



THE GEORGETOWN JOURNAL OF
LAW & PUBLIC POLICY

PANEL DISCUSSION

Federalism: Executive Power in Wartime

*from the Federalist Society's 2006 National Lawyers'
Convention*

PANEL DISCUSSION

Federalism: Executive Power in Wartime

*from the Federalist Society's 2006 National Lawyers' Convention*¹

PANELISTS:

Prof. Richard A. Epstein, University of Chicago Law School, Hoover Institution

Dr. Roger Pilon, Vice President, Legal Affairs, Cato Institute

Prof. Geoffrey R. Stone, University of Chicago Law School

Prof. John C. Yoo, University of California, Berkeley, Boalt Hall School of Law

Moderator: Hon. William H. Pryor Jr., U.S. Court of Appeals, Eleventh Circuit

Friday, November 17, 2006
Washington, DC

JUDGE PRYOR: The topic for this panel is, if not the most heated and important debates of constitutional law, certainly one of them: Executive Power in Wartime.

President Bush has asserted that he has far-reaching executive powers based on Article II of the Constitution, including war-making powers not restricted by act of Congress and not subject to the oversight of the federal judiciary. The President has, for example, approved surveillance of enemy communications that begin or end within the territorial limits of the United States without first seeking warrants from the Foreign Intelligence Surveillance Court under the Act that created it.²

In *Hamdan v. Rumsfeld* this summer, the Supreme Court ruled that detainees of the United States military in Guantánamo, Cuba are entitled to habeas corpus review of the detention.³ The President and Congress recently responded to that decision by stripping the courts of habeas jurisdiction and providing exclusive review of the military tribunal on enemy combatant status in the United States Court of Appeals for the D.C. Circuit.⁴

1. © 2007, Federalist Society for Law and Public Policy. This article is adapted from a panel discussion held on Friday, November 17, 2006 in Washington, D.C.

2. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. § 1801-11 (2000)); see Press Release, The White House, Setting the Record Straight: Democrats Continue to Attack Terrorist Surveillance Program (Jan. 22, 2006), available at <http://www.whitehouse.gov/news/releases/2006/01/20060122.html>.

3. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 (2006).

4. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified at 10 U.S.C. §§ 948a-948d).

Has the President acted legally? Has Congress exceeded its constitutional powers? What role, if any, should the judiciary have in mediating these disputes? How best should the balance of power between the three branches be struck? For a discussion of these issues, the Federalist Society has assembled a distinguished panel of experts. I will introduce each panelist in the order in which he will speak, and each will speak for about 10 minutes before we open it up for some discussion among the panel, and then for question-and-answers from the audience.

To my far left, Richard Epstein is the James Parker Hall Distinguished Service Professor of Law at the University of Chicago, where he has taught since 1972. He has also been the Peter and Kirsten Bedford Senior Fellow at the Hoover Institution since 2000, and presently is the director of the John M. Olin Program in Law and Economics. He's written numerous books and articles on a wide range of legal and interdisciplinary subjects. He's a graduate of Columbia College, Oxford University, and the Yale Law School.

To his right, Roger Pilon is Vice President for Legal Affairs at the Cato Institute, where he holds the B. Kenneth Simon Chair in Constitutional Studies. He's the founder and director of Cato's Center for Constitutional Studies and the publisher of the *Cato Supreme Court Review*. Dr. Pilon holds a bachelor's degree from Columbia University, a Masters and Ph.D. from the University of Chicago, and a law degree from the George Washington University School of Law.

To my right, Geof Stone is the Harry Kalven, Jr., Distinguished Service Professor of Law at the University of Chicago. A member of the law faculty since 1973, Mr. Stone served as dean of the law school from 1987 to 1994 and provost of the University from 1994 to 2002. After graduating from the University of Chicago Law School, he served as a law clerk to Judge J. Skelly Wright of the U.S. Court of Appeals in the D.C. Circuit, and then to Justice William Brennan of the Supreme Court. His most recent book is *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*.

John Yoo, to his right—our last speaker—is a professor of law at the University of California Berkeley School of Law, Boalt Hall, where he has taught since 1993. From 2001 to 2003, he served as a deputy assistant attorney general in the Office of Legal Counsel of the Department of Justice, where he worked on issues involving foreign affairs, national security, and separation of powers. Professor Yoo received his B.A. *summa cum laude* in American history from Harvard University. In law school, he was an articles editor of the Yale Law Journal. He clerked for Judge Laurence Silberman of the U.S. Court of Appeals for the D.C. Circuit. He joined the Boalt faculty in 1993 and then clerked for Justice Clarence Thomas of the Supreme Court. He's the author of *The Powers of War and Peace: Foreign Affairs and the Constitution After 9/11*, and the forthcoming *War by Other Means: An Insider's Account of the War on Terror*.

Please join me in giving a warm welcome to our first speaker, Professor Epstein.

PROFESSOR EPSTEIN: Ten minutes is what our time is, right?

JUDGE PRYOR: Yes.

PROFESSOR EPSTEIN: It is a very great honor to be here to speak about a topic that necessarily creates deep divisions even within the ranks of the Federalist Society. This topic is not one of the standard issues that I usually raise and discuss in these meetings. It has nothing to do with the distribution of powers between the national government and the states, where my own view is that Congress's power is sharply circumscribed. In the context of war powers and foreign affairs, the constitutional text and its complex history reveals very serious tensions. Our question is how best to resolve them.

As a general matter, let me state this conclusion: looking to the constitutional text, it seems clear to me that the President's claim of extensive powers under Article II of the Constitution is woefully overstated and generally insupportable. If you next look at the history, it shows that the President has had in practice greater power and freedom of action than is given to him under the Constitution.⁵ So we have here one of these classic difficulties of trying to reconcile a text, which seems to be strongly weighted in favor of Congress with a series of practices in which the Executive has asserted a bit more power than the Constitution, in strict terms, authorizes. Resolving that tension between text and practices raises, I think, an extremely difficult problem. In this short talk, I shall spend most of my time worrying about the structuralist and originalist arguments, and worrying less about the history of presidential activity after the signing of the Constitution.

