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THIS IS AN UNCORRECTED TRANSCRIPT.

PROCEEDINGS

MR. NIVOLA: Good morning. It's wonderful to see so many people here this morning. And welcome. My name is Pietro Nivola. I'm the new director of the Governance Studies Program here at Brookings.

The discussion that you are about to hear this morning is, hopefully, going to be one of the first of several sessions we're going to have under the auspices of my program on important judicial and legal developments. I'm especially grateful to my old friend Stuart Taylor for having helped us convene so distinguished a panel on pretty short notice and, by the way, for also having brilliantly navigated the reefs and undertows and riptides of people's summer vacations and other mid-July commitments. So thank you, Stuart.

Needless to say, our colloquium this morning is no garden variety Supreme Court wrap-up. Last week, the Court handed down among the most interesting and important decisions, I would say, since Korematsu v. U.S. on the relationship between national security interests and fundamental civil liberties--or more precisely, on the tension between the powers of the executive and due process of law.

We're fortunate to have with us this morning a very seasoned and well-balanced panel of experts to discuss these cases and their implications. So let me introduce everybody. On the far right over here, for no particular reason--

[Laughter.]

MR. NIVOLA: --is Larry Thompson who, as most of you know, was until last year deputy attorney general in the Bush administration and who's currently with us as a senior fellow here at Brookings.

Next to him is Neal Katyal, a former national security advisor for the Department of Justice during the Clinton years. He's a professor of law at Georgetown University.

Next up is David Rivkin, who was with the Justice Department and the White House under presidents Reagan and Bush 41 and is presently with the law firm of Baker and Hostetler.

Next to him we have Morton Halperin, director of the Open Society Policy Center here in town. Among other notable roles, Dr. Halperin was formerly director of the policy planning staff at the State Department during the Clinton administration.

And finally, in the middle, is Stuart Taylor of the National Journal and Newsweek, who will be chairing things this morning. I'd like to mention, pretty proudly, that Stuart will be joining us as a Brookings nonresident senior fellow, so with any luck, despite his nonresidency, you will be seeing more of him around these parts in the future.

Thank you very much for being here this morning. And Stuart, it's your show.

MR. TAYLOR: Thank you, Pietro. It's good to be here.

A word about format. Each of us will make an opening statement in the neighborhood of five minutes--we hope. And then I will ask questions in the neighborhood of 30 minutes to the panel, and then we'll have, hopefully, about 30 minutes left for questions from the floor.

Pietro mentioned the undoubted importance of the three decisions, all on June 28th, that we're going to discuss today. They were widely characterized in the

media and by civil libertarians as triumphs for the rule of law and major defeats for President Bush. After all, the administration was only able to persuade one of the nine justices, Clarence Thomas, that it was right on all issues. But some experts nonetheless see these decisions, on balance, as important victories for the president. And I expect we'll hear both views ably expounded today.

The Court, being economical as usual, pronounced its judgment in 10 separate opinions spread across three cases, 179 pages, and 69 footnotes. I will try to summarize them in three or four minutes.

In all three cases, President Bush claimed the powers to seize suspected enemy combatants anywhere in the world, hold them incommunicado for days, months, potentially years for purposes of interrogation, and keep them locked up for as long as the relevant hostilities continue, even for life if it's al Qaeda and it goes on that long.

During this time, the administration said, detainees have no right to see lawyers, no right to see family members, no right to see anyone else except their interrogators--no right to see their interrogators, for that matter, if the interrogators get tired of them--no rights to any judicial review for those who are non-Americans held outside the United States, and only the most cursory judicial review for American citizens, even if they're seized inside the United States.

Accordingly, in the first of the three cases, as the order I'll take them, the Guantanamo case, called Rasul v. Bush, the administration's position was that no court in the world could question anything the military might do to the 600 or so suspected Taliban and al Qaeda fighters who were captured in or near Afghanistan and then taken to Guantanamo and have been detained there, most of them, ever since, with some being released.

Six justices rejected that view. They gave unprecedented scope to the federal habeas corpus law, which provides for judicial review of executive detentions and has roots going back to the Magna Carta. The justices ruled that the habeas corpus law requires at least some form of judicial review for all of the Guantanamo detainees who claim to be innocent civilians picked up by mistake, as many of them do.

The Court shed no light on what kind of hearing would suffice. Yesterday, by the way, the Pentagon issued an order establishing military tribunals to implement its interpretation of the Court's ruling. That will probably be challenged as inadequate.

Justice Scalia dissented in the Guantanamo case, joined by Chief Justice Rehnquist and Justice Thomas. They warned that the decision would extend federal court jurisdiction "to the four corners of the earth"--perhaps including any cave in which Osama bin Laden might be found--with a potentially harmful effect on the war effort.

The second major decision was Hamdi v. Rumsfeld. Yaser Esam Hamdi, an American citizen born in Louisiana, raised in Saudi Arabia, was taken prisoner in Afghanistan by the Northern Alliance and ended up in a Navy brig in the United States. The military held and interrogated Hamdi virtually incommunicado for almost two years, with no access to family members or to a lawyer.

Based on a hearsay declaration by a Pentagon bureaucrat that Hamdi had been carrying a rifle when picked up with a Taliban unit in Afghanistan by the Northern Alliance, which handed him over to the United States, based on this declaration the administration argued that the courts had no power to hear from Hamdi or anyone else to contest the factual basis for his detention as an enemy combatant. Basically, it could

review the legal sufficiency of the declaration and, it being sufficient, that would be the end of the case.

The justices produced four separate opinions in the Hamdi case, none commanding a majority. There were two big contested issues. On the first, the justices voted 5-4 to uphold the administration's claim that Congress had implicitly empowered it to detain enemy combatants, including American citizens, for the duration of the relevant hostilities--a matter of definition that will be contested in the future, how long are the relevant hostilities.

But on the second issue, the justices voted 8-1, in separate groups, to reject the administration's denial of meaningful judicial review of Hamdi's claim that he had been in Afghanistan as a relief worker, not a Taliban soldier. Justice O'Connor's plurality opinion declared that "a state of war is not a blank check for the president when it comes to the rights of the nation's citizens." She held that due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest that designation before a neutral decision maker, including a right to counsel. The plurality also suggested that a military tribunal might suffice.

The third decision was Rumsfeld v. Padilla. Jose Padilla was an American street thug, really, who had converted to Islam and was arrested, at Chicago's O'Hare Airport after flying in from Afghanistan, on suspicion of being an al Qaeda agent sent to plot a terrorist attack--perhaps with a radiological dirty bomb, as Attorney General Ashcroft announced from Moscow dramatically, but we're not sure that they're going to pursue that. The government held and interrogated Padilla in a military brig, after an initial brush with being held as a federal material witness, even though the

circumstances of the case--a U.S. citizen arrested in this country--raised special alarms among civil libertarians and others.

The Supreme Court did not decide the merits of Padilla's case, holding instead, 5-4, that his lawyer had filed his habeas corpus petition in the wrong court and sending him back to the lower courts to start over again. Presumably that will go pretty fast, because it's utterly clear that Padilla is entitled to at least as much due process protection as Hamdi gets, and perhaps more, as I think we'll hear today.

At this point, we'll go to opening statements from our four panelists commenting on these decisions, their implications, where we go from here, what the Court did right, what it did wrong. And Neal Katyal will go first.

Thank you.

MR. KATYAL: Thank you, Pietro and Stuart, for allowing me to be here. One thing that Pietro didn't say, I represent the judge advocate general assigned to the defense at the Pentagon, in the Office of Military Commissions. I'm speaking today on behalf of myself, not on behalf of them.

In my view, last week the Supreme Court stingingly repudiated the Ashcroft/White House Counsel Gonzales legal approach to the war on terror. And I think in 10 years we'll forget just how significant June 28, 2004, is, because we'll forget just how extreme the positions taken by this administration were. You heard Stuart briefly categorize them in two sentences, but I think it's worth just thinking about what they told the Supreme Court.

