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PRESIDENTIAL WAR POWERS:

HAS THE GOVERNMENT GONE TOO FAR?

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C O N T E N T S

P R O C E E D I N G S

MR. STUART TAYLOR: [in progress] terrorism, which is already longer than the civil war or World War II, has no end in site. Just two weeks after 9/11, a Justice Department official named John Yew penned a memo that could be called the Bush Doctrine on War Powers.

He wrote this. "Congress may not place any limits on the president's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing and nature of the response. These decisions, under our Constitution, are for the president alone to make."

Since then, the administration lawyers have argued that the president has the following powers:

He could launch a major preemptive invasion without congressional approval, although ultimately he did obtain congressional approval in the case of Iraq.

He can order the indefinite detention of people he alleges to be enemy-combatants, including Americans seized on American soil, without due process of access to lawyers or courts.

He could authorize torture to make them talk, in defiance of treaty obligations and a 1994 law making torture a crime.

The president has not authorized torture although critics say he's condoned it.

He can prosecute non-American detainees and military commissions of his own creation, which can impose sentences up to and including death, and as we learned in December, the president has ordered electronic eavesdropping on Americans' international telephone calls and other conversations with suspected al Qaeda agents, without judicial warrants.

Claiming that this program violates federal criminal law, Senator Russell Feingold is seeking a vote to censure the president.

Others even talk of impeachment. The administration responds that the surveillance is a vital early warning program, that Congress implicitly authorized it in 2001, and that the president's inherent powers as commander in chief would trump any contrary act of Congress.

Such broad claims have met with some resistance from within the Justice Department, from the courts, and in recent months from a previously quiescent Congress.

In particular, in June 2004, the Supreme Court curbed the president's powers to detain suspected enemy-combatants, requiring access to counsel and hearings for American detainees and access to federal courts for foreign detainees at Guantanamo Bay.

Late last year, Congress adopted the McCain amendment to ban the use of brutal interrogation methods.

And in recent weeks, Congress has forced the president to submit to loose oversight of his no-longer-secret NSA surveillance program.

But the White House's retreats have only been tactical and may only be temporary. For example, in signing the McCain amendment, the president made clear that he would not always feel bound to comply with it. Rather, he vowed to construe it, quote, "in a manner consistent with the constitutional authority of the president and the constitutional limitations on judicial power."

The state of constitutional law in presidential war powers is highly ambiguous.

In a famous 1952 concurrence, Justice Robert Jackson wrote this about the Framers' intentions as to executive power:

"The law here must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.

A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question." End quote.

Fortunately, we have four panelists here today who should be able to clear all of this up. Each of them, in order, will speak for five minute and then I will ask, I hope, two rounds of questions of the panelists, with shorter responses, and then we should have a half hour of more for questions from the floor.

I turn first to Lou Fisher, a renowned scholar on presidential powers, who has recently moved from the Congressional Research Service to the law library of Congress.

Lou will begin with a page of history, which as Justice Holmes said, is worth a volume of logic.

Lou.

MR. FISHER: Okay. My views are personal, not institutionalized. At one of these one time, where someone said my views are personal and not those of the United States--he was an attorney for the Justice Department--I said, "What a nice thing it would be to speak for the United States." But these are personal views.

What you're hearing now from the Bush administration is what you also heard in the Truman administration with the steel seizure case, this notion of inherent, unchecked, exclusive powers of the president to do whatever the president thinks necessary in time of emergency.

That doesn't come from the U.S. Constitution. It comes from the British royal prerogative, which the Framers thought about at great length, and they studied other constitutions at the time, and this notion of a royal prerogative, they rejected and repudiated. And they did it for several reasons.

One is that they were not trying to set up a monarchy here, or an aristocracy. They were setting up a democracy. They were setting up a small-r, republican form of government where the power would reside not in the king but in the people.

And you can see this, as to why they did not want to put the war power in the president, in a nice essay by John Jay, Federalist No. 4, where he said if you

look at foreign governments and how they operated, when they go to war, it's not for what we say today, when the president claims he's doing something in the national interest. They never believed that, the Framers.

They believed that what executives did were not in the national interest, it was in some party interest, some personal interest, some family interest, and usually a disaster for the country and for the people and for the Treasury.

So that was the reason that the Framers took away the prerogative, the royal prerogative, and did not vest in the president any of the powers that the king had.

If you look at John Locke, and William Blackstone, on the prerogative, Blackstone would have put everything involved in external affairs, or foreign affairs, or the war powers in the executive.

So he would have put in the executive the power to declare war, the power to make treaties solely, the power to appoint ambassadors solely, the power to raise armies and navies, the power to issue letters of mark and reprisal. Reprisal would be small wars; letters of mark would authorize citizens to engage in military activities. All of that in the executive.

And if you look at the U.S. Constitution, if a text matter anymore, you'll see that none of those are given to the president; not a single one. They're either exclusively placed in Congress, to declare war, letters of marque and reprisal, raising armies and navies, including foreign commerce, in Congress, or

they're shared between the president and the Senate, such as treaties or appointments.

Let me go quickly through--maybe later in the morning we can talk about the sole organ doctrine, which if you look at the administration's justification for NSA eavesdropping, on the bottom of the first page you'll see that the president is sole organ in foreign relations, and that comes from a John Marshall comment in 1800, when he was a member of the House of Representatives and they were debating something.

If you read the whole thing in context, you'll see that John Marshall never argued for inherent powers or exclusive powers. There was a treat that President John Adams was implementing. That was the president's duty. And if you watch John Marshall on the Supreme Court as chief justice, you'll see he never argued for exclusive inherent powers for the president.

Instead, when there's a collision between, as with Youngstown [?], in 1804, a collision between a presidential proclamation and a Congressional statute, the statute trumped the proclamation.

You can go through this history in the United States, some people may say, well, Polk exercised the war power. Well, he certainly moved troops to trigger military activities, but he knew he had to come to Congress and Congress could have said war doesn't exist, hostilities exist, and we don't need war.

Congress decided that war exists, a state of war exists.

Lincoln. A couple of comments about him. When he took his emergency actions in the Civil War, he did not exercise any sort of royal prerogative. He did certain things of an emergency nature and then he came to Congress and said while you were gone I did a lot of things; I suspended writ of habeas corpus and took money from the Treasury and so forth. But my actions, whether strictly legal or not, his language, "I need to come to you, to Congress, to authorize what I did," and when Congress debated his request, it was done with the understanding that he had no such authority, and he needed authority from Congress, retroactively, after the fact.

And I think the last thing on this history, the Price [?] case in 1863, cited by the Justice Department, regularly, if you look at that, Justice Greer said that I'm only deciding this because this is a domestic matter. Now this has nothing to do with the United States going from a state of peace to a state of war against another country. That power resides in Congress.

And the person who was arguing for Lincoln, Richard Henry Dana, Jr., said exactly the same thing, said we're only dealing with domestic. The power to go to war against another country, that's sovereign power, resides in Congress.

Do I have a minute left, or what?

MR. TAYLOR: Yes, sir.

MR. FISHER: I've got a minute left.

I think a misconception--the idea that we had no royal prerogative from 1789 to 1950 I think is true. There were some uses of military force but

fairly minor. 1950 changed matters because Truman went to war on his own, against Korea, without any authority from Congress. He never came to Congress.

And it was a misuse of the U.N. charter because the U.N. charter contemplated certain military actions and each member state would have to contribute to the U.N. certain forces and equipment, and so forth, in accordance with their, quote, constitutional processes.

So each country had to do that. The United States, when the Senate was debating the U.N. charter, Truman, from Potsdam, wired, said I understand this provision and I will tell you now in this cable, that before I ever send any troops or forces to the U.N., I will come to Congress first and get your authority.

And that's what Congress did in the U.N. participation act of 1945, in section six.

It said any time the president engages in a special agreement with the U.N., he has to come to Congress first and get approval. Truman never did. Congress never, the Senate never protected itself, or the House.

Jackson's comment that Stuart ended up with, that it's enigmatic, it's like David interpreting dreams for the pharaoh, what was not enigmatic at all was the fact that when the United States goes from a state of peace to a state of war, it's done by Congress. That was the uniform understanding by all three branches from 1789 up to 1950.

So what I think we'll concentrate on today is what has happened since 1950 to change the Constitution.

MR. TAYLOR: Thank you, Lou.

Roger Pilon, who's vice president for legal affairs at the Cato Institute and flew in from the Midwest to help us today, where he's giving speeches. It won't be limited necessarily till the post 1950 era, but he will speak next.

MR. PILON: Well, thank you very much, Stuart. After listening to Lou Fisher, I need to begin with a line from Monty Python: And now for something completely different.

I need also to make a few preliminary points. Like Lou, I am not here speaking on behalf of the Cato Institute. Quite to the contrary. Most of my colleagues over there on the other side of this issue, they're not always right.

Second, I find it very difficult to be defending this administration. Talk about a thankless job. But there are sometimes when it does get it right and in the issue of NSA surveillance, I think they have gotten it right on this one. And so I am going to focus on that, not on the other issues, the detention, so on and so forth.

Next point, preliminarily, as Stuart suggested in his remarks, this is not an easy issue. The Constitution is not precise on these matters. I'm going to try to take a very different tack from the one that Lou took, to put it in a very different perspective.

Finally, as a preliminary matter, with respect to the NSA surveillance, none of us up here knows exactly what he's talking about because of course this is

a secret program, as it should be, it's very technical and I doubt anyone here understands the technical aspects of it.

There was a piece that came to my attention just this week, a pre-publication piece that will appear shortly in the NYU Review of Law and Security by Kim Tapal [ph], I'm not sure how to pronounce that, executive director of the Center For Advanced Studies in Science and Technology Policy.

He begins by citing a piece by Judge Richard Posner last month in the Wall Street Journal, saying that this surveillance here is an extraordinary difficult job of looking for a needle in a haystack. It's not like we think of going in with alligator clips and putting them on a phone line. The Tapal issue brings up the technical side of it. The transition from circuit-based to packet-based communications, globalization of communications infrastructure, and development of automated monitoring techniques include [inaudible] traffic analysis and so forth.

He goes on to speak of circuit-based packet snifters, and so I have no idea what he's talking about. He says that these are, this is material that doesn't even travel of the same lines, parts of it then has to be put back together, and so the technical aspects with which NSA is involved, I'm sure escape all of us up here, and I daresay would escape the people over on Capitol Hill if it comes to their attention as well, and I will return to that point later on.

Now to go into the matter that is of concern to me, and I want to discuss the moral, political and legal aspects of this case, there are two rights that are at issue here at bottom.

There's the right to protect ourselves and to engage in surveillance which John Locke said in the state of nature each of us has.

And that's the right that we yield up the executive power, as Locke called it, to government, to exercise on our behalf, with the idea--and now here's the second right--that it exercise it in a right respecting way.

And so you've got to have some kind of a balance between these two rights.

The critics of the administration's NSA program focus only on the Fourth Amendment and claim that we've got here an imperial presidency.