One of the constant themes of the Federalist Society has always been, perhaps a little bit too slavishly, a belief in originalism, original intent, basic constitutional design, and structure. I have no particular objection against this approach as a methodology, so long as we recognize that nothing you can say by way of abstraction will excuse you from the task of figuring out very closely what a particular document says and how its various parts move together. And in looking at this problem, the general principle of separation of powers and checks and balances, which animates the entire Constitution, is of enormous importance.

The Founders of the Constitution, I think, all started with the same position, that if you have a safe that contains valuables, like the liberty of the people and their security, you don't want to give all the keys to the safe to a single person. What you want to do instead is to figure out how to divide the power in ways that are consistent and coherent and, then, to create checks in each branch of government over what can be done in another branch. A general endorsement of

5. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding President Roosevelt's Executive Order creating internment camps for American citizens of Japanese ancestry during World War II).

the twin principles of separation of powers and checks and balances does not answer the specific question of exactly what division and what checks apply in a particular setting. In order to answer that particular question, you have to patiently sift through the various provisions to see how they interlock.

In tackling that interpretive issue, in light of these foundational principles, we should assume that the Framers sought to put together a coherent set of procedures. Accordingly, we should be suspicious of any claims that say that, "a-ha, in organizing our constitutional position, the Framers left a great deal of flexibility how these powers were allocated." More concretely, we should be suspicious that the Framers would have authorized more than one path from peace to war under the Constitution. In my own view, that supposed flexibility is a recipe for disaster. In trying to figure out how the Constitution works, you want to stress consistency and coherence first, and only thereafter worry about flexibility in the joints, which should never operate as your primary mode of analysis.

In this point, I think the most instructive point is the sequence of the Articles of the Constitution. Article I comes before Article II, which comes before Article III. To address the issue of war powers, it is best to follow that Constitutional sequence down. On the issues of war and peace, it's clear that the explicit powers that are given to Congress are very expansive and comprehensive. They cover military operations in general, and I disagree with any formulation of the question that holds that any powers that the Congress has over the Executive are less in wartime than they are in time of peace. There is absolutely nothing in the Constitution which seems to change the balance of powers between the various branches as a function of whether the nation is at peace or at war.

The basic architecture of Article I gives, as we all know, Congress the power to declare war.⁶ The word "declaration" in this particular context conveys the view that the nation has one way of switching from a state of peace to a state of war. Owing to the gravity of the issue, that choice—war or peace—is quintessentially a collective national decision that should not be lightly made or made by any single person. If you go further down the list of powers in Article I, section 8, you also discover that Congress has the power "to make rules for the government and regulation of the land and naval forces" and that explicit power applies both in peace and war.⁷ The questions, what do we mean by "rules" or by "government" or by "regulation" are, I think, always subject to some degree of dispute at the edges. Nonetheless, any general proposition about how the armed forces should conduct certain kinds of military activities in either peace or war seems to fall squarely within congressional power, even though the execution of these rules in particular cases is surely left to the President under

6. U.S. CONST. art. I, § 8, cl. 11.

7. *Id.* art. I, § 8, cl. 14.

his Article II powers.⁸

And if you read still further, there's a very interesting procedure that provides that Congress shall have the power to designate the rules "to provide for the calling forth of the militia to execute the Laws of Union, suppress Insurrections, and repel Invasions[.]"⁹ There is nothing in the Constitution which, absent congressional authorization, allows the President in his commander-in-chief role to call the militia into active service no matter how great the peril. And as Article II is worded, the President becomes their commander-in-chief when they're called into active service. The passive voice in Article I is designed to indicate that he does not have unilateral power to make the militia a federal force—a big issue at the time of the founding.

Article II has a slightly different configuration. It says, of course, that the President shall be the commander-in-chief of the army and the naval forces and the militia when called into actual service.¹⁰ It does not use the word "power" to describe his position. John Yoo and I have had this ongoing debate as to whether the use of the words "shall be" as opposed to the use of the words "have the power" has any particular significance.¹¹ In this particular context, I think that the difference matters, and for this reason: if the Constitution gave the President a commander-in-chief "power," then that particular power would give him the ability to initiate conflicts on his own motion. That outcome creates a genuine contradiction in the constitutional structure, which is not required (or welcome) under any views of separation of powers or checks and balances.

Think of it this way: Congress has the power to declare war, yet the President has the power to make war without bothering to wait for the congressional declaration. That manifest tension is resolved against presidential power by noting that the President's role as commander-in-chief does not give him any power, express or implied, that is in outright conflict with the power that the Constitution has already vested in the Congress.

So what then precisely is the role of the commander-in-chief? Why is that portion of Article II so important in the overall constitutional scheme? I think there are many reasons why the President's role is absolutely vital, and none of them, I think, support the extensive claims of executive power made by President Bush. One vital point is that the President's commander-in-chief power subjects the military to civilian control. There is no general in the Army who can outrank the President of the United States. So our long and salutary

8. See, e.g., *Ex parte Milligan*, 71 U.S. 2, 139 (1866) (Chase, J., dissenting) ("The power to make the necessary laws is in Congress; the power to execute in the President.")

9. U.S. CONST. art. I, § 8, cl. 15.

10. *Id.* art. II, § 2, cl. 1.

11. *Id.* ("The President shall be Commander in Chief of the Army and Navy of the United States . . ."); *id.* § 2, cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . ."); see generally Richard Epstein, *Executive Power, The Commander in Chief, and The Militia Clause*, 34 *HOFSTRA L. REV.* 317, 320-21 (2005); John C. Yoo, *War and the Constitutional Text*, 69 *U. CHI. L. REV.* 1639, 1674-76 (2002).

tradition of making the military subservient to effective civil control is, in fact, a direct and vital consequence of Article II.¹²

Article II also gives the President a key monopoly over that particular function. Congress can do nothing consistent with the framework of the Constitution to make somebody else the commander-in-chief of the military. Congress cannot, by any form of legislation, sidestep the constitutional authority of the President to discharge this key function. Both of these key consequences are wholly consistent with the view that the President doesn't have the power, expressly or impliedly, to declare war or to start international conflicts on his own initiative.