They told the Supreme Court, first, that the government has, under the commander in chief power, the plenary power to do what it wants. They told the Court that intentionally stationing people in Guantanamo Bay will allow them to evade civilian

review. They told them that intentionally stationing these people in Guantanamo Bay would make the Constitution, laws, and treaties inapplicable to what the government does there. They told the Court that despite the ratified Geneva Conventions and despite the fact that our own military regulations require Article V tribunals to determine where someone is an enemy combatant, they don't need to do that in these cases. They told the Court that the indefinite detention of a United States citizen without access to a lawyer was permissible. And they've gone further in their orders and said that the president has the unilateral power to set up these military tribunals at Guantanamo Bay, to pick the prosecutors, pick the defense attorneys, pick the judges, define the offenses after the fact, and then cut all of this off from civilian judicial review after the tribunals make their decisions.

Now, the Supreme Court has utterly repudiated all of these steps, with the exception of military tribunals because that wasn't before the Court. And what the administration, I think, has done here is do what I said President Clinton did in his own private life, which is make aggressive claims about executive power, claims that were too aggressive, in President Clinton's case, about executive privilege. And that led to a judicial backlash.

The truth is, I think the administration had some strong arguments about the detention power, about their position in the Guantanamo cases. But by taking this entire laundry list of the government can do whatever it wants whenever it wants, the Court was almost forced into repudiating what the government did. So the upshot is that, on the administration's own terms, the country is actually weaker today than it was before, that future presidents are going to inherit a regime in which the executive's hands are far more tied.

Now, it's my view that the next big battles will be fought in this military commission process. It's the one thing the Supreme Court hasn't really spoken on. And the administration seems quite clearly--before the decisions came down--content to basically allow these people to languish at Guantanamo Bay, say they'll have these trials, but keep these people detained for years on end with no trials actually taking place. As a result of these decisions, there's a lot of pressure on the administration to start these trials at Guantanamo, these military commissions.

The problem is twofold. Number one, the order by the president cut off any civilian judicial review on its own terms. The president hoped to basically say that none of the people who face these military commissions could actually have access to the courts. Well, now, as a result of what happened last week, we know that isn't true. People who face military commissions will have access to the civilian courts.

And the second problem is that the entire rules structure, from start to finish, about these military commissions was drafted with the assumption that there would be no civilian review in mind. And so every rule is stacked toward the prosecution at every turn. Just one example: Traditional military law says that if you have tortured testimony, that if someone's been tortured, a witness or a defendant, that testimony can't be introduced into evidence. Military commissions have no such rule. Indeed, the military commissions will permit the tortured testimony to be introduced and not even tell, necessarily, the defense attorneys or even the judges deciding this about the dubious provenance of this evidence. So it's really, I think, going to require a lot of rethinking among the Pentagon to make a fair system before we can even begin to think about trials or military commissions.

There's a whole other set of things going on now with the ordinary detainees, the 600 or so folks at Guantanamo Bay. And the Pentagon two weeks ago announced a set of procedures to deal with these with annualized detainee review boards, and, just last night, another set of procedures in an attempt to comply with the Supreme Court ruling for review of enemy combatant status. A little bit late, in my view, but it's a welcome development. The problem is that these things, on balance, really look like whitewash attempts for a dubious system. I mean, no lawyers present, no right to a lawyer; no necessary press access in these hearings; no real definitions of what the detainee must prove, stand before these judges and prove, to get out. It's, at this moment in time, a very vague system. My hope is that it gets fleshed out over time with procedures that are fair.

But here's the bottom line. The government for two years has been thinking about all of these issues like a tax code. They've been saying, okay, what's the loophole that we can do this in or that in. And these are human beings, and the Supreme Court has said exactly that. And so the upshot of these decisions is to tell the government stop thinking about this like a tax code, stop trying to look for every loophole. Instead, try and be fair. And it's better--obviously, I think, as we can now see--it's better for our national security as well.

My view isn't that a lot of this stuff is constitutionally compelled. As I say, I think that the detainees at Guantanamo are on somewhat weak footing. But as Abu Ghraib and all the other events have shown, we have, I think, a moral commitment and indeed a national security commitment to probably do a better job of trying to be at the forefront of protections for individuals, rather than being at the back end.

So let me just say one final thing, which is the other thing, I think, that the trio of decisions last week show is an utter repudiation of this administration's secrecy. All of this stuff that's come out--these prison scandals, these memos saying that they have the right under the commander in chief clause to torture--all of that stuff has come out not because the administration decided it was in the public's interest to know; it came out because of brave whistleblowers in the government. And if the administration's going to continue not only thinking about this as a tax code, but as a secret tax code, we're going to have more June 28ths for the next years that follow. We're going to be a much weaker country and a much weakened presidency if everything is done in secret.

Those of us, like me, who believe in a strong presidency, a unitary executive theory of the presidency, believe that theory only works if you have public accountability as a check on the presidency. But what the administration has done is couple extremely broad statements about the commander in chief power with a relentless drive for secrecy. Taken together, that's a dangerous recipe. That's what the Supreme Court rejected last week.

Thank you.

MR. TAYLOR: Okay, thanks, Neal. Next we'll hear from Morton Halperin.

MR. HALPERIN: Well, what I have to say is, I think, self-evident, so I will be very brief.

It is worth noting that, with one minor exception, the Hamdi case is the first decision by the Supreme Court coming down on the civil liberties side of the claim between national security and civil liberties since the Pentagon Papers case. Since then

you have had a whole set of decisions by the Supreme Court upholding claims of national security.

And I think you saw the Court acting this way because it was confronted with an extraordinary claim by the president, one that I think no other president had ever made before. And that was that the president could sit in his office and make up a category called "unlawful combatants" or sometimes "enemy combatants" and then decide what the definition was of that, keep that secret, and then write himself a note that a particular American citizen on the soil of the United States fit that secret definition, and then order the U.S. military to seize that person, put him in a military prison, and not allow that person to have access to counsel, not allow that person access by a writ of habeas corpus to the courts, and could hold that person as long as it wanted to under those conditions.

Now, by the time the government got to the Supreme Court, it had conceded a little bit that there may be some judicial standard. But that's where it started, that's what it did. Mr. Hamdi and Mr. Padilla were seized--Hamdi on the battlefield, but then later transported, and Padilla in the United States--and locked up that way. And the Court simply said, eight justices simply said that you cannot do that, that the Constitution was in fact designed to prevent the president from deciding who his enemies were, giving them a label, locking them in a prison, and denying them access to the courts. Eight of the nine justices clearly rejected this. And it seems clear to me that this was the right decision and does not weaken the presidency, but simply says, again, that this is a nation of laws.

The issue is not are there circumstances under which people who have the characteristics of Padilla or Hamdi could be locked up or even locked up for extended

periods of time. The question before the Court, the initial question, was could the president do this on his own based on a standard that he invented and denying all access to the courts; and especially could he do it in the face of a statute that specifically said that American citizens could not be detained without a specific law by the Congress?

Now, I think that there are many issues to be discussed and debated about how far the Court really went. But I think the policy conclusion that should be drawn, and that I hope the administration will draw, is that these issues are too important--too important to the civil liberties of the nation and too important to the security of the nation for the president to act alone. What the president, in my view, should have done is to go to the Congress of the United States and say that we are in a new kind of war, this new kind of war requires new authorities to detain people under new standards and in different ways, and laid out what additional authority he thinks he needed. I'm confident that the Congress would have given him the authority. Indeed, I suspect the Congress would still give the president more authority than I think the Congress ought to give the president.