Well, how about the possibility of an imperial Congress, about a Congress encroaching on the inherent powers of the executive?

It seems to me we've got to have some balance here, and, in particular, when you look at the balance with respect to the losses that incur from overemphasizing either of these two rights, its comes out pretty clearly that what the critics are worried about is that someone may be listening to their conversation, to which I would say "big deal," they won't even know that their conversation is being listened to. The loss there is all but nonexistent.

By contrast, the loss of not assiduously pursuing the protection of the first right is horrific, as we saw in 9/11. So when you balance these two possible losses, it seems to me that it is a very clear case.

Now how does the Constitution balance these competing interests? You've just heard one view, the congressional supremacy view. Lou and I have debated these issues before. I was not surprised by his position.

Let me characterize it. Is the post-Vietnam overlay of the post-progressive view of the Constitution and it's at war with the Constitution. I am going to draw here upon recent scholarship by people like John Yew, Cypra Kosh [ph] and others, which is challenging the scholarship that regnant in the '90s from people like Lou and Harold Coe [ph] and others, who were full-blown congressional supremacists.

But to lay the foundation for this, when I speak of the post-progressive view and the post-Vietnam overlay, I'm talking about the emergence of progressivism at the beginning of the 20th Century and the idea that we wanted active government with Congress passing the laws, the executive merely executing them and the judiciary deciding cases that arise under them.

That is a view that, as I said, is at war with the Constitution itself, and you go back to first principles and you see that, and so I'm going to go back to the Constitution itself, of all things, in particular the vesting clauses.

When you look at the vesting clauses of Article 1, 2, and 3, and you see that the Congress has powers that are qualified, that is to say the Constitution

begins, in the very first sentence of Article 1, "All legislative power herein granted shall be vested in the Congress."

It is a document that gives Congress enumerated and thus limited powers. I will work that for all its worth.

You look at Article 2 and Article 3 and you will see those powers are not qualified. The executive power, the whole executive power is given to the president. The whole judicial power is given to the Supreme Court.

Now what this means is that if you are going to come to grips with how the Constitution addresses these matters, you've got to come to grips with what it is that is entailed by the executive power. The modern view would have it merely the power to carry out the laws that Congress passes. That was not the original view, remotely.

Now you can go back and cite different historical figures on different sides of this, to be sure. Lou is giving you his. I'll give you a few. I expect that Bill and Andrew will give you others.

Here's Madison, for example, in 1789.

"The executive power being, in general terms, vested in the president, all powers of an executive nature not particularly taken away, must belong to that department."

Here is Jefferson in 1790.

"The Constitution has declared that the executive power shall be vested in the president, submitting only special articles of it to the negative of the Senate."

And you can go on through history and come up pretty much with views along these same lines, right up until the post-Vietnam era.

Youngstown was cited by both Stuart and Lou. You look at--that was, first of all, a domestic law case. It was about a steel seizure care. It was not about foreign affairs.

Jackson in that opinion, Justice Jackson carefully distinguished the seizure of private property within the United States from a case involving external affairs.

He noted that the president's conduct of foreign affairs was largely uncontrolled and often even unknown by the other branches and added, quote, "I should indulge the widest latitude of interpretation to sustain the president's exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."

Even in the **Keith** case, 1972, which is often cited in favor of restricting the president, we find that the court repeatedly distinguished that case involving domestic threats from one involving a collection of foreign intelligence.

And as a final citation, I will give you the "In re sealed case" opinion that came down in 2002 from the federal appeals court, the FISA, Foreign Intelligence Surveillance Act appeals court, in which it spoke about the inherent

executive power here, citing an earlier case called **Trong** [ph] that dealt with pre-FISA surveillance based on the president's constitutional responsibility to conduct the foreign affairs of the United States--notice how broad that was--the president's constitutional responsibility to conduct the foreign affairs of the United States.

The court said, and I quote: "The **Trong** court, as did all other courts to have decided the issue, held that the president did have inherent authority to conduct warrantless searches to obtain foreign intelligence information."

We take for granted that the president does have that authority and assuming that is so, FISA could not encroach on it.

All right. Does Congress then, is Congress powerless here? No. What we have to do is find those specific grants, those enumerated powers, if we're going to take the doctrine of enumerated powers seriously--those enumerated powers that Congress does have. It has of course the power of the purse. That was understood as we moved from the British to the American system, to be its principal method of restraining the executive, and of course ultimately it has the power of impeachment.

It does not have the power to micro manage the executive. When it does, as we can see in this "In re sealed case" and I encourage those of you who want to get to the bottom of this issue to read that opinion, it is an extraordinarily insightful opinion. When we look at that case, we see that Congress's micro management of the executive, which FISA amounts to, leads only to the judicial hermeneutics concerning what Congress really meant.

"Sealed case" makes it plain, it shows also how earlier courts doing the same, led to the erroneous erection of a wall between counterintelligence and law enforcement and that may have led, tragically, to September 11, as Mr. Hayden Benalee [?] of the NSA made clear in testimony recently before the Congress.

And so at the end of the day, it seems to me that these issues are subject to political, not to legal control. Not everything in this system of government was meant to be decided by lawyers. There were some things that were meant to be decided by politics and this is one, and I daresay politics is deciding the matter right now.

MR. TAYLOR: Thank you, Roger.

Our next speaker is Brookings's own Bill Galston. Bill is a senior fellow here, a proud acquisition from the University of Maryland, and he will perhaps come closer to representing the Cato Institute's point of view than the Cato Institute's Mr. Pilon.

MR. GALSTON: Well, you know, like Roger, I do intend to look at this issue, the broader issue, through the specific prism of the NSA surveillance controversy.

I would remind our moderator that Justice Jackson to the contrary notwithstanding, Joseph had no difficulty whatsoever interpreting pharaoh's dream correctly and drawing the appropriate policy consequences.

Mr. : Thank you.

MR. GALSTON: Now, you know, regrettably, Joseph went on to act in a way that aggrandized pharaoh's power quite dangerously and I see many of the same things at work in the current discussion and I'll try to stand up against them as best I can.

American history, it seems to me, reveals a pattern of governmental overreaching during times of war, perceived security threats. Sometimes one branch will resist this tendency but often none of them does, and the excess is not acknowledged or reversed until after the danger abates, if then.

As Justice Jackson said in his deservedly well-known dissent in the **Korematsu**, Japanese internment case, the greatest danger lies not in the specific excesses but in the possibility that courts will ratify them and thereby build distortions into the heart of our constitutional system.

In that spirit, while, as you'll see, I'm very concerned about warrantless domestic surveillance, I'm far more concerned about the theory that the Bush administration is advancing to justify that policy.

Stripped to its essentials, the theory goes something like this. The president has not only the inherent authority to conduct such activities but also the plenary or exclusive authority, Congress to the contrary notwithstanding.

Therefore, to the extent that FISA must be read to preclude the warrantless activities the administration is conducting, it is to that extent, and in those respects, unconstitutional.

Now to be sure, the administration also argues that in fact Congress is not to the contrary, because the authorization to use military force, in effect, provides the legislative predicate for the warrantless activities that the plain language of FISA precludes, but--and we may talk about this later--this construction of the authorization to use military force is, not only in my judgment, but in the judgment even of many Republicans who voted for that authorization, highly implausible.

At the end of the day, I believe the serious argument is about executive power. How should we think about that broader issue? My suggestion, like Roger's, is to return to the constitutional essentials. Let me spend just a couple minutes sketching them.

As I read our history, there were two great purposes at work in replacing the articles of confederation. On the one hand, the articles represented weak government, and ineffective government, and the Framers were determined to provide strength and effectiveness.

On the other hand, equally important, or perhaps even more so, the Framers were determined to construct a government that would preserve liberty against the perennial threat of tyranny.

There's a complex relationship between these two purposes. On the one hand, weak government can open the door for potential tyrants, promising order and firmness. On the other hand, excessive concentrations of power can

provide potential tyrants with the tools and the legitimacy they need to undermine liberty.

And Abraham Lincoln posed this conundrum or tension in his message to the special session of Congress called on July 4th, 1861, when he asked, Must government of necessity be too strong for the liberties of its own people, or too weak to maintain its own existence?

The circumstances of war and danger highlight precisely these tensions. Consider the following two questions, both from the Federalist Papers, both from Alexander Hamilton's contribution to those papers.

On the one hand, Hamilton said, famously: "Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks."

Who can disagree with that? But Hamilton also wrote in Federalist Paper No. 8, "Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger will compel even nations the most attached to liberty to resort to institutions which have a tendency to destroy their civil and political rights.

To be more free, they at length become willing to run--rather--to become more safe, they, at length, become willing to run the risk of being less free."

The U.S. Constitution seeks to balance these imperatives of effectiveness and liberty by, on the one hand, promoting effectiveness, by separating power institutionally along functional lines on the grounds that some activities are inherently legislative, executive or judicial, and on the other hand, safeguarding liberty by blending and mixing functions, so that no one institutional locus enjoys exclusive, that is to say, unchecked power.

And let me try to prove this point by citing both Madison and Hamilton, again in the Federalist Papers.

In Federalist 47, Madison considered the criticism of the daft Constitution, that the executive, legislative and judicial powers had not been cleanly separated into the three branches of government but had been blended and mixed in ways that contradicted Montesquieu's famous argument about the separation of powers.

Madison wrote, In saying there can be no liberty where the legislative and executive powers are united in the same person or body or magistrates, Montesquieu did not mean that these departments ought to have no partial agency in or no control over the acts of each other, and Hamilton chimed in saying the true meaning of this maxim, namely the separation of powers, has been shown to be entirely compatible with a partial intermixture of these departments.

Now in my conclusion as to FISA, FISA exemplifies this Madisonian and Hamiltonian strategy. Congress, the executive branch, and judiciary, acting

simultaneously and concurrently with regard to activities that implicate both national defense and individual liberty.

Throughout our history, the court has understood this basic principle of our constitutional structure. Indeed, every time it has confronted a statute limiting the commander in chief's authority, it has upheld that statute.

As Justice O'Connor, writing for the plurality in **Hamdi** put it, whatever power the United States Constitution envisions for the executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.

Until now, presidents have understood this principle.

As Lou has already indicated, when Lincoln, in his message to the special session of Congress in 1861, talked about habeas corpus, he conceded that Congress enjoyed at least concurrent jurisdiction on this question, after defending his action as an emergency matter, he said, and I quote, "Whether there shall be any legislation upon this subject, and if any what is submitted entirely to the better judgment of Congress.

Truman, in submitting a message to Congress the day after the steel seizure said, "IT was my judgment that government operation of the steel mills for a temporary period was the least undesirable of the courses of action which lay open. It may be that Congress will deem some other course to be wiser. That is a matter for the Congress to determine.

My bottom line, in conclusion, it might well have been possible for the Bush administration to defend executive action temporarily expanding warrantless eavesdropping in the days or even weeks after September 11th, on the grounds that Lincoln asserted, namely, a national emergency requires immediate action.

But I can find no justification in our constitutional traditions for the administration's continuing refusal, more than four years later, to accept the legitimacy of a constitutional role in this matter.