In understanding this structure, it is also useful to reflect on contemporary understandings of the division of power. The single most important document for explicating the commander-in-chief role is, I think, Federalist Paper No. 69.¹³ It contains very explicit language about the President as the first and foremost of the generals and admirals.¹⁴ Even so, he's still a general and he's still an admiral. Federalist 69 also explicitly states that the President, as commander-in-chief, does not have the broad powers of the English Kings or

12. See U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .").

13. THE FEDERALIST NO. 69, at 349-50 (Alexander Hamilton) (Bantam Books ed., 1982). Federalist 69 argues:

The President is to be the commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. He is to have power to grant reprieves and pardons for offenses against the United States, *except in cases of impeachment*. . . . In most of these particulars, the power of the President will resemble equally that of the king of Great Britain and of the governor of New York. The most material points of difference are these:—*First*. The President will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union. The king of Great Britain and the governor of New York have at all times the entire command of all the militia within their several jurisdictions. In this article, therefore, the power of the President would be inferior to that of either the monarch or the governor. *Second*. The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature. The governor of New York, on the other hand, is by the constitution of the State vested only with the command of its militia and navy. But the constitutions of several of the States expressly declare their governors to be commanders-in-chief, as well of the army as navy; and it may well be a question, whether those of New Hampshire and Massachusetts, in particular, do not, in this instance, confer larger powers upon their respective governors, than could be claimed by a President of the United States.

Id. Note that Hamilton does not use the word "power" to describe the commander-in-chief. He does use it in the next clause dealing with reprieves and pardons. On both issues he tracks the constitutional text precisely.

14. *Id.* at 350.

even the powers of the governments in the various states.¹⁵ And the word they use to describe this position is one of inferiority.¹⁶

So what does that, then, tell us about how well the President fares on his various claims of inherent executive authority by virtue of being a unitary executive? Well, the first point is you have to distinguish very sharply between the word 'unitary' on the one hand and the talk about "inherent Presidential authority" on the other. There is a unitary Executive, i.e. only one President. Our Constitution does not call for two consuls as they did in Rome. There is only one leader with these powers; that's probably wise. But the idea that the unitary executive confers vast residual powers on the President—powers that in fact explicitly contradict those powers that the Constitution has given to Congress—seems to me to be very dangerous. In looking at something like FISA (Foreign Intelligence Surveillance Act),¹⁷ whether one likes it or not—basically I'm moderately sympathetic with its general scheme—one has to come to the conclusion that those statutory requirements count, at the very least, rules and regulations that govern the operation of the land and military forces. In addition, they certainly address the scope of congressional power in dealing with foreign commerce. Taken as a whole it becomes very difficult to conclude that there's no congressional authorization to limit the President in these ways.

In addition, it is instructive to look at the various cases in which the President has operated on his own initiative. Virtually all of them did not fly in the face of a statutory prohibition on presidential power, which is a very different world from the one we have today, now that Congress has decided to occupy the field.¹⁸

In working through this analysis, there will always be kinds of loose points based on our constitutional history. It's not perfectly clear, for example, what it is that we mean by a declaration of war. We often use the term "authorization" of military conflicts so as to give some flexibility as to when or whether we engage in war; I think that approach is perfectly consistent with the constitutional scheme, because the authorization means that the President cannot act unilaterally, so that a key check on its power is preserved. In addition, there are certain some kinds of low-level military activities that probably don't rise to the level of being war. I do not think that the Constitution demands declarations of war before trying to rescue individuals taken prisoner overseas and similar kinds of low-level interferences. But nonetheless, we can say with complete confidence that the major claims of untrammelled and unchecked executive power are indefensible if the President may decide to bomb Russia today, such that the only thing that Congress can do, as John Yoo suggests, is to withhold appropriation in the next two years. That distribution of powers strikes me not

15. *See id.*

16. *Id.*

17. Pub. L. No. 95-511, 92 Stat. 1783 (1972) (codified as amended at 50 U.S.C. §§ 1801-71 (2000)).

18. *See id.*

as an implementation of our constitutional scheme, but as its total perversion.

Thank you.

DR. PILON: Our subject today is executive power in wartime, and the context, of course, is the War on Terror the United States has waged since 9/11 and the President's assertion of executive power that has led many to charge "Imperial Presidency." Let me say at the outset that I'm less concerned to defend the Bush Administration's use of its powers than the powers themselves. Because I'm going to defend a fairly robust conception of executive power in foreign affairs, I need also to add that I'm speaking here for myself, not for the Cato Institute, where several of my colleagues take a different view.¹⁹

Moreover, I'm going to focus on just two aspects of the question: the President's power to wage war,²⁰ and the administration's NSA surveillance program.²¹ In the few minutes I have I'm going to be able simply to sketch the arguments, of course.

I want to begin, however, with the context, because how we view what's happening goes far, I believe, toward explaining why the debate has been so intense. Are we at war? By historical standards it doesn't seem so. Yet the attacks of 9/11, killing 3000; the bombings around the world since then, from Bali to Great Britain; and the threats that arise daily are hardly ordinary crimes. Around the world in recent years, tens of thousands have been killed by the deliberate acts of Islamic terrorists.

The great question before us, then, is whether we're engaged in war, or mere law enforcement. I suggest that how you come down on that will largely determine how you see the administration's actions. Were we more clearly at war, the questions would be far fewer. But we're not. And to cloud matters even further, the enemy today is in our midst, as 9/11 demonstrated, not in uniforms abroad. That makes waging war all the more difficult and drawing neat legal lines all but impossible. Ask the Israelis.

Yet if this is war, as I believe it is, then our aim cannot simply be to prosecute terrorists *ex post*. We must prevent their acts *ex ante*, just as MI-5 did recently with flights out of Heathrow.²² But in an asymmetrical war, how do we do that consistent with a Constitution dedicated to liberty and limited government?²³ I

19. See, e.g., GENE HEALY & TIMOTHY LYNCH, CATO INSTITUTE WHITE PAPER, POWER SURGE: THE CONSTITUTIONAL RECORD OF GEORGE W. BUSH (2006), available at http://www.cato.org/pub_display.php?pub_id=6330.

20. For a fuller discussion, see Roger Pilon, *The War Powers in Brief: On the Irreducible Politics of the Matter*, 2 CARDOZO PUB. L., POL'Y & ETHICS J. 49 (2003).