But certainly it would have acted. And we know that because it did act. The only authority the president asked for, for new kinds of detention power, was in the Patriot Act, and that authority was entirely limited to new authority to detain non-citizens resident in the United States who were suspected of terrorism. And the Congress gave the president not all that he asked for, but most of what he asked for. And then, among other things, the president was then arguing that, having asked for that authority for non-citizens and getting less than he asked for, he now had even greater power to detain American citizens within the United States under a much lower

standard, without any court review, and without having asked Congress for that authority.

I think the president needs to go back to the Congress and I think we need to have a debate in the United States--not in the next three months before the election, but in January--and that we need to decide what the limits are, and we need to do that consistent with the opinions of the Court which say the courts must have a role, the defendants must be able to talk to their lawyers, and the government must prove by some standard that it has met the factual basis that Congress lays out in legislation.

MR. TAYLOR: Thank you very much. Next, Larry Thompson, former deputy attorney general. He will defend [inaudible] -- or maybe not?

MR. THOMPSON: From the far right here.

Good morning. I view the Supreme Court's decisions from a prism of a former government official who, after the 9/11 attacks, realized--and I agree with what Morton said, and that is that we were in a new kind of war and we were in a new kind of war with a new kind of enemy. We were dealing with an enemy without a regular armed forces, an enemy that did not have any kind of cities or territory or recognized population, and an enemy that used surprise, unconventional attacks to, indeed, slaughter and murder innocent civilians. This was an enemy unlike any other that we had dealt with in the history of this country. And I was hoping and looking forward to the Supreme Court decisions in providing the executive branch much-needed certainty as to how this country was to deal with this new enemy in this new kind of war.

Remember, Congress did act, as Morton said. And Congress not only directed the president to do everything that he could to bring to justice the people, al Qaeda, who were responsible for the World Trade Center and Pentagon attacks, but the

Congress also directed the president and directed the Department of Justice--and something that I took seriously as a former government official--to do everything that it could to prevent future terrorist attacks.

Sadly, the Court's decisions did not provide the certainty that I was hoping for. And the Court, I think, ladies and gentlemen, completely failed--completely failed to give the executive any kind of direction with respect to what I believe, as a former Department of Justice official, is the most important aspect of the war on terror, and that is what do we do and how does the government go about trying to prevent future attacks?

Now, my former colleagues at the Department of Justice, as Stuart said in the introduction, has sort of attempted to view the trilogy of cases as a glass half full. I really disagree with that. I think, if you look at these cases fairly, the glass is only a quarter full, but it's about ready to be empty with the next round of judicial balancing, if you will, that the Court undertook in the Hamdi case. Now to me, I think it is absolutely clear that in this new war we must be able to detain and question al Qaeda operatives in order to gain information with respect to how to prevent future attacks.

Now, what did the Court say about that very critical mechanism in the war on terror? Justice O'Connor said, in the plurality opinion, that indefinite detention for the purpose of interrogation is not permissible. Justice Stevens, in the Padilla dissent, basically dismisses completely the concept of detention for investigation and prevention of future terrorist attacks.

So where are we now with respect to how the government is to go about protecting you and I in light of these three decisions? I think the Court did uphold the basic constitutional framework that the administration advanced with respect to how to

deal with enemy combatants. The Court recognized that the country is at war. Most importantly, the Court recognized that you can detain an al Qaeda operative as an enemy combatant and that detention is not punishment, that--in the Hamdi opinion, that that detention is designed to prevent the person from going back to the battlefield.

Now, what does that mean, though, for someone like Padilla, who may be on our own soil and is out to do us harm? I would think that if you can detain someone to keep them from going back to the battlefield, clearly the congressional authorization directed the president to detain someone for the purpose of questioning that person and authorized a detention of someone in order to gain valuable intelligence about the enemy's plans. And while the Hamdi decision related only to fighting in Afghanistan, I think that a fair reading of that decision is that the Court does not rule out at all some form of detention for interrogation or intelligence gathering purposes.

In Hamdi, if you look at the Court's reasoning, the Court relied upon the 9/18 congressional authorization, which did not even mention Afghanistan. And the only reason we have Mr. Hamdi in the situation is that he was a part of the Taliban which was fighting to aid the al Qaeda operatives. I do not believe that Hamdi can be limited, as some have suggested, to people who were captured in Afghanistan or in foreign lands on the battlefield. I believe that its reasoning should at least apply to an al Qaeda operative, like Padilla, who is captured on American soil. A different reading would not make any sense. It would mean that the Court has authorized detention as an enemy combatant for someone who aids al Qaeda while preventing that same detention for an al Qaeda operative himself.

In closing, I thought about constantly, almost every day as a former government official, of the following situation. And believe me, it's not far away. And

that is the ticking-bomb scenario. And to me, when you deal with the ticking-bomb scenario, the criminal justice system is clearly inadequate to deal with a person who is ready to blow us up and who we need to get information out of to prevent the loss of innocent life. The criminal justice system is completely inadequate to deal with this. The best way to deal with it is in the enemy combatant situation. The Court authorized that in limited circumstances. I think it should be applied in the situation that I just outlined.

It's unfortunate that the Court did not provide the executive with any more certainty and guidance on this important aspect. I think the question will be not whether that kind of person in the ticking-bomb scenario, not whether that person can be detained, but if that person is detained, what kind of information will go to the court and to the detainee to justify grounds for detaining that person; and then, of course, when will judicial review of the detention take place.

Thank you.

MR. TAYLOR: All right, to clean up, we have David Rivkin.

MR. RIVKIN: Thank you, Stuart.

I guess I'm the most optimistic one. I would submit to you that, when I heard the remarks of some of my good colleagues, I was wondering if we'd read the same cases. But hopefully we can get into it in the question and answer period.

Let me just pose and answer a few basic questions. First of all, what did the Court do? And of course the conventional wisdom is that the Court has decisively repudiated the administration's policies--which I hope I can establish, at least a little bit, is a fair amount of spin. But to be fair, there is some basis for holding that the Court has handed the administration a defeat here; at least one case, Guantanamo, clearly was a

loss. And all three decisions feature language that's really harshly critical of the administration. I would submit to you, if you read all those three cases together and if you look at the bottom lines of what the Court has done, their bark is far worse than its bite.

Fundamentally and most importantly, the decisions have rebutted the most significant criticism that has been lodged by a number of critics, including some here, that it is the criminal justice system and the level of due process present in the criminal justice system which should govern those matters. The Court affirmed decisively the basic validity of the wartime paradigm that the administration had chosen up to September 11th, and that is enormously important. That was done primarily in Hamdi, to me is the most important case because it does parse in some detail the substantive contours of a president's power. At least the four justices, and Thomas, too, if you look at what he says, concluded that the president does have constitutional power to designate individuals as enemy combatants.

By the way, I would like to offer Mort a bet, a dinner of his choice, that I can find you 50 references to such categories as lawful combatants, unlawful combatants, enemy combatants not invented by this administration, but in writings of international law scholars, in military manuals, including British, Australian, and German military manuals. With all due respect to Mort, this is not something that got invented by Paul Wolfowitz or George W. Bush. The Court recognized that, and said that even if they're American citizens they can be held. Not indefinitely--that's a canard. Nobody suggested that they should be held indefinitely. For the duration of hostilities, ladies and gentlemen--that can be a very damn long time, years--does not trouble the Court.

A propos of the point made by my colleague from Georgetown who is going to challenge the military commissions, for all the people, including him, who [inaudible] Quirin and talking about--that's of course the World War II famous German saboteur case, where a military commission sentenced to death a number of individuals, including an American citizen. The Court had very nice language--not that the Court needed it, in my opinion, but it's nice to know that this Court, the plurality plus Thomas, do think Quirin is good law. Certainly revitalized those cases and rejected implicitly their arguments by people who argued that this is somehow passe and not politically au courant anymore.