The prudent as well as constitutional course would have been, and still is, to work with the Congress to craft legislation that can pass constitutional muster.

MR. TAYLOR: Than you, Bill.

[inaudible], we have Andrew McBride. Andrew is a partner at Wiley, Rein & Fielding, one of Washington's major law firms. More to the point here, he was a top Justice Department official during the first Bush administration working on executive power issues, among others, with Attorney General Bill Barr, who was no shrinking violent when it comes to presidential power.

Andrew.

MR. McBRIDE: My remarks shouldn't be associated with Bill Barr of the first Bush administration or anyone I clerked for, or anyone else, for that matter.

Two points at the outset. I would echo Roger a little bit, in that it is somewhat difficult to defend this administration in every aspect of what they've

done, because what they've done has been a bit of a patchwork, sometimes using the civilian criminal justice system, sometimes using the military power, and I think we have to give them a little bit of leeway on that, in that this has been, since September 11th, September 11th is an unprecedented attack on the civilian population of the United States, undertaken in an unprecedented manner by an organization that practiced, to my mind, as a former prosecutor, and someone who's been involved in national security, unprecedented internal security in carrying it out. This sleeper cell idea of foreign nationals who infiltrate the United States and then are activated by the very electronic communications that we've been discussing here, electronic communications from overseas.

So I myself do not agree with every legal rationale the Bush administration has put forward but I do say there has not been another 9/11 since 9/11, and they have had to cobble together, I think as everyone here has recognized, sometimes with claims of executive authority, sometimes using the criminal law, sometimes using the commander in chief power, means to try and ensure that another tack doesn't occur, and I think all the panel would agree that some regularization of some of our anti-terrorism devices, through statute and otherwise is necessary, and that will occur in the natural course.

I'm a litigator, so I'm gonna go right after these guys, one after another. I will call them all doctor, though. Dr. Fisher, the history is incomplete. There was a period between the first shot at Breed's Hill and that Constitution in

1789. It's called the Articles of Confederation. What was the main flaw? No executive power.

All the powers were laid at the national level with the legislature, and the military powers were with the legislature or with state governors.

A second thing happened in between that document and 1789 and our severance with the king, called the Revolutionary War. What was one of the main lessons of the Revolutionary War? The intermeddling of the legislative branch in the conduct of the war.

The Second Continental Congress, trying to tell George Washington and his generals how to run that war in a day to day manner.

Defend New Jersey, keep troops in New Jersey. Disasters occurred because the legislature sent directors to generals, other than General Washington, telling them what to do.

One of the miracles of Philadelphia was that, unlike Lou Fisher, the Framers said, true, we have severed from a king but we will create a chief executive, and the words commander in chief that they chose was a term of art taken from state constitutions. It doesn't mean six star general. It means more than that. It means someone who has the authority to call military force without the legislature declaring war. The Framers were veterans of the French and Indian Wars.

They were veterans of the Revolutionary War. They knew that there was such a thing as undeclared war. They knew there was such a thing as invasion or attack, such as the attack at Pearl Harbor, the attack on 9/11.

They knew that the commander in chief--and I challenge Dr. Fisher to refute this--the commander in chief does have authority to bring military force to bear without a declaration of war, where the United States is attacked, or in the case of insurrection, without a word from the Congress. So point one is the chief executive has authority independent of the Congress of the United States in a declaration of war to defend this country.

Point two. 9/11 was that kind of attack, an unprovoked attack against civilian and military targets, the center of our military structure in the United States.

If the president couldn't respond to that at the time it happened, as commander in chief, our document is truly parchment and nothing else.

Second point, and this goes to Bill. Bill is talking about divided government and about checks and balances. Makes a lotta sense in the domestic realm, doesn't it? The preamble to the Constitution talks about the domestic tranquility and the national defense, and that is mirrored in the chief executive's power. He's to take care that the laws be faithfully executed domestically and he's the commander in chief to defend us against external threat.

Well, think about it a minute. When he's the commander in chief and he's defending us against external threat, do we really want to check his power to

defeat the enemy? Do we want to have an exclusionary rule? You know, if he makes a mistake, do we want to exclude fort of the landing boats from D-Day to punish him, to vindicate some other value?

My point is that on the domestic side, we're willing to say look, to protect our liberty as Bill suggested, against a tyrannical government, we are willing to say we will achieve less-than-perfect efficiency in domestic law enforcement because we value our liberty, and so the executive, for instance on the domestic side, cannot act based on subjective judgment, based on his policy judgment. He has to act based on objective evidence, and the judicial branch is interposed between the executive and the people.

He's got to get a search warrant before he goes into your house. The grand jury is controlled, and a bill of indictment is controlled, to a greater or lesser extent, depending on whether you believe in the ham sandwich indictment--a greater or lesser extent by the judiciary, and of course proof must be beyond a reasonable doubt.

Could that ever be true in the commander in chief realm? No. The commander in chief has to be able to act on intelligence, on hunch. The commander in chief is told there's an airplane headed to the United States from France. There is a 50 percent chance that it has been hijacked. There's been no radio communication and it could be headed for the Congress. Could he go get a warrant? Is there probable cause?

Those aren't the questions we should be asking. He is allowed to act on his subject judgment. Does he have plenary authority? Yes, he does. Is it in a very limited area of authority, in prosecuting the war? Yes. And can that authority be abused? Of course it can. But any plenary authority can be abused, and the Framers did mean to give the commander in chief plenary authority to prosecute military hostilities, as he or she sees fit, and as Roger said, Congress retains the power of the purse.

Congress can decide whether or not to build a B3 bomber but Congress cannot tell the president whether or not to use the B3 bomber in Afghanistan or anywhere else.

My final point is about military tribunals and the **Hamdi** case that's no before the Supreme Court. I believe that military tribunals are a tool of war and the history I think on this--and I would again challenge my colleague on the history--the history of military tribunals is overwhelming, going all the way back to the trial of Major Andre.

That this is an incident of executive authority. I don't think George Washington had a statute at hand when he commissioned the trial of Major Andre, the British spy who was consorting with Benedict Arnold.

But I think that military tribunals--and the Supreme Court, I hope it decides this case correctly--the judiciary has no role in military tribunals. They are instruments of war, the same as bunker busters. They are designed for the president, as commander in chief, and his subordinates, to send a message to the

enemy--if you violate the laws of war, if you shoot at our troops under flag of truce, you will be punished. That helps deter future violations of the laws of war.

That must remain within the executive branch for the very morale of our military.

If any of you were serving in uniform and you were fired on by the enemy in a flag of truce, or an enemy who hides in civilian dress, you would expect that your army could redress that harm, that it wouldn't have to go to an article 3 court for a show cause to do so.

It is important that the military be able to discipline foreign forces who violate the laws of war within the military, in the same way that a federal court can punish contempt under its own nose, and that responsibility lies with the executive branch.

And I think much of the confusion in Bill's remarks, and in some of the other remarks, is the confusion between internal domestic criminal affairs and the president exercising his authority as commander in chief to defend us all from foreign threats, foreign armed threats that come from abroad.

MR. TAYLOR: Thanks, Andrew. I suspect that there may be some responses to Andrew on that.

I hope we can kind of integrate them with my first round of questions and our plan is that the responses should be two minutes or less, and then if anybody else on the panel has a comment, that's welcome.

Lou, why don't you say whatever you choose in response to Andrew, but while you're at it, I'd love to know whether, in your view, the Bush administration--you made it clear that the Bush administration's claims to power are out of sync with the constitutional framing, I think.

Are they unusual in terms of modern presidents? Has this president been greedier about war powers than the last few have been?

MR. FISHER: I think in my initial remarks, I linked what Bush is doing with what Truman did with the steel seizure, where they also have the inherent power theory, and they went into court, District Court, and told Judge Pine [ph] that the courts cannot control the presidents, and that was followed by a very spirited decision by Judge Pine and led to the Supreme Court decision striking it down.

So this--nothing new about this. What I think the breadth of this--Truman got beaten back because people, in news conferences, would ask him on this inherent power, you can do anything you want in emergency--they would ask him, "If you can seize steel mills, can you also seize radio stations?" Can you seize newspapers? And he said I can do whatever necessary in an emergency.

And the newspapers around the country blasted Truman for that, called it dictatorial. So that was a very quick defeat for Truman and that notion.

This time, it's much more complicated. So long as the administration says that the eavesdropping--and Roger's right--nobody knows anything about the extent of the eavesdropping cause it's an operation and no one is told about the

operation. But the administration will say we're only listening to terrorists. And that's enough to confuse a lot of people in the public as to, well, if it's just listening to terrorists, they're not listening to me or what I have to say on the phone doesn't matter, it's not going to get the same response publicly.

I would agree with Roger, that a lot of this is going to be determined by politics and by public reaction and not just in the courts.

I think that was very, very true with what happened to Truman, and Rehnquist, who was a law clerk on the court at that time of steel seizure, he was a law clerk to Robert Jackson, said he thought legally Truman would win. He was really surprised that Truman lost.

And then he realized that public opinion--there was a tide of public opinion that ran against the president.

Just a last thing on Roger. I don't think it's helpful to put us in cubbyholes, to say I'm a congressional supremacist, because if you look at my record, I've often testified against Congress when it's encroached upon presidential power or when it's encroached upon judicial powers.

So I'm not a congressional supremacist in the lockstep fashion. I think all of us, I hope, are here to defend the Constitution, and it doesn't help to talk about whether Roger's an executive supremacist, I'm something else. We have to look at the constitutional issues here and not just presidential power, but what is important for a republic and for citizens' rights. We don't give up every right under an emergency regime.

I've got some other comments but I'll let others talk.

MR. TAYLOR: Thanks. Roger, in addition to any comments you have on what's been said, I'd be interested in knowing, given the necessity of secrecy, which you discussed in the eavesdropping program, the complexity of it, technologically, if the president can do it without congressional or judicial oversight, what, in the long run--and this is gonna be a long war--would restrain a president from committing the kind of abuses that J. Edgar Hoover became famous for?

MR. PILON: Lou spoke of the importance of politics, as I did, for deciding these issues, rather than trying to decide every issue as a matter of law and having every issue end up in the court. I would note that the politics on this NSA matter are going the president's way notwithstanding his standing in the polls on most other issues.

On this issue, the public seems to be with him, at least according to recent polls. Now what would prevent the president from going to the J. Edgar Hoover--here, again, politics. We saw the reaction to that. It was an overreaction to the abuses of the Hoover regime and then the Nixon regime in the form of the war powers resolution and the Foreign Intelligence Surveillance Act, both of which in my judgment are unconstitutional, and in fact every president, as we know, both Republican and Democrat, has said that the war powers resolution is unconstitutional as an illicit encroachment upon the power of the executive.

So I think that politics would work here, Stuart, just as it would work in this area to sort the matters out.

When we go to the court with this, we get in a situation that comes out very clearly in the appeals decision, the FISA court of appeals decision, where the court--let's remember--that was a decision that reversed the FISA trial court.