21. See Roger Pilon, *Executive Checks on the Imperial Congress*, 7(2) THE POLITIC: THE YALE C. J. POL. 14 (Summer 2006).

22. See "Airlines Terror Plot" *Disrupted*, BBC NEWS, Aug. 10, 2006, http://news.bbc.co.uk/2/hi/uk_news/4778575.stm.

23. Given the views I will be setting forth here, I should make it clear that I have defended the liberty and limited government understanding of the Constitution repeatedly over the years, and that continues to be my understanding. See, e.g., *Guns and Butter: Setting Priorities in Federal Spending in the Context of Natural Disasters, Deficits, and War: Hearing Before the Subcomm. on Federal*

submit that the answer is closer at hand than many have noticed. Quite simply, in foreign affairs, unlike in domestic affairs—and here is where I part company with Richard—the Constitution is deliberately underdetermined, and it bows to the executive.

That underdetermination means that neither side here will be able to speak apodictically. Nevertheless, as between executive and congressional supremacists, the weight of the evidence, I believe, is on the side of executive supremacy, which brings me to my central thesis: The efforts by Congress in recent years and courts of late to insinuate themselves into foreign affairs are fundamentally at war with the theory and history of the Constitution, to say nothing of our security. Shocking as this may be for a room full of lawyers to hear, foreign affairs are fundamentally political, not legal.²⁴

Let me develop that thesis first, and very briefly, with the most basic foreign affairs power—the power to make or wage war—where the fundamental constitutional question is: May the president wage war absent a congressional declaration of war? In the state of nature, John Locke tells us, where everyone not specially related to us is a foreigner, each of us has the “Executive Power,” the power to defend his rights by whatever means may be necessary and proper for self-preservation.²⁵ That is the power we yield up to government in the original position, dividing it in a way that will ensure its effective use, on one hand, while avoiding abuse, on the other.

We did that through our Constitution, of course, starting with the vesting clauses, which tell us that Congress’ powers are enumerated, whereas the executive and judicial powers are plenary, save where they are reserved, shared, or otherwise delegated. No part of Locke’s Executive Power is lost, however. The only question is where the various parts rest. Thus, the power to declare war rests with Congress.²⁶ But that’s not the same as the power to make or wage war. Those are discrete powers, as the theorists of the 17th and 18th centuries understood.²⁷ Declaring war puts the nation in a state of war. It is a juridical power. British kings had the power both to wage and to declare war. They often declared war in the midst of war, moving the nation from an imperfect to a perfect war.

Financial Management, Government Information, Federal Services, and International Security of the S. Comm. on Homeland Security and Governmental Affairs, 109th Cong. (2005) (testimony of Roger Pilon, Vice President for Legal Affairs, B. Kenneth Simon Chair in Constitutional Studies, Director, Center for Constitutional Studies, the Cato Institute), available at <http://www.cato.org/testimony/ct-rp102005.html>, reprinted as ROGER PILON, *THE UNITED STATES CONSTITUTION: FROM LIMITED GOVERNMENT TO LEVIATHAN*, 45(12) (2005). Properly understood, there is no inconsistency between government limited in scope but armed with robust powers to secure the liberty of citizens against both internal and external threats.

24. I develop that point more fully in Roger Pilon, *Foreword: Politics and Law, Again*, 2006 CATO SUP. CT. REV. vii.

25. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* ¶ 13 (Peter Laslett ed., 1960) (1690).

26. U.S. CONST. art. I, § 8, cl. 11.

27. See JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 143-52 (2005).

The Framers understood that distinction too, as the slim record shows. During the convention, they famously changed the grant to Congress from the broader power to “make” to the narrower power to “declare” war.²⁸ What, then, became of the power to make war? It remained where it always was, as part of the Executive Power that we yielded up, to be exercised by the commander-in-chief.

Now to be sure, congressional supremacists often point to Madison’s convention notes, which say that he and Elbridge Gerry moved “to insert ‘declare,’ striking out ‘make’ war; leaving to the Executive the power to repel sudden invasions.”²⁹ But if “sudden invasion” was meant to limit the executive, it is an odd instrument for that end. Moreover, there is no shortage of evidence cutting the other way, such as Madison’s famous response to Patrick Henry at the crucial Virginia ratifying convention: “The sword is in the hands of the British King. The purse is in the hands of Parliament. It is so in America, as far as any analogy can exist.”³⁰

Thus, Congress has the power, if it wishes, to restrain a president bent on war, but the Declare War Clause is not the source of that power. It is a blunt instrument, unsuited for the purpose, and fraught with danger, too—be careful what you ask for.³¹ And history demonstrates its limited use. Over the past 200 years, presidents have sent troops into hostilities abroad over one hundred times, yet on only five such occasions has Congress declared war.³² Are we to suppose that those other occasions were all *ultra vires* and unconstitutional?

Courts addressed that question fairly clearly in 2000 in *Campbell v. Clinton*.³³ War is a consummate *political* affair. That is why presidents *ought* to go to Congress—not to get authorization, which they don’t need, but to get the support of the people. Of course, the last thing we need is judges telling us that an invasion was not “sudden enough” to warrant a presidential response. We are not there yet, fortunately.

But if presidents may wage war without a declaration of war, and have throughout our history, they surely must have the implicit power to gather the

28. 2 THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA, REPORTED BY JAMES MADISON 418-19 (Gaillard Hunt & James Brown Scott eds., 1987).

29. *Id.*

30. 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1282 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

31. Indeed, numerous federal statutes kick in under a formal declaration of war, enabling the government to requisition ships, abrogate contracts, and do much else that would otherwise not be allowed. *E.g.*, 50 U.S.C. § 82 (2006) (authorizing the creation of obligatory contracts for ships or war material on the President’s terms, the modification or cancellation of existing contracts, and the requisition of factories for government use); *see generally* 78 AM. JUR. 2D War § 6 (2002) (outlining the effects of a declaration of war).

32. RICHARD F. GRIMMETT, CONG. RESEARCH SERVICE, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD 1798-2004 (Oct. 5, 2004), *available at* <http://www.history.navy.mil/library/online/forces.htm>.