As far as the Nondetention Act is concerned--and it's interesting, those arguments were advanced, just remember, in Padilla, the Second Circuit. Not just the professors, the Second Circuit said there is no such animal as being able to hold American citizens as enemy combatants. You have to either release Mr. Padilla or you have to criminally charge him. The Court very nicely dissected the language of congressional authorization of September 18, 2001, talked about the Nondetention Act--another point a propos of my friend Mort, the Court never reached the constitutional arguments, which are very compelling, where the president has commander in chief power. Because you cannot be commander in chief if you cannot--you cannot use force, you cannot wage war if you cannot detain people you catch, any more than you can be commander in chief if you cannot shoot bullets. The Court did not reach this issue. Why? Because they felt--and this is entirely standard in the analysis--that issue is well disposed by statutory analysis.

So the congressional authorization does trump the Nondetention Act. And it's interesting to me that this argument, of course, was advanced far more prominently in the Padilla case. They'd done this in Hamdi.

Now, look at--a lot of stuff is being made out of the fact that there's decisive repudiation. Before the administration had "some evidence" test; now it's "credible evidence" test. I don't of any arguments the administration has used suggesting that non-credible information is going to be used. Fundamentally the administration has said individuals, even U.S. citizens detained as enemy combatants, have a modicum of due process right to challenge what?--the classification decision, nothing else. Not conditions of confinement, not duration of confinement, not interrogation approaches. Status classification. How do you do that? Nothing approaching the criminal justice level of due process, a lot of my colleagues would argue. Very deferential stuff. No presumption of innocence, basically. The administration gets to put forward a case, then the burden shifts to the defendant. Credible evidence test.

And remarkably--and I'm no slouch when it comes to defending executive power--in passing, the Hamdi plurality/majority said you can do that, you can satisfy the due process requirements we sketch out even for U.S. citizens in military commissions.

If somebody asked me on Sunday before the decision came out, can a president detain a U.S. citizen in the United States and the only degree of due process that gets accorded to him is a military commission?--I would have probably blanched. Now I'm thinking that the Hamdi Court blanched.

Now, if you look at Thomas's dissent, he thinks the president's power is absolute, so I don't think I err in putting him together with the plurality.

Look at Padilla. For me, Padilla--and I'm sure we can have a lively debate about it--was the most difficult case because it was detention of a U.S. citizen caught in the United States rather than a foreign battlefield. The Supreme Court did not reach the merits. But interestingly enough, they in essence used a prudential basis to escape reaching the merits, went through analysis of why it's the wrong district court and basically said, eh, start from scratch. And I think I cannot put it any better than in the dissent in Padilla by saying that you guys have basically demonstrated total lack of interest in Padilla's constitutional plight.

Leaving aside where Justice Breyer's going to line up--and hopefully we'll get into it--I would submit to you that Padilla to me indicates that the Supreme Court is strongly leaning to treat Mr. Padilla the same way as Mr. Hamdi, because from an analytical perspective there is absolutely no difference for purposes of authorization to use force trumping the Nondetention Act. The president has constitutional powers to designate people as enemy combatants, including Mr. Padilla and Mr. Hamdi.

A couple of last points. It does bring us to the Rasul case which, in my opinion, is intellectually incoherent--not just because of the decision it reached, but because they didn't have the decency to say that [inaudible]. And it's very ambiguous, because I would submit to you there is some basis for Scalia's scathing language about four corners of the world--but maybe not. It's really unclear. Are they really extending habeas jurisdiction to people in Gitmo, or to everybody in the world? I would submit to you it is deliberate ambiguity. And the reason that you have this deliberate ambiguity is because the Court basically in those three decisions got itself a seat at the table. It did not--did not--change the substantive parameters of the president's power. They understand that this is war.

Nobody's going home, ladies and gentlemen. Everybody's going to stay more or less where they are, unless they're released or some process. But the Court said we want to be present at the table, we want to be in a position in the future to come back and insert ourselves in scrutinizing what you do. And that's why you have this Rasul decision that basically enables them, if they really don't like what the executive is doing--and I agree with Larry's statement--in the future, there's not much guidance there, to jump in.

Is it bad? Eh, it's not great, in my humble opinion. It was probably inevitable because in this day and age the Court is not going to sit on the sidelines. But I think it's far from the repudiation, especially given the magnitude of the criticisms that have been lodged. We're going to talk about how the executive responded.

One final nitpick. One interesting aspect of those decisions reminds me again of how absurd it is to characterize justices liberal and conservative. You have Justice Scalia--that is, a typical conservative bogeyman--impassionately joining with Justice Stevens and arguing--I happen to think he is wrong, but it's a respectable viewpoint--that no executive cannot detain enemy combatants, that you need Congress to suspend habeas corpus. And I hope the next time we're going to have confirmation debates about some future justice for the Supreme Court and somebody starts prophecizing that if so-and-so becomes Supreme Court justice based upon his or her paper trail, that somebody would come back and say would he have predicted that Justice Scalia would have lined up with Justice Stevens on this issue.

Bottom line, the administration has done very well, better than 50 percent on the bottom line--leaving the scathing rhetoric aside and given the intellectual incoherence of the Guantanamo case. Thank you.

MR. TAYLOR: Now we'll move to some, hopefully, quicker questions and answers. But the first question is a little bit of a fudge. It goes to Mort Halperin because I did not include in my summary, due to the complexity of it, I didn't do justice to the four members of the Court. It was only 5-4 to allow military detentions at all in the Hamdi case. And Mort is going to start us off by explaining what the four who dissented on that point, what their reasons were and why I think he disagrees, if I understand him correctly.

MR. HALPERIN: [Off-microphone.] I do disagree, if I understand them correctly. We had an opinion by Souter and Ginsberg and then one by Scalia with Stevens concurring. And they're very different. Souter and Ginsberg basically say, as I read them, that there was authority to detain Hamdi if he had been detained according to the laws of war. That is, if Hamdi had been detained on the battlefield as a prisoner of war entitled to what's called an Article V hearing, where he could contest his innocence, and if he was then held as a POW--that is, for the duration of the war, whether it's the war against the Taliban or the war against al Qaeda--that that was authorized by the statute consistent with the Constitution. But because the government was not relying on that, that it was arguing that the Geneva Convention provisions did not apply to those [inaudible], that it again did not have the authority to detain them, because the statute only authorized detaining them as prisoners of war.

I think one could read the Court's plurality as saying essentially the same thing. That is, they pleaded the procedure that they'd crafted, which is not in any statute, for what kind of process should they be entitled to, in effect saying that they're entitled to challenge the fact whether they were properly held under the rules of war and should be detained for that purpose.

So I think there is less difference in the philosophy of the four and the six. All of them thought that you could detain a person captured on the battlefield as a prisoner of war. And I think that to read the four-judge plurality or the two-judge concurrence as not knowing the difference between Afghanistan and Chicago--as at least one member of this panel doesn't seem to understand--is to misunderstand what all of them are saying. There is nothing to suggest that the Hamdi procedures that the four found would be acceptable to all of them in the circumstance where the person is captured not on the battlefield but in the city of Chicago. And I think of what they're saying is [inaudible].

The Scalia-Stevens opinion goes much further. The Scalia-Stevens opinion in effect repudiates, I think, a lot of other Supreme Court decisions. Justice Scalia is fond of attacking people for not following earlier decisions that he likes, but ignoring the fact that he seems to not follow decisions that he doesn't like.

Justice Scalia basically argues that if a person is an American citizen, the government--again, I think he would agree--could seize the person on the battlefield, where obviously you don't know if somebody's an American citizen. But what he seems to be saying is that as soon as you find out he's an American citizen, you have two choices. You can--unless Congress has suspended the writ of habeas corpus--you can try them in a criminal court for treason or another crime, or you can let them go. Or presumably you could go back to the Congress and ask them to suspend the writ.