SO you've got two secret courts disagreeing, about what? About what Congress really meant. Now if that's the situation, put yourself in the shoes of the executive, trying to figure out what Congress really meant.

In other words, if the court, with all that's available to it in the way of reasoning these things through, can't get a clear picture of what Congress meant, how is the executive, which has to act quickly in so many of these matters?

And if that's true when you're dealing with relatively simple technology like telephones connected by wire to other telephones, a foruri [?], it's going to be the case when they're dealing with the kind of technical sophistication and detail that is involved in modern communications .

And so that is my short answer to your question, Stuart. But I would also take this opportunity, just as Lou unburdened himself of a few things during his response, I would note that Lou said, and I took it down as an exact quote, he may wish to correct it--the Founders did not vest in the president anything that was vested in the king. That couldn't be further from the truth.

As Andrew said, they went to school on the British experience. What they did not give the president, which is a power that the king had, was the power

to declare war. But the power to declare war is not, contrary to what Lou believes, a power to authorize hostilities. The president has that power inherent. The power to declare war is simply a juridical power to move us from a state of imperfect to perfect war by notifying citizens, enemies, and third parties that we are now in a state of formal war.

And so the idea that the Founders did not vest in the president anything that was vested in the king, it seems to me couldn't be further from the truth. They vested in the president virtually everything that belonged to the king, except for the power to declare war, and they did so, as Andrew said, after the experience of 11 years between the Declaration and the Constitution, and after the experience, especially of state constitutions during that period, ranging from the New York constitution which provided for an active executive to the South Carolina constitution which went just the other way. They could have, when they wrote the Constitution, drawn upon the South Carolina constitution.

They did not. They drew upon the constitutions of New York, Massachusetts and New Hampshire, which had strong executives.

MR. TAYLOR: Roger, who do you have lunch with at Cato?

MR. PILON: Well, after today, mostly myself.

MR. TAYLOR: I'm resisting the temptation to say "royalism comes to the Cato Institute." I could say that but I won't. Instead, I'm going to ask Bill to address any thoughts he has to what's been said and also the following question, hypothetical question, Bill.

You are the President of the United States. Stranger things have happened. It's September--

MR. GALSTON: Not many.

MR. TAYLOR: --September 2001, the ruins are still smoldering. The head of the National Security Agency comes to you and says we could, you know, stop the next time--and remember at the time, a lot of people were worried that the next wave was going to be any day. We can do a lot to stop this, that we haven't been doing already, if we can scoop up all the communications and do all sorts of things that, unfortunately, the Foreign Intelligence Surveillance Act does not allow us to do. Can you authorize it? What do you do then? And what do you do as time passes, about that?

MR. GALSTON: Well, let me take your question. First, I would have responded to that request in much the same fashion that Abraham Lincoln responded to the immediate emergency that faced him in the state of Maryland, and elsewhere, in the early months of the Civil War.

I would have A, authorized that as an emergency measure, and B, and let me now try to get out of Team A, Team B, and agree with what Andrew has said--I would have initiated, you know, drafting efforts to create a fundamental revision of FISA in order to take these new technological realities into account.

As I said in my remarks, I am not faulting President Bush for acting as he did in the first days or even weeks of the emergency.

I am faulting the president for not doing, in this respect, what he did under the aegis of the Patriot Act. The Patriot Act represented an updating, and in some respects, a necessary expansion of a wide range of powers. I cannot understand--or yes, unfortunately, I can understand why the administration's proceeding differently in this fashion, because it has a doctrine of executive power that it is determined to move forward and to prosecute, and this is a vehicle for doing it.

I think that's very regrettable. It is a constitutional conflict that need not be arising.

Now let me go then to the wider issue, and here I will directly take issue with the litigator to my left. I am not now nor have I ever been--

MR. : Only physically.

MR. GALSTON: Yeah; yeah. I am not--well, you're stage right. I am not now, nor have I ever been a litigator, but I do know on which side of the "fight or flight" syndrome I stand in circumstances of this sort, and so let me say, flatly, that while I emphatically, constitutionally affirm the leading power of the president and the executive branch in the case of armed conflict and national security issues, I deny that leading authority is the same as plenary authority.

That is the distinction that I want to draw, and let me draw it in three ways.

First of all, the leading authority of the president, and the executive branch, does not extend to overriding fundamental rights of American citizens. I think we'd both agree to that.

And if the NSA surveillance were simply a question of the surveillance of foreigners, noncitizens, we wouldn't be having this discussion.

The fact that U.S. citizens are implicated brings Fourth Amendment issues into play, and when that happens, it seems to me that there's, you know, there's a prima facie case for saying that the president's authority is not plenary, though it is leading.

Second. According to my reading of Article 1, section 8 of the Constitution, that Congressional article explicitly authorizes Congress, and I quote, "to make rules for the government and regulation of the land and naval forces."

I was in the Marine Corps, and the very first thing that happened to me after I stood on those, you know, stood on those painted shoe print, was that I was instructed in the basics of the Uniform Code of Military Justice, which was a congressional statute which certainly, in many respects, you know, binds what the executive branch would otherwise do in the case of military forces.

By the way, the second thing that happened to me was an outright violation of the Uniform Code of Military Justice, which occurred about five minutes after it had been cited to me.

MR. : Perhaps you do need a litigator.

MR. GALSTON: I did then.

Third point. If I recall correctly, President Bush himself said that the president's wartime executive power does not extend so far as to permit him to order torture.

The president said that that was a, quote, unquote, red lie. So the president's position is that while he has leading authority, he doesn't have plenary authority in this area. And so that--I could go on much longer but those are the basics of the case I'd like to make.

MR. TAYLOR: Andrew, add anything you'd like to that and address any of the following that you're interested in addressing.

What if any role do you see for Congress or the judiciary in oversight of the NSA surveillance program, and, in particular, does the secrecy that's necessary in such a program preclude a congressional role because of leaks?

And while you're at it, do you think that the New York Times publication of the leak about this program is a shameful, or even an illegal act as various administration officials have said?

MR. McBRIDE: I'll speak to Bill first, cause I've never run from anything. But first, I think Bill and I were speaking past each other a little bit on his first point, because I was speaking about the military commissions which are limited to foreign nationals and so you were speaking about the NSA program which does implicate U.S. citizens, and I believe that **Ex Parte Milligan** was correctly decided, and I believe that when the president--it's something the

president actually hasn't gotten a lot of credit for but he limited the military tribunals to foreign nationals. There's a fairly good argument that under the **Kirin** [ph] case he wasn't obligated to do that, but he did, which I think is important because it eliminates the possibility of the use of military tribunals against domestic enemies, or a sort of Nixonian type use of military tribunals.

Let's remember--everyone in a military tribunal is a foreign national who has been found by military authorities, in a fairly careful screening, to have some connection to al Qaeda and we have reason to believe that they are guilty of some form of unlawful combatancy, that they have born arms in a way that is contrary to laws of war.

As to the NSA surveillance, I guess the first thing I would have to say is Roger is wrong. There is someone here who knows a great deal about the technology because I represent in court a number of telecommunications carriers who have been sued over that issue, so I don't know whether I should speak to it. I mean, I can speak to the public aspects of it, or not speak at all. Or I know what a packet switch is and I know--

MR. : Then please speak to it.

MR. : Well, speak--

MR. McBRIDE: Close the room and--

MR. : Please speak to it briefly.

MR. McBRIDE: I'll speak to it on the legal level in terms of FISA and what I think--I think Bill makes a fatal concession when he says the president has

inherent authority to do it for a little while, and then he's got to go to the Congress, because we all know that al Qaeda's pattern is to set these things up over a period of time.

The pattern is to set up sleeper cells and then activate them through communication from abroad.

The problem with FISA, as I see it as a tool, and I go back to, say, what Roosevelt was doing prior to the beginning of hostilities with Japan. He issued a presidential directive to monitor a large number of communications from Japan to Hawaii, from Hawaii to Japan, from San Francisco to Japan, vice-versa, and actually, there's a good book called--a couple good books, but "At Dawn We Slept," there's a book that goes into the fact it was actually a dentist who was describing where all our ships were in the harbor, in code, and had we translated that and figured it out, it was much like some of the 9/11 communications--we would have know that the attack--

[Start tape side 1B.]

MR. McBRIDE: [in progress] my point being it's impossible to argue that the president's authority comes from FISA, because presidents did it before FISA. FISA was passed in '78. And as Roger pointed out, the FISA court of appeals held, citing four other court of appeals decisions which were decided prior to '78, that the president did have this authority.

So you can see that he has the inherent authority to do it. You're in a difficult position to say, oh, but he should have gone to Congress to what? Get it

reaffirmed at some point. Or he had to stop at some point, when maybe his intelligence is that al Qaeda's attack is planned six months from now.

Now my nonclassified understanding of the program, and the problem with FISA is, FISA requires you to show, focus on a particular individual who might be acting as an agent of a foreign power. Well, that's not what this is about. This might be about the following exchange in Tora Bora is "hot." That's where we think the communication's going to come from. We want everything that goes through the London switch to New York from that exchange in Tora Bora, and we're going to sort it, cause that's where the call from Ramsay ben Alsheed [ph] came to Atta. That's where we think the next one's coming. Or that's where we know the new Ramsay ben Alsheed is today.

Now that I think we should be doing, and as to the concerns about privacy, I would say this.

When you cross an international border you can be searched. Why, when you call overseas to Iran, or Iraq, or Tora Bora, or someone from Tora Bora calls you, do you have this heightened expectation of privacy? I don't understand that.

You can be searched from head to toe if you enter the United States as a U.S. citizen, from Pakistan. Believe me. I've done it.

Why, if you call a "hot" exchange in Pakistan, can the United States not isolate your calls in a time where that area is perceived as a serious threat, and listen to them? And frankly, the program is actually more refined than that. I'll--

MR. TAYLOR: Thank you.

MR. McBRIDE: About the New York Times thing? I don't know. I think they're in the same boat as Scooter Libby.

MR. TAYLOR: I'm not sure. Bill, were you at the end of your chair there?

MR. GALSTON: Well, just to say very briefly, that I don't think I made a fatal concession any more than President Lincoln did. My position is the same as Lincoln's--

MR. McBRIDE: Well, either there's executive authority or there isn't. You know, if there is, did you say it evaporates after three weeks unless you go to the Congress, or you've acted illegally when you decided to do it in the first place? That's your problem.

MR. GALSTON: Well, I don't--

MR. McBRIDE: I mean, as a lawyer, either-if you say on day one, well, gee, this is an emergency, there's no emergency clause to the executive power; either you got it or you don't.

MR. GALSTON: Well, I don't think President Lincoln was a bad lawyer, let alone a bad constitutionalist, and his position was, A, in the last analysis, the Constitution is not a suicide pact, but B, it is his responsibility as the chief executive to insert that basic fact of regime survival into the legal and constitutional framework to the maximum extent possible, which is why he

explicitly went to Congress and affirmed Congress's concurrent jurisdiction in the matter.

