding among both scholars and the public of how Congress works to create policy.

So my principal project now is the establishment off a center for the study of Congress as a policymaking institution. It is a place to which we shall bring presidents, senators, representatives, current and former Democrats and Republicans, cabinet officers, congressional staffers, judges, diplomats, journalists, parliamentarians from other countries, students and scholars to discuss the ways in which our national legislature influences and shapes policy, as well as significant issues of public policy. The purpose of The Center for the Study of Congress will be to encourage the exchange of ideas amongst scholars and policymakers, thereby promoting the creation and dissemination of knowledge and public understanding of what is, after all, the first branch of government.

Among the many topics the Center plans to examine are the speakership of the House of Representatives, congressional redistricting, legislation ensuring education for the disabled, Congress and the federal judiciary, and the development of a public policy to preserve the papers of senators and representatives. – **John Brademas**