Now, whether that applies to people held outside the United States, he says he doesn't know. He says there may be a different rule outside the United States. So that he and Justice Stevens said that if you bring an American citizen into the United States, then you no longer have the exigencies of the battlefield--you're just entitled to

seize people--and that therefore, in the absence of the suspension of the writ, you have to either try them criminally or let them go.

MR. TAYLOR: Larry?

MR. THOMPSON: Stuart, this is why it's very unfortunate that the Court did not give the executive any more direction with respect what do you do with respect to an al Qaeda operative who is caught trying to do something on the American soil. Morton, when you look at the congressional authorization that was passed right after--on September 18th, right after one of the most horrific attacks on this country's soil that the country has experienced, it defies logic--to me, at least--it defies logic to say that Congress would authorize the executive to use force with respect to al Qaeda operatives overseas when in fact the attack occurred on our soil and that the authorization did not give the executive authority to detain someone who is caught in the act in New York or in Chicago trying to murder innocent American citizens.

MR. HALPERIN: If the government believed that, then the authority it asked for in the Patriot Act was wholly and completely superfluous and the debate in the Congress about under what circumstances an alien terrorist arrested in the United States could be held, for how long, without charges being brought--which was debated extensively in the Patriot Act, which was passed after this statute--makes no sense. Because your assertion is that the government had the authority to hold an American citizen indefinitely under the authorization to use force, but didn't have the authority to withhold an alien in the same situation. And that's, I think, wrong and misreads and--what the Supreme Court says is when you're talking about the essential business of detaining an American within the United States, Congress has to be very explicit about the standards and the delegation of authority.

MR. TAYLOR: At the risk of never getting past the first in my 10 questions--David?

MR. RIVKIN: I will be very brief, because we need to move on. Mort continues to fundamentally misunderstand it, this difference between detaining an American citizen as an enemy combatant and detaining an American citizen as a terrorist. The two categories are not coextensive. The reason the Patriot Act is there-- and I'm a big fan of executive power, but I'd be the first one to submit that, unless you're an enemy combatant--which is an established category in international law, which has a number of qualifications, not every terrorist is an enemy combatant--the president has no right to detain a terrorist. That's what the Patriot Act is all about.

But very simply, back to Hamdi for a second--to simplify things somewhat, let's forget about dissents for a second--there's nothing in the plurality opinion, to which Thomas would add, that makes any distinctions between POWs, non-POWs, Article V's, and whatnot. You have to distinguish between the issue of what due process attaches to challenge your detention, from the first question, does the president have the power to detain American citizens as enemy combatants who in his opinion qualify? It is that first question that is most important. I suspect Mort is very unhappy with the characterization. But you do have four votes--O'Connor, Breyer, Rehnquist, and Kennedy--plus Thomas that support this basic proposition.

And last but not least, there is absolutely nothing in logic that suggests that the battlefield is always outside the United States. And Larry's right, there is nothing in the Nondetention Act that distinguishes between detaining American citizens in the United States or outside, because if you're a citizen that doesn't matter. And

there's nothing in the congressional authorization that limits geographically the scope of presidents' powers--nothing whatsoever.

So you can have it both ways. I--

MR. TAYLOR: I thought you were going to stop at "whatsoever."

Thank you.

I had a two-part question for Neal. One is whether you agree with David's view that the Court has vindicated the administration's position that these kinds of cases should be viewed through a war paradigm, not a law enforcement paradigm. And number two is what happens next, in your view? In Padilla's case in particular, what are the unresolved issues?

MR. KATYAL: Okay, well, I don't mean to directly criticize a member of the panel, who did write last week that the decisions were a total victory for the administration, but I think that that is fundamentally flawed. The victory that they won is a victory of the mundane, a victory that says that we're not in the ordinary law enforcement model. I'm not sure who really disagrees with that. I mean, the only thing that they won was the idea that an enemy combatant can be detained. When Mort Halperin agrees with that proposition as well as the entire Senate Judiciary Committee on the Democrats, I'm not sure what victory they won. David's argument is drawn at such a high level of abstraction as to make it something that basically no one would disagree with.

So let's talk about what they did disagree with, what the Court disagreed with last week within this war-time paradigm. The administration said you don't need a right to a lawyer; the Supreme Court said absolutely wrong. The administration said you don't need to give any process to American citizens; the Supreme Court said absolutely

wrong. The administration says if we gave any process, it would interfere with our wartime operations; the Supreme Court says that is entirely an overdrawn proposition and entirely inaccurate. The administration says that commander in chief power of the Constitution gives a plenary power for the president to do what he wants; the Supreme Court says au contraire, we have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens.

So what I think is going on--and this is why I so appreciate Larry Thompson's comments today, which is really the first time I've heard a former administration official not attempt to spin these Supreme Court decisions into some kind of victory, looking for a footnote here and a clause there--what I think is going on is that some of the administration's defenders hope that if they can hide all of these extreme propositions that they told the courts and pretend that, well, we got a victory on this one point--a point that basically no right-minded person, I think, would disagree with--then we'll forget about these extreme claims. But the real problem is they've made all these claims and the upshot is that they overplayed their hand in the same way that President Clinton overplayed his hand in the Lewinsky case, and leading, really, to a much more hamstrung executive branch.

I mean, Justice Breyer signs on in full to the Padilla dissent, which restricts what the government can do for enemy combatants in a time of war. So I think it's a really tough sell to say that this is somehow a total victory for the administration.

Just briefly on what's going to happen in the Padilla issues, the second part of Stuart's question. Gherebi is a Ninth Circuit case on the ordinary detainees. The Supreme Court granted certiorari and remanded that case to the Ninth Circuit to decide whether or not Mr. Gherebi must sue basically in Washington, D.C. or in Los Angeles.

My strong sense is, for many reasons, in part because I think that Gherebi's counsel is probably not a federal courts and federal jurisdiction expert, I think that this case is going to be handled in a rush way and not briefed in the appropriate deliberative way, and it will be sent to D.C. very fast. That's my prediction. I think that will be a mistake, because the Gherebi case probably does have a number of complexities to it that, you know, that make it a tough question on where the case should be brought.

And as far as military commissions and what happens there, the last part of Stuart's question, I disagree with David's claim that somehow the Supreme Court upheld the Quirin decision's views that the military tribunals are now constitutional. The Supreme Court in this plurality opinion in Hamdi directly picked up on the amicus brief that we filed, the Judge Advocate General brief, which said that military commissions have to be appropriately authorized and properly constituted. That's a traditional phrase in domestic military civilian law, and we submit that there's really no appropriate authorization here. The president has said he can do this on his own, doesn't need to go to Congress, can set up this whole procedure system on his own. And it's unlike World War II, because what President Bush did here is he said only foreigners get these military commissions; if you're an American citizen, no military tribunal, you get some separate set of rights and processes. The Equal Protection Clause, the founders of our Equal Protection Clause wrote it in a way to encompass protections against persons, not against citizens, because they wanted to overrule the language of Dred Scott, which gave rights only to citizens. This order, unlike the order in World War II, targets only aliens. That, I think, is a fundamental problem with the way the administration has gone about these military commission.

MR. TAYLOR: Mort, did you have something to add?

MR. HALPERIN: Yeah, I just want to quote an attempt to summarize what the Court decided in Hamdi on this question of whether it is limited to abroad and what the definition is. And this summary says that the government has never provided any court with the full criteria it uses in classifying individuals as enemy combatants. It has made clear, however, that for the purpose of this case, the enemy combatant that it is seeking to detain is an individual who it alleges was part of, was supporting forces hostile to the United States or coalition partners in Afghanistan who engaged in an armed conflict against the United States there.

That summary of what the Court said is in the opinion of Justice O'Connor for the plurality. And to read that as not limiting itself to in Afghanistan and engaged in armed combat is to just ignore the plain meaning of the words.