He acted because Congress couldn't, with the requisite dispatch in the immediate weeks and months of the emergency, but that emergency logic disappears as time passes, and so yeah, time doe make a difference, and as I said, you know, as I said--

MR. McBRIDE: As long as Congress denies you the authority--

MR. GALSTON: Then you don't have it.

MR. McBRIDE: Well, no, let me finish.

MR. GALSTON: Then you don't have it.

MR. McBRIDE: To pick up on Stuart's hypothetical, let's take it a little forward.

MR. GALSTON: Yeah.

MR. McBRIDE: You're the president.

MR. GALSTON: Uh-huh.

MR. McBRIDE: You go to Congress. Congress says no, you can't do this. Your intelligence personnel say, hey, we really believe we need to do it another three months, cause that's when we think the attack's coming. What do you do now? You've got regime survival. Congress says no. What do you do?

MR. GALSTON: Well, that's not an easy question but I'll give you a "seat of the pants" answer which may or may not amount to a fatal concession, and that is, if I--

MR. McBRIDE: I would choose [inaudible].

[Laughter]

MR. GALSTON: Yeah. Not my style.

You know, if I genuinely believed, if I genuinely believed that there were no alternative, I might authorize it and declare, very publicly, what I have done, and say--

MR. McBRIDE: Or brief members of Congress perhaps--

[Simultaneous conversation.]

MR. GALSTON: No, no, no, I would say--

No. Hear me out, please.

I would say that it is the constitutional right of the Congress to impeachment, and to remove me from office because of what I have done, and if Congress chooses not to do that, I will proceed as long as they don't. That at least is an honest constitutional answer and one that even Roger would grant is within the power of Congress to act upon.

MR. TAYLOR: Before Roger responds to that, I think Lou has--because I'm not sure Roger would grant anything, from long experience. But Lou has something to grant or perhaps to--

MR. FISHER: Let me develop what Andrew brought up, this commander in chief clause, cause the way Andrew presented it, it sounds like it swallow sup an awful lot, including the Constitution.

First of all, there are some things we can say about the commander in chief clause. It's very important that the president is commander in chief so you have unity of command. I think we can agree on that.

The second very important quality of the president being commander in chief, we have civilian supremacy. It's not a general or admiral in control; it's the president.

Beyond that I think you're getting into dangerous waters as to how much you want to say the commander in chief controls. Now Andrew brought up the Major Andre hanging in 1780. That's not a good argument for commander in chief because we didn't have an executive power, as Andrew mentioned, we didn't have any--we had a Continental Congress at the time. So there's no executive power.

MR. : Or historical example.

MR. FISHER: It's bad history though; it's bad history. When Major Andre was hanged, he was hanged under an article of war that the Continental Congress passed, it's either in 1776 or--so was a statutory basis for the hanging. It had nothing to do with any inherent executive power.

Now I agree with what Andrew said, that Congress was involved in trying to direct George Washington and the Revolutionary War, is pretty--not the most efficient way, and a lotta frustration to it.

But with all of that, once the new government began in 1789, if you look at what Washington did and Adams and Jefferson and Madison, and all the

rest, it wasn't just open the door to anything a president wanted to do as commander in chief. That when Washington wanted to act against the Indian tribes, he did so under statutory authority and he made sure, when he communicated to the Cabinet, that they did only defensive actions because offensive actions were up to Congress, and when the Whiskey Rebellion--that was under statute--you needed a judge to come in, and when Jefferson took certain actions in the Mediterranean with the Barbary pirates, he said beyond the line of defense I cannot go.

So they were really restricted. There was no open door policy to commander in chief.

MR. McBRIDE: We have a bit of [inaudible]

MR. TAYLOR: Sure. Go ahead.

MR. McBRIDE: --because I did disagree with Roger in one respect. I thought you set up a straw man with a scepter theory, you know, as they call it, the passage from the king to the president. I do not believe that, and I do believe that the commander in chief, as defined in those state constitutions, and is chosen as a term of art, has a defensive component, and I think you do too.

In other words, the commander in chief can repel invasion, put down rebellion without--I view, for instance, the Iraq war--I do not think that the declaration of war clause is just about formalization.

So to my mind, that line is drawn in something like the Iraq war. To my mind, a preemptive war that is a strategic war, in the way that the Framers

viewed European strategic war at the time, not the repelling of an Indian attack or the repelling of an invasion, that would require a declaration of war, to my mind, so I disagree with Roger in that regard.

I think the commander in chief power is a power to repel. I think we might disagree, in that think however the war starts, by declaration or attack, the very name, commander in chief, means that he cannot be superintended in any decision about "Take this hill, use this bomb, try him in a military tribunal, shoot him now."

Who is there--and that's where I disagree with his separation of powers notion in the prosecution of the war. It says commander in chief. It's written to be supreme and exclusive and plenary. That's the way it's written. Commander in chief doesn't admit of judicial review.

MR. FISHER: Andrew, would you agree that if the president is involved in Iraq that Congress, by statute, can say don't go into Iran and don't go into Syria? By statute. He can veto it of course. The Congress can place a statutory check, not on each hill but certainly on countries.

MR. TAYLOR: Roger's been very--

MR. PILON: I've been uncommonly patient.

MR. : I'm sorry; yes. Roger's turn.

MR. TAYLOR: I actually had an offbeat question to ask you, a little tangent, but why don't you say what you wanted to say before I get to that.

MR. PILON: Sure. In fact I'll just pick up where Lou left off, Can Congress, by statute, say don't go into Iraq, and so on and so forth.

Under what authority? And that's the theme I want to work right now. Just to pick up on this last exchange, presidents often go to Congress to get them on board. Your President Bush did in the first Iraq war.

They get an authorization as in the Tonkin Gulf, as in the authorization for the use of military force. That is not the same as going to Congress to get authorization, in the sense that without it they couldn't act.

The president has a wide range of foreign policy powers, starting with diplomacy, on the one hand, going all the way up to full-blown war on the other. Everything from the withdrawing of ambassadors to providing munitions to combatants, to blockades, to surgical strikes; the whole range of things.

Congress has this on/off switch not a continuum, but declare war or not declare war, and it's not accident that it's been used only five times in our history, with some 200 foreign uses of force, only five times has a declared war clause been invoked.

That's because in most cases you don't want a country at war. It's a very dangerous situation because all kinds of laws, as Andrew will tell you, kick in at that point.

I daresay the steel seizure case might have gone the other way, had we been in a state of declared war in 1952, rather than in a state of undeclared war.

Presidents can abrogate contracts, can seize property, can engage in a whole range of activities under a state of declared war. So to those people who insist upon it at every turn, I say be careful what you ask for, you may get it.

Now I come back now to my main point and I cannot emphasize this enough. The agenda that I'm putting forth here is part, as I told you before, Stuart, of a much larger agenda to return constitutional government to its pre progressive era state, pre New Deal state, if you will, whereby you had a Congress that did not think that every problem that came before it was a subject of legislation. Got a problem? We've got a program for you. Everyone from Roosevelt to Clinton can be heard--indeed, Bush, today, can be heard to say that, dare I say? That's why it's so hard to defend this administration on the one occasion when it gets it right.

But I digress.

MR. : He's not Libertarian, he's not with the Bush guys!

[Simultaneous conversation and laughter.]

MR. PILON: As I said, I'll be eating alone when I get back to Cato. But the point I'm getting at is this. Congress is a body of enumerated powers. Therefore, we must ask ourselves, "What power are they invoking when they try to pass something like the war powers resolution?"

I put this to David Cole, the other day, over at the National Press Club, and what did he come up with? The commerce clause. Big surprise, huh?

MR. McBRIDE: I think the question Lou asked, what enumerated power would--'cause I think it's a difficult question, once you grant the enumerated

power. What power would they be acting under, saying, you know, don't go beyond the 52nd parallel or--

MR. PILON: That's exactly my point and in fact--

MR. McBRIDE: I understand.

MR. PILON: Yeah, and I will bring it up with respect to something that Bill said. He pulled out his Cato constitution out of his pocket, I'm glad to see, and he went to article 1, section 8, and he said make rules for the government and regulation of land and naval forces. That was a power that was meant to enable Congress to provide a system of military justice outside the ordinary courts. It was not a power that was designed to enable Congress to say "take this hill, don't take that hill." Or as Richard Epstein said in The Wall Street Journal last month, to tell the Army that it can use live ammunition. He would even allow that under this clause.

This is not remotely what that clause was about.

MR. TAYLOR: That brings me to my next question for Bill, if I could do it. It's the same one I was going to ask you; but I'll ask Bill.

And I want to preface it by saying we've heard a lot about Hamilton, Jefferson--not Jefferson--Washington, Madison, and I love them all, I love all the Framers with the possible exception of the one who killed one of the other in a duel, and I'm still very upset about the Whiskey Rebellion. I want to make that clear too.

But why should we decide how best to respond to what has been correctly characterized as an unprecedented threat of nuclear terrorism, among other things, by reference to what a bunch of very wise but very dead white males said more than 200 years ago about very different things?

MR. GALSTON: Well, the snap answer to that question is that you go to war with the Constitution you have and not necessarily with the Constitution you'd like to have, and so I do think--and I do think that elucidating our constitutional principles, and here I associate myself with the man who's about to be expelled from Cato. You know, I do think that elucidating our constitutional principles with reference to the people who understood them pretty darn well, for then, but also for now, is a reasonable point of departure.

You know, we have to try to function within the framework of the rule of law to the maximum extent feasible.

The alternative to that is chaos, and I think that triangulating from the wisdom of the past to the parlous circumstances of the present is at least the default point of departure.

You begin there, you don't necessarily end there.

Let me now say something about Article 1, section 8, to both agree and disagree.

Yes, it's absolutely true that Article 1 section 8 does not give the power to Congress to interference with tactical military decisions that are the province of the executive branch.

Granted. But if in the course of battle--here's a hypothetical--the President of the United States were to order to do something that flatly contravened the Uniform Code of Military Justice, at that point I believe the general would have grounds to resist. That from an operational standpoint there is an element of concurrent jurisdiction as between the executive branch and the Congress as to the conduct of military affairs.

And so I repeat, I offer that as an example against the thesis of the plenary executive power. It is not intended as an argument in favor of tactical direction of a military enterprise from the halls of Congress, which would be preposterous. No reasonable person could support that.

The broad issue is leading power, which is my position, versus plenary power, which appears to be the position of Team A.

MR. : Team A.

MR. GALSTON: Yes.

MR. : The distinction I would prefer is plenary power versus concurrent power. I think that's the constitutional distinction.

MR. TAYLOR: Lou. I think Lou had a minute, and, by the way, I've never understood what plenary meant, so can you wedge that in.

MR. FISHER: No, I didn't bring it up so I'm not going to wedge it in. I have one minute--

MR. TAYLOR: All right. We'll come back to Roger on that.

MR. FISHER: I have one minute to talk about enumerated powers. It's not true, as Roger says, the vesting clause gives Congress the powers herein granted. I mean, obviously, Congress has more than the enumerated powers. Otherwise, it couldn't investigate, it couldn't issue subpoenas, and it couldn't hold executive officials in contempt.