33. 203 F.3d 19 (D.C. Cir. 2000).

intelligence necessary to do that. We come, then, to my second concern: the NSA surveillance issue. Let's note first that foreign intelligence gathering is a 'round-the-clock affair, done during war and peace alike. Every president since George Washington has engaged in this practice. Indeed, the duty to do so is entailed in the oath of office.

In 1978, however, reacting to certain abuses, Congress insinuated itself into the matter when it enacted FISA, the Foreign Intelligence Surveillance Act,³⁴ a complex scheme for regulating that presidential duty. Judge Richard Posner has well stated the practical problems with FISA: It may serve, he said, "for monitoring the communications of *known* terrorists, but it's hopeless as a framework for *detecting* terrorists. It requires that surveillance be conducted pursuant to warrants, based on probable cause to believe that the target of surveillance is a terrorist, when the desperate need is to find out *who* is a terrorist[.]"³⁵ which he likens to looking for a needle in a haystack. And on the technical side, many others have noted how hopelessly out of date FISA is in the modern world of digital communications.³⁶

Practical and technical problems aside, the questions for us are legal. Only one court, of course, three months ago, has ever found that the NSA program violates the Fourth Amendment,³⁷ in an opinion from which all but the editorialists at the *New York Times* have sought distance.³⁸ More thoughtful administration critics, including two on this panel, point rather to the FISA statute, then add, in response to the President's constitutional objections, that even conceding that the President may gather intelligence abroad, "Congress indisputably has authority to regulate electronic surveillance within the U.S."³⁹—the very place, let me note, where we want most to gather that intelligence in this War on Terror.

The issues here are far too complex to be addressed in the couple of minutes I have left—indeed, the Federalist Society has published a 135-page answer to the critics, which I commend to all.⁴⁰ But for all that complexity, the dispute boils down in the end to the simple question of whether the President is the

34. See Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1811, 1821-29, 1841-46, 1861-62 (2000)); S. REP. NO. 95-604(I), at 15 (1977) ("[FISA] would relegate to the past the wire-tapping abuses brought to light during the Committee hearings by providing, for the first time, effective substantive and procedural statutory controls over foreign intelligence electronic surveillance.").

35. Richard A. Posner, *A New Surveillance Act*, WALL ST. J., Feb. 15, 2006, at A16 (emphasis added).

36. See, e.g., K.A. Taipale, *Whispering Wires and Warrantless Wiretaps: Data Mining and Foreign Intelligence Surveillance*, 7 N.Y.U. REV. L. & SECURITY (SUPPLEMENT) (June 2006).

37. *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754, 775 (E.D. Mich. 2006).

38. Compare Editorial, *Ruling for the Law*, N.Y. TIMES, Aug. 18, 2006, at A16, with Editorial, *A Judicial Misfire; The first federal court on warrantless NSA surveillance is full of sound and fury*, WASH. POST, Aug. 18, 2006, at A20.

39. Letter from Scholars of Constitutional Law & Former Government Officials to Congress (Jan. 9, 2006) in *TERRORIST SURVEILLANCE AND THE CONSTITUTION* (The Federalist Society, n.d.).

40. *TERRORIST SURVEILLANCE AND THE CONSTITUTION* (The Federalist Society, n.d.).

nation's principal agent in matters of war and peace and, if so, whether Congress has the authority to try to micromanage the exercise of that power. Madison, Jefferson, Hamilton, and most others in the founding generation were quite clear on the point. Here is Madison: "All powers of an Executive nature, not particularly taken away must belong to that department,"⁴¹ with Jefferson adding, "*Exceptions* are to be construed strictly."⁴²—a rare point of agreement between Jefferson and Hamilton.

Indeed, where precisely among Congress's enumerated powers is the font of its claim to intrude on this inherent presidential power? The power "to make Rules for the Government and Regulation of the land and naval Forces"?⁴³ That's the power to establish a system of military law and justice outside the ordinary jurisdiction of the civil courts. The Necessary and Proper Clause?⁴⁴ That's the power to afford the means for carrying into execution the various other powers of government, not the power to impede another branch in the performance of its constitutional duties. At bottom, the critics invite us to believe that a power presidents have exercised unproblematically for nearly 200 years can be restricted by the mere stroke of a congressional pen—and to believe further that during this year that Congress has fiddled over revising FISA to meet the new realities, the President should have abandoned the surveillance program.

Yet the cases say nothing of the sort. *Youngstown*,⁴⁵ which the critics often cite, the *Keith* case of 1972,⁴⁶ the *In re Sealed Case* of 2002,⁴⁷ which was the only decision the FISA appeals court has ever handed down, all clearly distinguish domestic surveillance for ordinary law enforcement purposes from foreign intelligence gathering. Citing *United States v. Truong Dinh Hung*,⁴⁸ which dealt with pre-FISA surveillance based on "the President's constitutional responsibility to conduct the foreign affairs of the United States,"⁴⁹ the FISA appeals court said, "[t]he *Truong* court, as did all the 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 the President's constitutional power."⁵⁰

Let me conclude by stepping back just a bit. What we're seeing here, I

41. Letter from James Madison to Edmund Pendleton (Jun. 21 1789), in JAMES MADISON: WRITINGS 465-566 (Library of America 1999).

42. 16 THE PAPERS OF THOMAS JEFFERSON 378-79 (Julian P. Boyd ed., 1961) (emphasis in original) [hereinafter JEFFERSON].

43. U.S. CONST. art. I, § 8, cl. 14.

44. *Id.* art. I, § 8, cl. 18.

45. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

46. *United States v. United States Dist. Court (Keith)*, 407 U.S. 297 (1972).

47. *In re Sealed Case*, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002).

48. *United States v. Truong Dinh Hung*, 629 F.2d 908 (1980).

49. *Sealed Case*, 310 F.3d at 717.