MR. TAYLOR: I'd like to move on with a question for Larry Thompson. We're down in the trees, but looking at the forest for a moment, Larry, the administration's made rather broad claims of inherent executive power, not only in these cases but in the famous torture memo of August 1, 2002, that the Office of Legal Counsel at the Justice Department has now partially disavowed. And I hasten to add that your name is not on that memo. But could you give a broad view of where you think, after all that's happened lately, the administration's claim of very broad executive power in a wartime situation--which they say this is--where does that stand?

MR. THOMPSON: Stuart, before I answer that question, just let me say that when I was deputy attorney general, in a number of speeches I said--specifically, I remember speaking to the Ninth Circuit Judicial Conference last year--I said that the government's authority to deal with terrorists should not be unchecked. And I do not believe that the administration ever took the position that what it did would not be

subject to judicial review or would not be subject to a test of fairness. There was a difference of opinion with respect to what kind of evidence. As David pointed out, the administration took the position, which the Court rejected, of some evidence. The administration never said that American citizens should be denied habeas corpus.

So what the administration did, because there wasn't any book on the shelf to tell you how to deal with the threat that this country faced after 3,000 of our fellow citizens were murdered, what the administration did was to stake out positions to give itself maximum flexibility in dealing with a new kind of enemy and in a new kind of war.

Now, with respect to your question, the Hamdi decision did not get to the commander in chief authority. It relied upon the joint congressional resolution. But it's clear that the Court sent a message that I think a number of people in the administration agreed with before, and that is whatever we do--whatever we do in the context of this war on terror, it's going to have to be consistent with the basic values, the basic mores of this country, it's going to have to be consistent with the rule of law.

But. But it would be foolish for your government officials not to think about the outer parameters of the commander in chief authority. For example, let me posit the following situation. You have a group of terrorists who are bent on killing Americans but who are not part of al Qaeda, who do not come within the ambit of the joint congressional authorization to use force. What are you going to do in a situation like that? It would be foolish and irresponsible for government officials not to think about those kinds of things in the context of future planning from the standpoint of public safety.

So while clearly the memo as it related to torture is one that the administration is reevaluating, I think in today's world the administration and lawyers for the administration are going to have to contemplate all kinds of approaches to dealing with a new enemy and in very, very uncertain times.

MR. HALPERIN: Yeah, I must say that I find even more troubling than the authority the government asserted was the continued claim that, as we heard again just now--with all due respect--that it did not claim that authority. The government denied Hamdi and Padilla the right of the writ of habeas corpus. The right of the writ of habeas corpus is for the person who was seized to petition the court to release him on the grounds that he was improperly held. In fact, Padilla and Hamdi were not allowed to send a piece of paper to any court, they were not allowed to see any lawyer to ask the lawyer to send the piece of paper before him. The government specifically took the position that they did not have the right to do so and that it needed, in fact, to keep them from doing so in order to deny them any hope that there was any judicial process under way. When lawyers went into court claiming to represent these people, the government took the position that they did not have the right to represent them and that the court had no jurisdiction over these people. It was only later in the litigation that the government decided not to contest the mere evidence rule.

But the government's initial position was that the courts had no jurisdiction, and to the time that the cases reached the Supreme Court, neither person was allowed to send the petition. So the writ of habeas corpus was denied. And if the government thinks it has the power to do that, it should have been willing to admit that it had to do it instead of claiming that somehow it was allowing the right to go forward even in a very limited way. It simply was not.

MR. TAYLOR: All right, I'm glad to say that we're approaching consensus here. It looks like Neal's about ready to seal it.

MR. KATYAL: Just 15 seconds. I'm dismayed that Larry Thompson has now joined the view of the repressors on this issue. He says that the administration has never said that there should be no judicial review. In addition to what was just said, three other examples: First, President Bush's military order on commissions explicitly says no judicial review in it, no habeas. Second, the administration filed a brief in the Supreme Court cases, in Rasul, saying no judicial review at Guantanamo Bay. Third, the administration says in Office of Legal Counsel opinions that the constitution, laws, and treaties do not bind the United States abroad, that there's no substantive claim for the courts to review.

Taken together, it's an extremely broad set of statements.

MR. THOMPSON: I was speaking in terms of the Hamdi U.S. citizen enemy combatant.

Let me just mention thing, Stuart. I do think it's important, and the Court sent a message that in the case of the U.S. citizen enemy combatant, we're going to have to have judicial review. And I also think it's important, the point I made in my opening statement, that we're going to continue to need to detain people not just for the purpose of keeping them from the battlefield, but gathering intelligence.

So I've often thought that one of the things that we need to think about as a country is to have a regime of a national security court, much like we have with respect to the FISA court, where in a situation where I posited the ticking bomb kind of scenario, where the government would be required to go to judges who are specialized in these matters and to justify continued detention for purposes of interrogation, to justify

continued detention for purposes of intelligence gathering. I think that would satisfy sort of the basic mores of this society in terms of a check on abusive government authority, but it's something that's needed in this new world and the new threat that we face.

MR. TAYLOR: Thank you. I just have two questions before we go to the floor. And I hope we can do them in about a minute apiece. The first goes to David.

Larry has mentioned what I found to be the remarkably short shrift that the justices, or some of them, seemed to give the administration's passionately stated view, in the Padilla case in particular, that it is vital to protecting American lives to have a crack at incommunicado interrogation of captured enemy combatants for months, really, so that they can create a sense of dependence--all very gentle interrogation, of course.

But the Court said, yeah, you can detain people for purposes--to keep them from going back to Afghanistan and shooting our soldiers, but the idea that you can keep them incommunicado, keep lawyers away so that you can interrogate them and get information, they didn't seem very sympathetic to that. Where do you think we go on that issue? Do you see any hope for your side on that issue?

MR. RIVKIN: Well, thank you, Stuart. I'm not sure what "my side" is, but I would say two things. What you're--

MR. TAYLOR: For the interest in getting information out of these people.

MR. RIVKIN: It is a fair summary, but let me say a couple of things. First of all, the Court did affirm, despite much bellyaching to the contrary, that you can hold enemy combatants, including U.S. citizens, for however long the hostilities last--

not forever, but possibly for years. That's a damn long time, ladies and gentlemen. That is plenty of time to interrogate a person from a--leaving aside the access to lawyer issue. For purposes of how long the government is going to have a crack at those people, the answer is, unfortunately--and I wish it were otherwise, because that means we would win quickly--for a long time. So the Court has in no way imposed a meaningful restriction on the total amount of time that individuals can be interrogated. Needless to say--it was not before the Court--the Court never reached the issue relating to the types of interrogation.

Now, the Court has indeed rejected pretty strongly the justification that you can be held for purposes of interrogation. That to me is not particularly relevant because the correct statement are the laws of war anyway, that first the primary purpose is to keep you from getting back to the battlefield. That's what determines the timeline for your confinement, not the interrogation imperatives. The interrogation imperatives only go to the question of access to a lawyer.

It's fair to say the Court having done that--no spinning--is a bit of a defeat for the administration. But look at what the court has not done. It did not indicate when this right attaches, whether it's days, weeks, or months. It did not say whether an individual has to be informed of that right immediately, a day, weeks, or months. It didn't say whether in special cases you can delay an even longer time period for that. And it did not say in the context of military tribunals that those people have to be lawyers.

So there's a lot of deference to the executive despite the rejection of argument that you can be interrogated for a long, long, long, long time. I, frankly, think

that if there's any blame to go around here, the executive could have been more definitive that it's not forever.