So obviously Congress now--the reason I brought up to Andrew what kind of geographical boundaries--during the Iran-contra period, there was a statute that said that U.S. troops couldn't go within something like 20 miles of the Honduras border, something like that. That was never challenged in the executive branch, a DOG, an OLC on it. I think Congress can place that--now the president can veto it, you get into a stalemate. But Congress can place limits, and I think Congress can say you cannot go into some surrounding countries--

MR. : Well, you raise it as a spending measure, then you get into, you know, in other words, no money shall be spent, you know, then you get into the whole, you know--

MR. : Roger's having an attack here.

MR. : No, no. I'm not agreeing that it's constitutional.

MR. PILON: Just a quick response to that. Congress's enumerated powers include as the 18th--excuse me. It has 18 enumerated powers. The last is the necessary proper clause which gives it the means to carry out its other 17 enumerated powers.

So what you suggest, subpoena, may be a power that it has a means to carry out one of its other powers. So that does not--it's not an open sesame.

MR. TAYLOR: Andrew, perhaps you could, you mentioned something that makes me think perhaps you could clarify something that's confused me about the spending power.

Now the McCain amendment which says no abusive interrogations of certain kinds was an exercise of the spending power, I believe. Yet the president said, in essence, I'll comply with it when I want to, i.e., the spending power can't override my constitutional powers. I think that's what he said.

Mr. FISHER: May I respond directly to that?

MR. TAYLOR: Sure.

MR. FISHER: The spending power is as chimerical as is the general welfare clause. That is to say, we speak of Congress's first power, oftentimes, as contained in the general welfare clause. There is no general welfare clause. There is no spending clause. No matter how many times the Supreme Court says there's a spending clause, there isn't.

There are three ways Congress can get money. It can tax. That's the first power, the taxing clause. It can borrow. That's the second clause. Or it can sell land and other property. That's in article 4. If it wants to spend, it has to first appropriate.

So the power to appropriate and spend is properly subsumed under the necessary and proper clause. I know that that escapes completely the Supreme Court; so much the worse for the court.

MR. TAYLOR: I want to move toward audience questions but anyone who wants to add something before we do that, briefly, and I sense that perhaps you do, Andrew.

MR. McBRIDE: Well, no, I just wanted to say in response to your question, you know, it is usual for presidents to put that reservation clause in. I'm not sure the president's thumbing his nose at the substance as much as reserving a constitutional right. I think more generally, the issue of torture is just--as a moral issue, forget the legal piece, is just a huge issue in terms of, you know, the hypotheticals you can put out.

You know, we believe this gentleman knows where the flight is leaving from and what its target is, and we have six hours to find out, you know, 3000 lives in the balance, as many as last time. What do we do? You know, and I think it's really--that's why there's so much debate about it.

Whether or not the president has authority; this, that. I mean, it's really a question that the body politick of the United States needs to debate in the same way that the citizens of the United Kingdom had to have a great deal of debate over some of their responses to Irish terrorism.

You know, what defines us as a nation? Are we willing to suffer loss because we're not willing to do certain things? Where we're willing to say another

three thousand might die in a tower in New York or Los Angeles because we're not willing to torture a Mohammed Atta, if we catch him, to find out where that plane is gonna go. So I think that's at the heart of it. Beyond constitutional authority is a moral question that really is for political debate.

MR. TAYLOR: Any other thoughts before we go to the audience?

MR. FISHER [?]: I would just follow up and say, quite apart from torture, and I don't associate myself with that, let me be very clear, when the issue is are we willing to suffer another 3000 losses at the cost of the remote possibility that someone will be listening to our phone conversation about our sex life? I mean, this is the loss that is at risk, by the NSA surveillance program, it seems to me is--and I come back to this, the point I made at the outset, so minuscule, that you wonder how it is that so many people get so exercised over it.

Believe me, the NSA Is not listening to yours and my phone calls, Stuart, no matter how much, in principle, they might be able to do so. They have got--

MR. : I don't know, I've heard a few of Stuart's--

[Laughter]

MR. FISHER [?]: But they have got reams of information, that they have all they can do to work their way through. As you know, most of this is machine churned, that no human being ever gets close to it. It's only when it's filtered out, maybe through one or two or three different steps that you finally get

someone with a human eye looking at it, and even then it can be cleaned, as I understand it, so the names are removed, and so forth.

MR. McBRIDE: Well, one point in terms of the expectation of privacy in the NSA things is look, if you call Pakistan or Iran, it's quite clear the NSA is not the only one who's intercepting your call. In other words, your expectation of privacy when you call Tora Bora is not the same as when you call Los Angeles. You know, you're calling a place where communications are themselves not secure and I can guarantee you that the NSA is not the only service, and that other services are much less discriminating about sorting calls.

They're probably listening to every call. In fact most of those international calls--the reason this is an issue at all is ten years ago they were carried by microwave. It's the fiber optics and the fact that they're now carried by transatlantic cable that makes this really an issue at all.

I mean, they used to be intercepted under Echelon overseas. Didn't have to do any interception in the United States. But I've said too much.

MR. TAYLOR: Bill, last, last--

MR. GALSTON: Well, o that point you may actually have said too much.

MR. McBRIDE: No, I don't think so. Echelon is public.

MR. GALSTON: No; no. I was referring to constitutional "too much," and that is to be arguing about issues such as expectation of privacy, it seems to me is already to implicate Fourth Amendment issues in this discussion.

That is, it is so to concede the principle that if there's a clash between or a possibility of a clash between the Fourth Amendment and some exertion of executive power, that that has to be taken into account.

It may turn out at the end of the day that those Fourth Amendment considerations are not strong, not dispositive, et cetera, but to say that they could be, and to engage in the argument on that basis is to concede, at least in principle, that the executive branch's authority in that respect is not plenary, it seems to me.

MR. McBRIDE: And I do in the case of U.S. citizens.

MR. GALSTON: Okay.

MR. McBRIDE: I said, I started, I prefaced my remarks, I said I think ex parte Milligan is right.

MR. GALSTON: Okay.

MR. McBRIDE: A citizen in Illinois who is trading with the enemy and has not pledged allegiance to the army of the enemy as in ex parte Milligan, and the civilian courts are open, the Supreme Court said no military tribunal, try him in a civilian court. But a foreign national--and this is where the administration is in a hodge-podge. Moussaoui, a foreign national who enters the United States under false pretenses, to engage in sabotage, indistinguishable from the Nazi saboteurs in Kirin, is in a domestic civilian court. Why? That's not where he belongs.

MR. TAYLOR: I'm almost to the audience but I'd love to ask you one more thing, if you care to address it, and what Roger said brings it up.

What is the worst thing that could happen to civil liberties in the United States if the president had untrammeled power to eavesdrop on anybody he wanted in the name of chasing al Qaeda?

MR. : Eavesdropping with the NSA program, you mean.

MR. TAYLOR: Yeah. And imagine it being--I mean, what could he do with this program that should really scare us?

MR. : Well, I think it's the premise of it that would scare me. It's not just the eavesdropping. Once you start to "buy in" to inherent power and I can do anything in an emergency, then you've opened the door to any exercise, and we all can say, well, we have to just give up our liberties because the great father is going to protect us. That's the danger I see.

MR. TAYLOR: Okay. Questions? Yes?

QUESTION: I would like to ask a question to Dr. Andrew. I think one of the key essence of your argument is that in times of war, as the commander in chief, the President of the United States does have the power to take appropriate actions such as the NSA wiretapping.

Does that mean that in a case where America successfully wins the war on terror, then would you be open to idea of now finally dismantling the NSA, when we actually win the war on terror?

MR. McBRIDE: I think that's one of the main problems with this war on terror that's been raised both in the context of the Guantanamo situation and the

NSA situation, is the nature of the conflict is not one where hostilities will cease by treaties being signed at, you know, a train car at Versailles, or on boats.

So it's very difficult to--that said, you know, in 1941 it was unclear when World War II was going to end and it was unclear when the Vietnam War was going to end as well.

I think we have general agreement here. I would like to see FISA revised to allow the president to engage in more generalized surveillance, much the way Roosevelt did prior to the attack on Pearl Harbor, when there was a sense that the Japanese might attack the West Coast of the United States, that it's directed toward possible hostile threats abroad but not necessarily a particular individual and not necessarily based on probable cause.

And I would stipulate, and this is where I think the Bush administration has made a mistake. I would stipulate that that is a prophylactic measure, done as commander in chief, and it could not be used in criminal prosecution, whereas the Bus administration has linked some of the NSA wiretaps to successful criminal prosecution, which violates my two realms doctrine that I laid out at the start, which is you're either acting as commander in chief where you're acting to take care that the laws be faithfully--but you can't put one hat on and then the other.

So if you're going to do more sweeping surveillance under NSA to protect the United States, throw it away when you're done, don't send it over to the U.S. Attorney's Office.

MR. TAYLOR: More questions?

Yes, sir.

QUESTION: You discussed the commander in chief powers which I take is the executive acting in his military capacity. One of the inherent authorities of the military is to gather intelligence about the enemy.

James Woolsey, former CIA director, has referred to the fact that in this war on terror, and after the 9/11 attacks, the U.S. is part of the battlefield in the war on terror.

With this inherent power, the commander in chief to obtain battlefield intelligence, how does this concept impact on your arguments about restrictions on intelligence gathering on the domestic scene?

MR. TAYLOR: To whom were you addressing that?

MR. : Anybody except Roger [inaudible].

MR. PILON: What do you mean?

MR. FISHER: I'll start off.

MR. TAYLOR: Lou can comment on your question and then Roger can comment on Lou's answer.

MR. FISHER: I've been following the Padilla case, which was down in the 4th Circuit, and it was very interesting. You can for $26, whatever it is, you can get a CD of oral argument.

I'm listening to it and Paul Clement is arguing for the Justice Department and he's arguing since Hamdi had picked up in Afghanistan, he's

arguing now that Padilla was in Afghanistan getting training and when he got to Chicago, that's the tie he was trying to make, and the judge in the case intervened and said that shouldn't be your argument, says the whole United States is a battlefield.

When he was in Chicago, Chicago was part of the battlefield. So you've got some federal judges, very ambitious federal judges arguing that the entire United States is a battlefield, and if so, the president can do whatever, to U.S. citizens here, which Padilla is, and that's the door that's opening up.

MR. : Isn't that the key, though? It's not where you are; it's who you are.

MR. PILON: In fact may I respond now, Stuart?

MR. : No, it's both. It's U.S. citizens here; this is a battlefield.

MR. : Why should a foreign national who wants to do harm to the United States gets more rights, cause he gets closer to the target? Why would--

MR. : I should think that--

[Simultaneous conversation.]

MR. : Why does Mohammed Atta have more rights when he's in airspace over New York--

MR. : I should think it's precisely the person in the United States--

MR. : --[inaudible] the opposite.

MR. : Yeah.