50. *Id.*

submit, is the latest stage of the Progressive Era, about which Richard has written so colorfully and correctly—for the Cato Institute, no less!⁵¹ (I should know: I commissioned and edited the book.) In the 1930s, Progressives essentially rewrote the Constitution, submitting to the tender mercies of congressional micromanagement vast areas of life that the Constitution had left to *private* ordering. Having largely completed the effort by the late '60s and the Great Society, they turned their attention to two areas the Constitution had left mainly to *political* ordering—campaign finance and foreign affairs. The Federal Election Campaign Act of 1971;⁵² the draconian amendments of 1974,⁵³ to say nothing of the recent McCain-Feingold Act;⁵⁴ the War Powers Resolution of 1973;⁵⁵ the Foreign Intelligence Surveillance Act of 1978⁵⁶—all are efforts by Congress to micromanage what until then had largely been ordered by politics. And in each case, Congress has made a mess of things, of course, to no one's surprise.⁵⁷

Law is a safeguard against the rule of man, to be sure. But overdone, law itself is tyrannical. The social engineers of the '30s sowed the seeds of the modern regulatory state under which so many today are suffocating. The same hubris, in Hayek's sense,⁵⁸ drove the activists of the '70s to believe that they too could order and micromanage campaign finance and foreign affairs through comprehensive regulatory schemes—and here too the predictable and predicted results are before us. FISA led to the pre-9/11 "wall" between law enforcement and counterintelligence, as frustrated agents would later testify.⁵⁹ We can't afford that kind of micromanagement—nor does the Constitution permit it. Here again the Founders got it right when they left these political questions to politics.

Thank you.

PROFESSOR STONE: Let me begin by saying that when we talk about the President's authority in his role as commander-in-chief, it's important to distinguish between two different conceptions of that authority. The first is the President's power to act as commander-in-chief in the absence of any congressional authorization or limitation. To the extent the commander-in-chief author-

51. RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006).

52. 2 U.S.C. § 431 (2000).

53. Act of Oct. 15, 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

54. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

55. War Powers Resolution of 1973, Pub. L. No. 93-1478, 87 Stat. 555 (1973).

56. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801-11, 1821-29, 1841-46, 1861-62).

57. In the campaign finance area, see Eric S. Jaffe, *McConnell v. FEC: Rationing Speech to Prevent "Undue" Influence*, 2004 CATO SUP. CT. REV. 245; Allison R. Hayward, *The Per Curiam Opinion of Steel: Buckley v. Valeo as Superprecedent? Clues from Wisconsin and Vermont*, 2006 CATO SUP. CT. REV. 195.

58. See generally F.A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* (W.W. Bartley III ed., Univ. of Chi. Press 1989) (1988).

59. Neil A. Lewis, *Superior Says He Didn't See Agent's Report on Moussaoui*, N.Y. TIMES, Mar. 22, 2006, at A22.

ity carries with it a set of implied powers, we can say that the President may act in a reasonable and proper manner to fulfill his responsibilities as commander-in-chief. But there will be outer boundaries. For example, the President, as commander-in-chief, cannot constitutionally set the price of chicken in peacetime in Nebraska. That would be a violation of the Constitution because the President would be exceeding his power as commander-in-chief, if he claims that was the source of his authority. That's going to be a reasonably broad power within the realm of issues relating directly to the military security of the United States. That's one way of defining the commander-in-chief power.

The second approach is to define the core of the commander-in-chief authority. This represents the authority that cannot constitutionally be limited by legislation and that in some instances can even exempt the President from what would otherwise be the commands of the Constitution. Those are very different conceptions of the commander-in-chief authority, and it's important to keep them separate.

What too often happens in debates about this question is that people conflate the first with the second. That is, they think that because the President might have the power to do something as commander-in-chief he is therefore exempt from any legislative or other constitutional check on his authority. That's a serious defect of reasoning. So, for example, suppose the President could institute electronic surveillance of non-citizens overseas in order to gather information to strengthen the military and national security missions of the United States. That would be clearly within the commander-in-chief power. No one would argue that the President was exceeding the boundaries of his constitutional power in instituting such a program. Similarly, the president has the authority as commander-in-chief to decide where the military forces of the United States should be stationed around the world. That concept of the President's commander-in-chief power has not been at issue in any of the recent disputes over the scope of the President's authority. The question instead has been whether attempted limitations on the President's authority are unconstitutional because they impair his authority as commander-in-chief. An example is the FISA statute that you just heard about from Roger, with whom I strongly disagree. Another example is the government's detention of José Padilla. Another would be the President's Executive Order with respect to military commissions.

Let me take a moment or two to elaborate. In the NSA case, as Roger said, before 1978 there were no explicit statutory limitations on the authority of presidents to engage in foreign intelligence surveillance. This all changed in 1978. Two developments were relevant. First, during the Watergate investigations, many investigative abuses came to light. Second, in 1972, the Supreme Court, in the *Keith* case, unanimously rejected the claim that the President had inherent authority to engage in domestic national security wiretaps—without probable cause and a warrant. At the same time, the Court put aside the question

of whether the same holding would be true for foreign intelligence surveillance.⁶⁰ That was an open question.

Against this background, Congress in 1978 enacted the Foreign Intelligence Surveillance Act.⁶¹ By the way, it's important to note that when we ask whether Congress can constitutionally limit the President, what we really mean is whether the *government* can constitutionally limit the President because, after all, when FISA was enacted, it was signed by the President. In any event, FISA clearly attempted to restrict foreign intelligence surveillance to situations where there was probable cause and a warrant obtained from a special FISA court, which was created in order to meet the unique security concerns of foreign intelligence surveillance.⁶² And, so far as we know, the requirements of FISA were complied with by every president until George W. Bush.

Now, what is the argument for the President deciding to disregard FISA? The argument is either that FISA is unconstitutional or that Congress has authorized the President to disregard FISA. Both arguments have been made by the Bush administration. The second argument is truly bogus, so we should dismiss it first. The argument is that the Authorization to Use Military Force, authorizing the use of force against those who committed 9/11, was intended to and had the effect of abrogating the President's responsibilities under FISA. That might be a plausible argument, but for the fact that FISA *itself* explicitly anticipated declarations of war and provided that even in the event of a declaration of war the President shall have 15 days in which to act outside the limitations of FISA, but only 15 days.⁶³ And if the President wants to seek an amendment to FISA, he should go to Congress and seek an amendment.