The last thing I'll say, before we play the game of gotcha, we've got to look realistically at how those things work. There's an old expression, where you sit is where you stand. It is natural for the executive to be driven by the desire--not to arrogate some imperial presidency power--the desire to protect all of us, ladies and gentlemen. Public order means civil liberty for all of us. It is natural for the courts to push back. It is natural for Congress do that. If you look at any single major issue in the evolution of American body politic, it has always been this evolution. The fact that the executive did not start where it ended up is not, to me, any evidence of, you know, venality or stupidity. That's how those things work. And with all due respect, where they ended up is a hell of a lot closer to where they began as compared to where the critics began. So that's the relevant comparison, not--

MR. KATYAL: Just one sentence, if I could?

MR. TAYLOR: Well, I'm about to ask you the last question, so maybe you can work it in?

MR. KATYAL: Absolutely.

MR. TAYLOR: After your one sentence, my question for you, Neal, is let's assume that Al Gore had become president and let's assume that you had remained in the Justice Department in a high-level position. What do you think a Gore administration would have done differently on these issues than this administration did?

MR. RIVKIN: I can't speak for Gore itself, but would say that basically what David has said is flat wrong about what the tendency is of the executive branch. There's only one president that has ever taken a position on these issues about the

commander in chief power in times of war that is similar to what President Bush has done here, and that's President Nixon in an interview with David Frost in which he says the commander in chief power in times of a national security crisis basically gives me the power to do what I need to do; if the president says it's right, it's right. The one that came closest before that was President Lincoln, who said it's an immediate crisis, I need to suspend the writ of habeas corpus, and so on, but then afterwards went and asked the Congress for its blessing and said ratify what I did.

This president hasn't done any of that. This president has said I have the raw power to do all the things I've been telling you that this president has said he has the power to do. That, I think, is really just far beyond what any president's done in recent times. Certainly, the Clinton administration took really seriously its commitments to international--I remember being in the Situation Room on various issues and saying, well, what does international law have to say about proposed action X or Y? I'm not really, frankly, very sure the administration did that here, because it took the view that treaties just don't constrain the president when the commander in chief power is set up against it.

I don't think this has to be politicized. Indeed, I think what Larry Thompson said, almost every word of it, I agree with. I don't think that the president should have unfettered interrogation power. I don't think that detainees should have all the full-blown rights of habeas corpus that American criminal defendants do. And on so many different issues--and indeed, Larry Thompson's view of a national security court has been proposed by none other than Senator John Edwards. So I think that there's a lot of room for the administration to work together, whether it's a Gore one or another administration that doesn't inherit these dubious constitutional claims.

MR. TAYLOR: David, briefly.

MR. RIVKIN: Just one sentence. We're all entitled to our opinions, we're not entitled to our facts. If you look at Chief Justice--

MR. TAYLOR: That was a sentence.

MR. RIVKIN: --Rehnquist's book, "All the Laws But One," I would submit to you that the claim that this administration has been more aggressive in this area is ludicrous. Presidents Lincoln, FDR, and many other presidents have done things that this administration has not even come close to. It's not fair, and it's completely not supported by your story correctly. We did not detain American citizens. We did not stop mails. We did not impose censorship. Dozens of things. If we had two hours, we could talk about Lincoln, how much Lincoln deferred to congressional views in this matter. It is just ludicrous. In this war, I would submit to you, far more perhaps than in a civil war, it represents a lot of danger that Korea and Vietnam, World War II and World War I did not do. It is just not fair to characterize things in this way.

MR. TAYLOR: Let's--

MR. RIVKIN: If you don't believe me, read "All the Laws But One," a great book by Chief Justice Rehnquist just a few years old.

MR. HALPERIN: I don't want to pass up an opportunity to agree with David. The Clinton administration took the position in court that the detainees in Guantanamo, then Cubans, then Haitians, were outside judicial review. And they weren't enemy combatants, just ordinary folk.

MR. TAYLOR: And there, I think that's a very important point. There were a lot of human rights groups who acted as though the administration's legal argument in Guantanamo was a unique and barbaric thing, and maybe it was from a

standpoint of some nations. But it had been the position of the Clinton administration, on that at least.

Any questions from the floor, I hope? Ben Wittets [ph], yes.

QUESTION: It seems to me, regarding the competing claims of victory, that a huge amount depends on the substantive law that develops with respect to what rights the various categories of detainees actually have. That is to say that, you know, Rasul and Guantanamo jurisdiction could be a very dramatic victory for civil libertarians or a completely empty vessel depending on whether it turns out that the Court means to, you know--certain rights to attach either under international law or under American constitutional law that would then be cognizable in these habeas actions that it now claims jurisdiction over.

So I guess I'm interested in all of your thoughts regarding where you see the substantive law going here. Is this going to turn out to be a situation where you have a right to bring a losing case because you actually have no rights, or is it going to be a situation in which you have a right to bring a case and, you know, all the administration's nightmares about having battlefield commanders having to come and testify in federal court about the circumstances of your capture?

MR. TAYLOR: Good question. I'm not sure I want to hear all of your views on it.

[Laughter.]

MR. TAYLOR: But I'd like to hear Larry Thompson's views, for starters.

MR. THOMPSON: I think, with respect to the Rasul case, number one, I agree with the dissent; that is, that the administration was completely blindsided by this opinion. The administration's policy was based upon what was thought to be Supreme

Court precedent, the Eisenberger case. What I think we should do with respect to Rasul is to have a very quick--and I agree with Morton on this--we should go to Congress and have a very quick legislative fix. We can either just overturn the decision and go back to the Johnson case, or we can limit the jurisdiction as to where habeas petitions will be brought--for example, to the District of Columbia, district court, or the district court for the head of the agency which holds a person in custody is located.

But more importantly, I think that whatever we do, we have to limit the challenge of detention to a habeas, and not to something like, for example, the Alien Torts Statute. That's a very dangerous proposition. And I don't think the courts have the expertise to conduct war. And I think we need a very quick legislative fix.

MR. TAYLOR: Mort, something to add?

MR. HALPERIN: Yeah. I mean, I think in fact the order that Wolfowitz issued last night--though I haven't looked at it very carefully--I think goes almost all the way towards what those people are entitled to. And it already has changed the situation. That is, the government is now agreed that they have a hearing before a neutral body with some kind of due process procedures. Maybe not as far as many people would like to go--I think probably all the law requires, plus a check of that by the district court in the District of Columbia, which I would do by legislation. But I think it's already changed. What every person in Guantanamo is going to get as a result of Wolfowitz's orders is fundamentally different than what they got before.

Secondly, I do not think the government will pick up another person on the streets of the United States and throw them into a military brig and refuse to let them see their lawyer. They may do that for 48 hours or 96 hours, but they will not do it indefinitely and not claim they have the right to do it indefinitely.

And those, in my view, were the two big issues. And then we can argue now about how Congress ought to legislate the precise standards.

QUESTION: Mike Miyazawa [ph]. Besides Hamdi, there is another American Taliban captured in Afghanistan and brought here--John Walker Lindh. Unlike Hamdi, an Arab-American, or unlike Padilla, a Hispanic-American, John Walker Lindh, Caucasian, almost from the outset had access to the U.S. legal system, including lawyers and court.

My question is what is the reason or legal rationale to justify this differential treatment among three American suspects? Could anybody among the panel give me an answer or explanation that is easy to understand for an ordinary non-law-expert guy like me?

MR. TAYLOR: Well, Larry Thompson, you were in the Justice Department when these decisions were made, so why don't you answer?

MR. THOMPSON: I'll start off by pointing out that John Walker Lindh was convicted of material support to terrorism, among other things. But the decision was made, as I understand it, because of the various assessments of the intelligence value of the three individuals that you just named. And the reason why Lindh was put into an Article III regular civilian court system was that he was deemed to basically have no intelligence value with respect to what he did while fighting with the Taliban.