MR. : The opposite. The question is if you're a citizen of the United States, lawfully in the United States, of your right--if you're Mohammed Atta, you have fewer rights and you can be killed immediately when you violate our territorial sovereignty and enter U.S. airspace. You're saying the guy has more rights at that point?

MR. : No.

MR. : You get closer to the target, you have less rights.

MR. : No, you're talking about Padilla who's a U.S. citizen--

MR. : And I agreed with you as to U.S. citizen it's a different situation.

MR. : Lou, could I--

MR. : But that's what I'm saying. It's who you are; it's not where you are. You disagreed with me.

MR. : Before we leave this, with respect to the surveillance, the foreign domestic distinction was cut right through by the FISA appeals court, and I think rightly so. In fact they pointed out, very powerfully, that the distinction that the courts had, to that point, from the **Trong** case in 1980 been drawing, was mistaken. They created this wall of the **Trong** court and several appellate courts below that, this wall between foreign and domestic.

And indeed, this came up with the case of Colleen Rowley. You wrote about, Stuart, in the Legal Times piece a while back. She is the agent who wanted to get a warrant to--what was it?--Moussaoui it was, I believe.

MR. : Yes. Moussaoui.

MR. : To monitor Moussaoui. This was what, nine days before 9/11?

MR. : Or was it two weeks maybe?

MR. : Yeah.

MR. : A month. I think it was a month.

MR. : Month before. It was in August.

MR. : Yeah.

MR. : Yeah. Before 9/11.

And the Justice Department turned it down because they couldn't satisfy the requirements that had been set under FISA, and so she--her response was, Somebody is gonna die. Well, two weeks alter, 3000 people did die.

The court of appeals for FISA cut through this and said look, the distinction that we should be working with is not between foreign and domestic, indeed. Where you really want to pick up this intelligence is with a domestic person who's about to unleash the act.

The distinction is whether this intelligence gathering is part of foreign policy and foreign intelligence gathering, wherever it takes place, or whether it's part of ordinary criminal prosecutions, murder, rape and robbery and stuff like that. In that case you're going to need to go to court and get a warrant, except for the usual exclusions under the Fourth Amendment, just like ordinary police do at your local level.

When what the government is involved in, however, is foreign surveillance, for these purposes it's a completely different matter. It seems to me that is the distinction that was crucial, that was drawn by the FISA appeals court and it puts a much better perspective on the matter.

MR. TAYLOR: Did you have something to add, Bill?

MR. GALSTON: Well, we won't know the answer to that question until I say what I have to say, will we? It may be that--

MR. TAYLOR: While you're thinking about it, I had another question.

MR. GALSTON: It may be that I'll simply repeat what's been said before. Let me say that since think it's important not to multiply disagreement without necessity, it's sort of argumentative, Occam's razor, that I think the principle that it's not where you are, it's who you are, is a pretty good point of departure for a lot of this discussion. I'm not sure whether Roger's ratifying that point or adding a third consideration, namely, it's what the government is doing.

MR. PILON: No; that was Posner's point in--

MR. McBRIDE: Okay; okay. Well, okay, then let's take that up, because I think that's a principle that does a lot of work. If you look at the arguments that the government offered in 1942, in favor of the interment of Japanese, the formal structure of those arguments having to do, you know, with the nature of the unprecedented attack, the urgency of the threat, the incapacity of the normal mechanisms of law to sort through all of these 120,000 different people,

necessitated a certain action which the Supreme Court then, to its undying shame, ratified.

And the right response to that is that there are certain things that you simply can't do to U.S. citizens. That doesn't mean that if someone is not a citizen, then you can do whatever you want with no limits.

The President of the United States has already conceded that point, and quite properly. But to say that there are certain things that you simply can't do to U.S. citizens is to say that the commander in chief's power is limited by that principle.

And that's one of the points I'm urging.

MR. TAYLOR: While you're talking, Andrew, address this. Do we want to send a message to everyone in the world who's not a U.S. citizen, that when you come here, we can lock you up any time we feel like it, for any reason--

MR. McBRIDE: No. But see, the who you are is about your connection to a foreign military. In other words, take Moussaoui, right? Moussaoui's a French national who entered the United States under false pretenses. He's pled guilty; right? Forget about this penalty phase stuff.

He had, you know, a GPS scanner, box cutters, he took flight lessons. This guy wasn't here, you know, to teach French; right? He invaded the territorial sovereignty of the United States to commit an act of war; right?

Take a French tourist who comes to the United States, goes to the same place Moussaoui does, Oklahoma City, you know, gets in a car and drives

drunk and hits someone. That's the fundamental difference. They're both French citizens but he French citizen who lawfully came to the United States as a tourist is in our domestic criminal justice system; right?

That person voluntarily associated himself with the United States, or herself, and with the laws of the United States. You can't put that person in a military tribunal. But it's who they are. It's not that they're French citizens. It's that Moussaoui invaded our territorial sovereignty to attack us as part of an armed campaign by foreign nationals against us.

The French tourist came here and said I will abide by your internal laws; then made a mistake. Entitled to all the protections in that trial for DWI, or someone died, involuntary manslaughter, that you or I are.

It's not just citizenship. It's are you part of an armed threat to the United States that the president is meeting, not as part of the internal disciplinary function of the criminal law, but as part of the commander in chief's job to repel and frankly destroy, if possible, the enemy.

MR. TAYLOR: More questions?

Sir.

MR. : By the way, Posner is stealing all my ideas.

MR. : I know.

MR. TAYLOR: And let's try and let everybody who has a question get it asked, if we can, from here on.

Yes?

QUESTION: Gary Mitchell from the Mitchell Report and I'll do my best to turn this into a question, and in the process of doing, I want to use an imperfect analogy but it's triggered by listening to Roger's observation made earlier, and at the end of the session, about what possible difference could it make if the NSA is listening in on your telephone conversations about your sex life.

And believe it or not, as I thought about that, I was reminded of the battle, some time ago, around construction of a dam and the snail darter, and there were no end to snail darter jokes about what difference could it make versus the construction of a dam that would deliver all sorts of good things to the people of Tennessee and elsewhere?

And the answer is if you looked at it in the narrow view of the snail darter versus the dam, the dam had it. But if you looked at it in the larger construct of a snail darter being representative of the notion of endangered species ecosystem, et cetera, then not quite so simple.

I would just simply say, and try to think of this as a question, that the answer to what possible harm could it do is almost anything, the minute that we allow any president the right to listen in under such broad sweeping powers as he has granted to himself, and a number on the stage would argue the Constitution allows him to do that, but nevertheless, he's arrogated to himself.

It seems to me, you know, you've given away the keys to the kingdom. You either need to do one of two things. You need to say fine, go ahead and do it, or you need to have a second constitutional convention.

MR. : The short answer is the Fourth Amendment does not prohibit warrantless searches. It prohibits only unreasonable searches and the problem has always been to determine what the word unreasonable means in a given context.

MR. : Yeah, when you say that I don't mind anyone listening to my phone conversations, let the government do it, then I think you might as well say I don't mind the government coming into my house, leave the door open cause I have nothing in here to hide, then you leave everything up to the discretion of the government as to what they do with your rights and liberties.

MR. : That is a form of argument called a reductio ad absurdum, and of course you can always come up with extreme examples. You did a little bit earlier, and Bill did, Stuart did and Bill did when he brought up the internment of the Japanese Americans.

Yes, you will have abuses of discretion. That's what discretion allows for. You hope you don't have too many. But when you give discretion to an agent, you know you're running a risk of abuse.

The alternative of sorting people out by category is what we see at airports today where babies and little old ladies are surveilled and, you know, that's the way to do it, with punctilious attention to the equal protection clause.

MR. : I'll add an editorial comment that doesn't necessarily disagree with anyone. It's always seemed to me that as between the Padilla case, which you mention, and an American citizen grabbed in Detroit, held for more than a few years--

MR. : Chicago.

MR. : --Chicago--held for more than two years with no lawyer, no judge, no nothing, to be interrogated forever, that that's what Congress should have gone berserk about, not whether they're listening to our phone calls, and both of them raise civil liberties problems, but I think most of us would far rather risk them listening to our phone calls than risk being thrown into that cell without due process forever.

MR. : Absolutely; absolutely.

MR. : And Andrew, you might address this. I think your French tourist example is perfect but yes, if we know it's Mohammed Atta, in advance, we know it's him or Moussaoui, but once you loose the power to grab any foreigner in the United States who just might possibly be an agent of al Qaeda, it's a pretty dangerous power, isn't it?

MR. McBRIDE: Well, I mean, I think the Padilla case, I agree with you on that. Padilla is Milligan, you know, with a few trimmings around the edge, you know, and that is a case, you know, where--and in terms of protection of civil liberties, I think there are a couple things you can say.

One, you know, the internment of U.S. citizens is always subject to challenge by habeas corpus, always, and in fact Kirin and Yamashita teach that even foreign nationals can bring the habeas corpus action, and now we have some regularized procedure under the new act, but under the DTA for review, but they can always at least say look at the jurisdiction of this tribunal.

In other words, take a look as to whether or not I am properly before a military tribunal as an unlawful combatant. I think President Bush, having limited it to foreign nationals, and having set up this screening process, tells us, you know, it's not like Milligan. He's not picking people up off the street, and I think Roger's point is well-taken. That when you charge an executive with the conduct of war, you have to give him some discretion, and the keys to the kingdom, I agree, in a time of war there's danger of abuse.

But don't forget. Those keys only last for eight years and then someone else gets them. And the president defends the whole body politick but he answers to the whole body politick.

So you have a chance, if you think this guy has gone overboard and you don't agree that he's protected you from another 9/11 or he's doing things that are wrong, to take him out, or now he's got to go out, take his party out.

The thing I would say about the NSA wiretapping is it is my firm hope that Congress will regularize it to some extent. I think Congress has a role in oversight and reporting the way they do in Title 3. It's important that Congress know what the executive is doing, and that eventually, when it's not, no longer classified, that the people know what the executive is doing.

I believe that as long as those calls are limited to outgoing and incoming, that touch another country, it is lawful in the same way that border searches are different.

But I think if the executive started to monitor calls from one domestic point to another in the United States, that would be a very different animal. And Congress' oversight is necessary to ensure that that's not going on.

MODERATOR: I'm sorry, you're next.

QUESTION: Me?

MODERATOR: Go ahead.

QUESTION: I had just moved back to D.C. and I've been told by all of my friends the atmosphere is profoundly changed. Everything is partisan, much embittered. So I have a modest suggestion for the panel and my friends on it.

If, based on reading the paper this morning, that agreement was getting close on a measure where Congress would acknowledge a president's authority to do some surveillance, I wonder whether this is really going to happen. Or I have a slight suspicion that some of the politicians really don't want an agreement. And maybe they want the issue--to let this sucker stew in his juices, or on the other side, we want to show that we're strong.

But let's say that Andrew, our lawyer, could draft a little agreement here amongst this panel of learned scholars. Lou, my friend, would you sign it if agreement here were saying, okay, let's compromise, come out with a plan, give the President a little authorization? If we, sort of the talking heads, the gurus, could agree on this, maybe the politicians might. Would you be willing to accept a compromise to resolve the issue?