Now, it may be, as Roger said, that FISA is out of date, and it may be that in light of 9/11, we would want to authorize the President to engage in much more aggressive foreign intelligence surveillance than FISA permits. Both of those propositions are perfectly plausible. But the proper way—the legal way, the constitutional way—for the President to address that question is for him to go to Congress and seek an amendment to FISA. That's clearly the process FISA anticipated. The proper course was not for the President secretly to disregard FISA—I'll come back to the secretly point in a moment—and to institute, in defiance of the law, a program that, in my view, clearly was unlawful. Rather, it was for the President to say FISA is no longer appropriate in light of changing technology and world conditions, and to propose that Congress amend or repeal the law. Then there could have been a debate on the proposal. The *Padilla* case is another example. Here, the President secretly decided that he has the inherent authority as commander-in-chief to seize an American citizen at O'Hare Airport, to bring him to a military base, not to inform anyone—friends, family,

60. *United States v. United States Dist. Court (Keith)*, 407 U.S. 297, 308, 322 (1972).

61. Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. §§ 1801-62 (2000)).

62. 50 U.S.C. §§ 1803-04.

63. *Id.* § 1811.

coworkers, neighbors—that he has been seized by the United States government, to hold him incommunicado in a military base, not give him any access to a lawyer, and not allow him any judicial determination as to the legality of his detention.⁶⁴ The President made his own, secret determination that he has the unilateral authority to detain an American citizen in circumstances that the Supreme Court implicitly held in the *Hamdi* case⁶⁵ clearly violate the Due Process Clause of the Fifth Amendment. No thoughtful and responsible lawyer could believe to the contrary.

Now, again, if the President wanted the power to do this, if he thought that the circumstances facing the United States were so dire that he needed the authority secretly to seize American citizens, hold them incommunicado for as long as he wanted, with no hearing, no lawyer, then he could have gone to Congress and said, “I want this power.” Congress could then have decided whether it was an appropriate power, and eventually the Court could have decided whether that power violated due process. But instead, the President instituted this process on his own, in secret, not seeking any congressional approval, and attempting to hide his conduct from the judiciary and the public. Frankly, I don’t see any possible argument one could make that this authority is inherent in the commander-in-chief power. Indeed, such conduct completely moots the right to habeas corpus. Keep in mind, we’re not talking now about Guantánamo Bay; we’re not talking about non-citizens. This is, in my view, the most reckless claim of executive authority in the history of the United States, and surely it does not comport with the Constitution.

My final observation is that there are two dangers, at least, in such overly aggressive assertions of executive authority. One is, of course, the violation of separation of powers—the arrogation to the Executive of authority to do things without the opportunity of the Congress to weigh in. But the other, even more troubling danger is secrecy. Not only was the President attempting to act without congressional authorization, but he was attempting to act without *anyone’s* knowledge. And that, in my view, was the real reason he did not go to Congress to seek authority to do what he did to José Padilla and what he did with the NSA. The President did not want to ask permission because he knew that to propose such power might be a problem politically. And so he just did it. That is not consistent with the American constitutional system. It is devious, it is dishonest, and it is dangerous to the American system of law.

Thank you.

PROFESSOR YOO: Thank you to the Federalist Society for inviting me to speak at 6 a.m. my time this morning. I don’t know why they chose to do that. It’s also a great pleasure to be on this panel with these distinguished commentators and professors. We’ve been having, I think the four of us, a running debate

64. *Rumsfeld v. Padilla*, 542 U.S. 426, 430-31 (2004); *id.* at 456-57 (Stevens, J., dissenting); *id.* at 458 n.3; *see id.* at 442 (majority opinion).

65. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

in the press and in different locations about these issues. It's great to actually be all in one place at one time.

First, I think Roger did an excellent job of sort of summarizing the formalist case for presidential power growing in response to war and emergency. I will just supplement that with a functional approach. If you were to supplement the formalist case with a functionalist argument—this is one that really does stretch back to John Locke, and then to the Federalist Papers—which was the idea that the Executive Branch would be the one that was most effective at waging war because it had unity, secrecy, and the ability to act with decision. These thinkers also held the idea that the legislature could not anticipate future problems, future emergencies, and written antecedent laws.⁶⁶

The very notion or idea of executive power was not just that it would execute the written laws but that when the public safety required it, it would be able to act quickly to respond to those kinds of things. I don't think that's actually inconsistent with what Geof described as the first type of argument about executive power, and that's actually how I would characterize it in, say, a wiretapping program. It was a response to a great attack that was clearly unforeseen by those who wrote the FISA law. The President had to respond quickly, and at some times secretly, in order to intercept these kinds of communications with terrorists inside and outside the United States. You wouldn't, at first, want to have a broad public discussion about it because in doing so, you would be tipping off the enemy of our technological advantages in being able to intercept their communications.

I think the President has now said, and I think it has become clear, that this program has been able to pick up communications that have led to the acquisition of actual intelligence that has led to the prevention of attacks on the country.⁶⁷ I think it's very much an action that was consistent with Locke's view of the Executive.

Let me also supplement what Roger said with a discussion of history; not the framing period of history but the history of our country in wartime since the framing. I would throw out this argument. The basic thesis I have is that the greatest presidents—the ones if you look at the polls of all the political scientists and historians and law professors of who our greatest presidents are—have been the ones that have drawn most deeply upon this reservoir of

66. See Yoo, *supra* note 27, at 30-54 (2005); see also Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343 (1989); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 488-94 (1987). See generally Stephen L. Carter, *From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 BYU L. REV. 719 (explaining Supreme Court decisions adjudicating congressional and executive constitutional authority disputes); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994) (exploring the congressional regulation theory of executive power).

67. 152 CONG. REC. H15 (daily ed. Jan. 31, 2006) (The State of the Union Address By the President of United States); see also JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERRORISM*, ch. 5 (2006).

constitutional power, have made at times what people at the time thought were dictatorial, extraordinary claims of executive power, but did so to protect the country. And because of that, history has viewed them often as quite successful not because they drew just on the power but because they matched the power to great emergencies.

Some of our worst presidents have been of a set that felt constrained by the understanding of constitutional law held at that time and felt that as President, they could not do much, did not have the initiative. The most obvious example would be President Buchanan, who as President thought he had no executive power to try to bring together a summit of northern and southern leaders to try to head off the Civil War.