MR. RIVKIN: I just wanted to--one sentence--I often get to this when I deal with foreign audiences. And the assumption underlying the question is that somehow it's more beneficial for you to be in an Article III court. At the risk of sounding counterintuitive, let me submit to you that you're far better off being held as an enemy combatant for a number of years and be let go. Not only Mr. Lindh is going to

serve more than a 20-year sentence and nobody's going to pardon him, if you look at another case in Virginia, the so-called Paintball Case, if I'm not mistaken you have people getting 60-plus years in prison for, frankly, doing very little other than running around yelling jihad and playing paintball. Unlike the European system, we have a very tough criminal justice system that any jury--and these people, by the way, did not want a jury trial, which tells you what they thought they would get from a jury. If I were a low-ranking Taliban al Qaeda guy, I would rather sit for four or five years in Guantanamo versus spending 50 years in a penitentiary--having got my day in court.

MR. THOMPSON: One other point, though, and that is we have Padilla and we have Hamdi, who are U.S. citizens who were taken as enemy combatants. But by far the majority of individuals, whether they're citizens or aliens, who have been charged with terrorist activity since 9/11--and I think there have been about 280--by far the majority of those individuals have been charged and the cases have been tried in regular civilian courts--U.S. citizens and aliens. There have been a number of convictions, there have been some acquittals. But that's the way the system should work. Many of these people--by far the majority of these people have been put in the regular criminal justice system, with independent judges ruling on the legal matters, and before juries.

QUESTION: My name is Pete Chutley [ph], and I'm from Brookings. A two-part question both to Larry and to David.

The first part is, much of the discussion here has been on details of definitions, or combatants and so on. I'd like to focus it slightly differently on the right to some kind of a process. And my question to you two is I don't understand how you or the administration could support a position that says if you walk outside here after this

session, you get picked up by a cop, defined as an enemy combatant, put in the clink, you have no rights to tell anybody, hey, they got the wrong person. You just sit there for who knows how long. I don't see how you can defend that.

Now, we've been doing this in the abstract. It happened to me. I got picked up outside of Dulles Airport after 9/11. Thank God I could go to a judge and say, you know, you got the wrong guy. I'd still be in jail if I couldn't go to a judge. So I don't see how that can be defended.

My second question to all of you is the international reverberations of this. Suppose some other country, it doesn't matter which one, had their version of Guantanamo--seized a whole bunch of Americans and said these guys, these Americans, are our enemy combatants, and held them. This country would go bonkers if we had no access to them, they had no process to say whatever. This is damaging us internationally, seriously.

I'd appreciate your thought on that.

MR. TAYLOR: David, you've been pretty quiet, so why don't you go first.

MR. RIVKIN: Thank you, Stuart. I'll try to be brief.

Look, you fundamentally, with all due respect, do not appreciate the differences between two types of systems. There are rights, there are due process-related procedures in the military system. They are very different from a civilian system. And you cannot import the civilian system, and at least the majority of the Supreme Court agrees with me on this point. It is not the case that the only way to be fair and just in life is to have access to lawyers and go before Article III judges, I'm sorry to say. You cannot import that into the military system. And I don't think that the

military is particularly interested--our military, most normal militaries--in grabbing people randomly, having presidents grab their political enemies, as my colleague from Georgetown mentioned, and throw them in the clink. There's no evidence that people have not acted in good faith here. And if you're truly innocent--

Let me tell you this. We have gotten 10,000 people in and around Afghanistan. Fewer than 700 of them have ended up, after many rounds of vetting, in Guantanamo. Over 100 of them have been released. A number of people who have been released we know have gone back to fighting. Let's not pretend that we're talking about arbitrary abusive practices of us grabbing and incarcerating people.

As to--you do have a lot of due process. Oh, it's up to you. If you cooperate with the interrogators, if you tell them, look, I'm the wrong guy, I was not where you said I was, I was in Hawaii and there are three people who can confirm that, you'll be let go because nobody's interested in detaining you. If you're going to be sitting there looking surly and saying nothing and we have a basis to believe that you're a member of al Qaeda and Taliban, you're going to rot there, sorry to say, for a long time. That's the way it should be. But only for the duration of the war. It is not about terrorists, it is only the duration of an armed conflict.

You need to have that power, sir, because the flip side of that is, if you capture people you have to give them a right to live. The preexisting rule was you shoot them or stab them or kill them. Once you give people--it's called the right to give quarter, an obligation to give quarter, you have to be able to detain them. Not even because of interrogations. Otherwise, they're going to go back and start fighting against us again. And then the war will be even longer and more people will be killed. That makes no sense.

And as to foreign criticisms, I don't have time. But frankly, 98 percent is hypocrisy, where countries who torture their people at any justification, who are not complying with any norms and rules of war, they're in no position sit in judgment on us. I mean, I hate to be flippant--but there's not much time--but there is some criticism from our European allies that reflect a different perception of how international law should work, but 98 percent of them are just hypocritical.

MR. TAYLOR: We have about 60 seconds left on my watch, and there was a gentleman in back. But Larry, did you want to address that in the first 15 of our seconds? Or did David cover it?

MR. THOMPSON: David covered it, but -- we have to be concerned about what I talked about in my opening statement, and that is the ticking-bomb scenario. We have to be concerned about public safety. And the enemy combatant scenario has been used sparingly in our war on terror, but it does reflect the situations where there may be a time when the criminal justice system is not appropriate from a prevention standpoint, from a public safety standpoint, to prevent a bomb from being exploded in downtown Washington, D.C. We may need to take a person and interrogate them without a lawyer, subject to the process that the Hamdi Court said could come later on, the due process that could come later on.

But we're not talking about law enforcement here. We're not talking about law enforcement, we're talking about a military situation, as David said. And I think that's appropriate from a public safety standpoint as long as it's done in a transparent way out in the open and subject to not only judicial review, but the sunshine of the public.

MR. TAYLOR: We're out of time, but maybe one last question from the back.

QUESTION: Stanley Kober with the Cato Institute.

Since we're talking about the military justice system, I wonder how this affects the members of the armed forces. What if a soldier came to you and said, I'm confused; I'm told I'm not supposed to obey an illegal order, but at the same time I could be prosecuted for disobeying a legal order; and I'm confused now where the line is.

What advice would you give?

MR. TAYLOR: Mort? Or Neal, do you want to take that? Why don't you both take it, if either of-- That's a hard question, I think. We have a very quiet panel up here.

MR. HALPERIN: I think it reflects why it is so important for the president to go to Congress and for Congress to legislate clearly what needs to be done in what is clearly a new situation, so that everybody in the government, including military people, know what it is they're supposed to do and not supposed to do.

MR. KATYAL: Let me just say that I presume good faith in the administration. I don't think they're trying to lock up their political critics. [inaudible] certainly didn't mean to say that in any way. The problem is that you have excessive claims by the administration and excessive claims by the detainees for full-blown habeas corpus rights and things like that. And when the administration's defenders come up and say, well, we didn't stop the mails and do other things that other presidents did--most of which were authorized by Congress not pursuant to unilateral executive decree--then the most you can do when faced with these excessive claims by both parties is to say, well, at least it's not Korematsu and we're not locking up 40,000 citizens. Well, that, to me,

doesn't strike me as a very powerful argument. I think we can do more to be a beacon in the world community than we've been doing.

MR. RIVKIN: I was only responding to your point, that this administration has done more in this area than anybody else. I'm not suggesting that not repeating Korematsu is somehow something that should be praised, because I think Korematsu was a wrong thing.

MR. TAYLOR: I'm sorry to say we didn't quite nail down the consensus I was looking for. But I'm happy to say that if Brookings just makes a transcript of these proceedings and ties a bow around it and sends it up to Congress, they could skip a lot of hearings and just get right down to business, because I think we've heard the full spectrum of views on this, or a pretty full spectrum, very well-stated by our panelists. And I thank them, and I hope you thank them.

[Applause.]

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