MR. FISHER: Depends on what the compromise is, Bruce. And it depends on what Andrew comes up with. We don't even know what's going on.

When Attorney General Gonzalez was asked about the NSA program, he said, sorry, can't get into operations. So we don't even know what we're talking about--no one does. Until we do that, compromise is hardly the word to be used here in the dark. Unless you can shed some light as to what the government is doing--

MR. TAYLOR: Andrew, in 30 seconds or less, does it really need to be as secret as it is? I assume you know something about what's going on. You don't have to tell us, but is all of this stuff about, oh, if it weren't such a secret it would be ruined. Should we be--

MR. MCBRIDE: I think there is something to that. Yes, I mean, how patterns are selected and as Roger was suggesting, data today travels in packets. You know, that's the way the Internet is. There are ways to search for markets on packets that identify them in certain ways. And certain phone numbers might be identified in certain ways or even exchanges that--you know it's hard--that's not to say that Congress couldn't--I mean, the evidence that you present in a FISA warrant, which I've asked for, is itself confidential, but FISA doesn't have to be. You could build a structure, I think, that could allow the President.

And certainly the broad outlines of the program are out there. And the idea, I think, a prophylactic monitoring beyond FISA-type monitoring of the

specific individual. And that's what I get back to is that FISA is not useful here. Everyone is saying, oh, FISA, FISA, FISA and FISA prohibits this.

Well, FISA doesn't prohibit this because it doesn't address it. Honestly, FISA doesn't address broad prophylactic monitoring based on intelligence data over 700 phone numbers for a particular area. It just doesn't give me a tool to do it.

So how can you argue expressio unius from it or that prohibits it?

QUESTION: Could I make a follow-up on this? When I was in State and Justice I had Cold War security clearance and I saw stuff that makes it clear to me that this isn't the kind of stuff you want to have out in the public. You don't even want to have this among many Members of Congress. Because as we all know in this town, Congress leaks like a sieve.

And I go back to Benjamin Franklin and the other four members of the Committee on Secret Correspondence, 1776. They agreed unanimously that they could not inform their colleagues in the Continental Congress. And I quote, "We find by fatal experience that Congress consists of too many members to keep secrets."

It seems to me that there reaches a point, at some point in government, where the people you give discretion to just have to be trusted. There is oversight to be sure. The President informed eight members of Congress of this, and it leaked. Now we don't know if it came from Congress or it came from the administration itself. There's an investigation going on right now.

MR. : It leaked from the administration, right?

QUESTION: Well, you know that? Gee, that's good. We can--

MR. : Where did the New York Times get it from? It being St. Patrick's Day--

QUESTION: That's exactly what's under investigation, is it not?

MR. TAYLOR: Given that it's St. Patrick's Day, I think we need question from somebody with a green tie.

MR. ; This guy was right about partisan--

MR. TAYLOR: Sir?

QUESTION: Thank you. David Skaggs, a former part of the sieve.

[Laughter.]

QUESTION: And a member of the House Intelligence Committee for six years.

A question I think Andrew has already responded to it, but I'm interested in Roger's and other's views. It has to do with whether, as a prudential matter, the administration ought to seek an authorization either within or outside of the FISA authorization, but as a prudential matter.

As a constitutional matter, whether the Congress has the authority to exercise in this realm, or whether you are saying that your notion of plenary authority precludes the exercise of Congress' role in this area at all. And then I think there were implications anyway beyond the question of prudence and

authority of whether Congress is competent. That is, are the technological dimensions of this so daunting that it defies legislative intervention?

My familiarity, which is modest, but real within NSA, is we shouldn't be cowed by the very real technological dimensions of it from thinking that it's sort of beyond intelligent legislation.

MR. PILON: No, that's a very good concluding question. And the invitation to distinguish and separate myself from some of the things that Andrew said, it's my judgment that if you take a--if you're going to be a stickler in the administration and take a strict position, you're going to stand up to the Congress with respect to those powers that you have that are plenary as distinct from concurrent. And that distinction has to be preserved.

At the same time, having said that, it is prudent, as you suggested, indeed, foolish not to, go to Congress to seek--and I wouldn't use the word authorization, because that gives the game away, so-to-speak--to seek Congress' concurrence with what it is you propose to do assuming time is not of the essence.

And it's prudent because a country that is contemplating going to war as the first President Bush did over some period of time before the first Middle East war, it is simply prudent to have the country behind you when you undertake something of this kind.

And so, what is so frustrating about this administration is the--and I'll use the word--arrogance that it so often exhibits with respect to the role of Congress in this. To be sure, it may not be an authorizing role, but it certainly is a

role in which if the Congress moves against you, its power of the purse will stop you dead in your tracks. And you don't want that to happen.

MR. MCBRIDE: If I could, I think there's a little more than prudence involved here. I tend to agree with you.

The reason I do is, look at Title 18, right, on the criminal side, which codifies the authority to engage in wire tapping in the criminal realm. And as a federal prosecutor, I used that statute often.

As was pointed out, with U.S. citizens, there are 4th Amendment rights at stake here. And the Congress does have the power, I think, to some extent to say, here is our sense of the balance of the 4th Amendment rights versus the power of the executive in this area.

I think you would have to argue that Title 3 of Title 18 of the United States Code is unconstitutional in its entirety.

MR. PILON: No, no, because--

MR. MCBRIDE: Why? Because it's domestic?

MR. PILON: Not because it's domestic. Because it is pursuant to other authorities that Congress has, for example, under the commerce clause, to regulate interstate commerce therefore and have a criminal code pursuant to that.

But there is no general police power on the part of the federal government, as you know. That's why murder, rape and robbery are not federal crimes.

MR. MCBRIDE: Congress can't codify the right of U.S. citizens under the 4th Amendment regarding the privacy of their communications against intrusion by executive branch officers?

MR. PILON: I--

MR. MCBRIDE: My God, [inaudible] to the right by CATO?

MR. PILON: No, no, no, listen.

[Laughter.]

MR. PILON: Listen--

MR. MCBRIDE: I'll never hold another position in a Republican administration.

MR. PILON: No, no--

MR. MCBRIDE: I'm finished. Stop the tape.

[Laughter.]

MR. PILON: No, no.

[Laughter.]

MR. PILON: The idea that alluding to here obviously is the over-criminalization, in particular, the over-federal criminalization of the law.

I mean, the idea isn't that wherever there is wrong in the country, it is therefore subject to being called a federal crime. We have these cases come before the Supreme Court all of the time. The Dewey Jones case back in 1998 involved whether residential arson could be made a federal crime.

MR. MCBRIDE: Well, let me say this, aren't these communications interstate commerce? It's a conduit of interstate commerce.

MR. PILON: This is exactly what David Cole (ph) said the other day when I asked him, where's the authority to do this. And he goes to the--under the commerce clause of course--

MR. MCBRIDE: Wait a minute.

MR. PILON: --where Congress can regulate anything.

MR. MCBRIDE: No, no, hang on a second. Now you're straw-manning. This is a conduit of interstate commerce. Those wires are like navigable waterways. So don't parody--

MR. PILON: Okay. No, no.

MR. TAYLOR: Let's not get into navigable waterways.

[Laughter.]

MR. TAYLOR: No, once you get Roger started on navigable waterways, we're in trouble.

[Laughter.]

MR. PILON: That's--

MR. : [Inaudible] who knows something about the commerce clause.

MR. PILON: Well, the navigable waters is the case right before the Supreme Court.

MR. MCBRIDE: No, no, wait a minute, Roger. This is not the FDA with pills made in State A moving in commerce to State B. This is an instrumentality of commerce.

MR. PILON: Absolutely right, absolutely right.

MR. MCBRIDE: And Congress can say the privacy of communications on that instrumentality is important to its use.

MR. PILON: Absolutely. Having said that--

MR. MCBRIDE: So I think the power is there. I think I beat you on the power.

MR. PILON: I agree--no, no, I agree--

MR. TAYLOR: You guys can have lunch over this.

[Laughter.]

MR. TAYLOR: One more minute to talk. And then Brookings' own Bill Galston will synthesize everything.

MR. : Okay, let's talk about what Andrew--the power of the purse, yes, is there. But it's not an instrument that is very useful on these matters we're talking about.

MR. : [Inaudible] more.

MR. : If you want to--I want to get exactly to that. If you want an example of where Congress used the power of the purse, it was in 1973 when they cut off funds. And it was vetoed by President Nixon. And now with a veto, you

need two-thirds in each house, which they couldn't get. And they finally had an accommodation of 45 more days of bombing, whatever it is.

But for Congress to use the power of the purse in the face of a presidential veto, that led to a court case up in New York by Judge Judd. He said, it cannot be the meaning of the Constitution that a President can do what he likes in terms of initiating war and doing things and Congress has to use the power of the purse. And all he needs is one third plus one in one house to prevail.

And it cannot be the [inaudible]. So I think there's certain limitations.

Now John Ewe (ph) is the one who will say, Congress has the power of the purse. But it's very, very limited on these types of confrontations.

MR. TAYLOR: Bill, the synthesis, the one-minute synthesis, please.

MR. GALSTON: Well, there is no one-minute synthesis. But I will take the opportunity, at least, to respond to the question asked.

I think we can all agree--we all have agreed that it would be prudent for the administration to come to the Congress and seek an agreement on the updating and revision of FISA.

But in my judgment--and here I associate myself with this part of Team A and opposed to the more distant part of Team A--it is more than an issue of prudence. It is also, in my judgment, an issue of constitutional appropriateness.

We have all been urged to read the sealed case. I've done so. And at the end of the day, on the subject of correction, the famous sealed case upheld the constitutionality of FISA.

MR. : No.

MR. GALSTON: It did.

MR. : No, it didn't. That was not the issue before the court.

MR. TAYLOR: Sounds like you ought to go to lunch too.

MR. GALSTON: So the long and the short of it is, I think that there is a very, very venerable constitutional tradition which antedates the Iran-Contra affair, antedates Vietnam, antedates progressivist theory and legislation to the effect, that as Madison said in Number 47, there is an intermixing of powers and functions in the Constitution, such that zones of overlap--what I'm calling concurrent jurisdictions are established. In my judgment, the cases before us represent an example of precisely that kind of concurrent as opposed to plenary jurisdiction.

And I would not, therefore, sign the agreement that Bruce is urging upon us, if in signing that agreement, I were asked to concede that the role of Congress in this matter were merely advisory, merely commendatory, merely applauding or ratifying something that the executive branch could surely do in the teeth of a congressional utterance to the contrary.

That is my bottom line.

MR. TAYLOR: Thank you.

I think we're over time. The one thing I'd like to observe we seem to have consensus on, and I hope it holds, is that nobody has relied on President Nixon's statement that if the president does it, then it is not illegal.

MR. : Right [inaudible].

MR. TAYLOR: With that, before somebody jumps on that one, thank you to all of our panelists. And thank you for coming.

[Applause.]

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