Our greatest President is probably Abraham Lincoln, and look at some of the things he did at the start of the Civil War. In response to the Civil War, he removed money out of the Treasury without an appropriation, which is a direct violation of the Constitution. He raised an army without congressional permission. He put up a blockade and he invaded the South, all without any kind of congressional permission. He also instituted military detention, not just of Confederate soldiers but of people who were rebels and sympathizers behind Union lines. And he created a system of military commissions to try thousands of people outside the civilian system. He did not ask for congressional permission for the military detention and trial system until 1863.⁶⁸

The executive role in war does not extend merely to the start of the war, but grows even stronger over the conduct of the war. President Lincoln, in his commander-in-chief power, freed the slaves. The Emancipation Proclamation was issued pursuant solely to the President's commander-in-chief power. It seems to me a theory that would say the commander-in-chief power essentially has no substance other than to make the President the top general fails to account for the Civil War. Would you be willing to reverse all of these decisions that Lincoln had made on his own authority?

Let's turn to a more modern hero of Progressives everywhere, Franklin Roosevelt, who's an even clearer case of a president acting against laws in order to protect the country. I think these days we often forget the lead-up to World War II. In the lead-up to World War II, Congress passed a series of neutrality acts designed to prevent the United States from entering into the War. President Roosevelt—I think many people now believe—violated those laws and provided destroyers to the British and aid to the Allies. He essentially moved the United States Navy into a shooting war with German submarines in the Atlantic well before Pearl Harbor in order to protect convoys to Great Britain.

President Bush, I'm afraid, was not the first person to think of this idea of warrantless wiretapping. In May 1940, over a year and a half before Pearl Harbor, President Roosevelt ordered J. Edgar Hoover to conduct interception

68. *ENCYCLOPEDIA OF THE AMERICAN CIVIL WAR: A POLITICAL, SOCIAL, AND MILITARY HISTORY* 1190-91 (David Steven Heidler & Jeanne Heidler eds., 2001).

not of just international phone calls but every communication in the United States, all phone calls in the United States, to search for "subversive elements" who would be helping the Axis powers during the War.⁶⁹ At that time, there was a statute that prohibited any warrantless interception of calls.⁷⁰ There wasn't even a FISA at the time, and there was a Supreme Court decision concluding that the President and the Executive Branch could not seek that kind of authority.⁷¹ Now if you look at the memoirs of Justice Jackson, who was Attorney General at that time, he talked to members of Congress quietly about getting Congress to approve that program. He was told the members of Congress would not vote for it, and so he decided that the Executive Branch and the Justice Department would continue to do it anyway.⁷²

President Roosevelt also, in addition to these other things, detained an American citizen without a civilian jury trial. He sent the citizen and his fellow Nazi saboteurs into a military court in the case of *Quirin*.⁷³ Again, the President had to draw on these authorities to respond to these great emergencies to the United States and its national security. Under the vision that some of the Bush Administration's critics have sketched, you would constrain the ability of Roosevelt or Lincoln to respond to the Civil War or World War II in the most effective way to protect the country.

Bringing us forward to the Cold War period, presidents often used their authority unilaterally in ways that we have come to admire and praise. Think about President Kennedy in the Cuban missile crisis. President Kennedy didn't check with Congress. He didn't get legislative authorization. If you think about it, the "quarantine" was a species of preemptive war. The Soviet Union was trying to base nuclear missiles in Cuba. It wasn't about to imminently launch them. We put up a blockade around Cuba, which is an act of war, in order to forestall a serious change in the balance of power. President Kennedy not only put up a blockade unilaterally, but he determined all of the rules of engagement, he made all the tactical and strategic decisions, as a commander-in-chief would, and we all think of this as the greatest moment of Kennedy's leadership in his presidency.

Let me just turn to the future. I quite agree with Roger that the war powers and these questions are to be determined by the political process. When the President and Congress use their constitutional powers to cooperate or fight about war policy, what makes this war different or unusual is not just the nature of the enemy, which is very different, and the nature of the conflict, which is based on secrecy and intelligence rather than out-producing the enemy or fielding larger armies, but also the way that the courts have imposed a more intrusive species of review on the Executive and Congress. You can just see that

69. Yoo, *supra* note 27, ch. 5.

70. Communications Act of 1934, Pub. L. No. 73-416, § 605, 48 Stat. 1064, 1103-04 (1934).

71. *Nardone v. United States*, 308 U.S. 338, 339-41 (1939).

72. ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 69 (2003).

73. *Ex parte Quirin*, 317 U.S. 1 (1942).

in a series of exchanges between the courts and Congress and the Executive Branch over the detention issue and the role of habeas corpus.

At the end of World War II, the Supreme Court decided not to exercise judicial review over enemy alien combatants held outside the United States, and that was the law established in 1950, if not earlier, in a case called *Johnson v. Eisentrager*.⁷⁴ When we were in the administration, we based a lot of these decisions on World War II decisions, like *Eisentrager*. I think the court in *Rasul* two years ago effectively overruled that decision *sub silentio* and suggested that the writ of habeas corpus would extend to anybody held by the United States anywhere in the world, something that the World War II Supreme Court clearly rejected.⁷⁵

Congress overruled *Rasul*, or tried to overrule *Rasul*.⁷⁶ The Supreme Court in *Hamdan* this summer,⁷⁷ tried to ignore the clear congressional commands in the Detainee Treatment Act, and then Congress just a month and a half ago overruled the Court again because Congress has control over the jurisdiction of the courts.⁷⁸ That's a complicated issue that I can't get to today. I think it's extraordinary to think about this if you compare it to the Civil War or World War II. The idea that the courts are now, at least twice, and perhaps in the future a third time, struggling with Congress to try to narrow its policy decisions, where Congress is trying to support the decisions of the Executive Branch in wartime. The thing that troubles me is that the courts are constructing a rule demanding clear statements from Congress and to impose a peacetime system which requires a series of very precise rules to govern the war on terrorism. Does it make more sense? I think war requires legal rules that provide the Executive Branch a lot of discretion and a fair amount of room to run in trying to flexibly meet those challenges.

Thank you.

JUDGE PRYOR: I want to give the panel an opportunity of about two minutes each to respond to some of what they've already heard, beginning with you, Professor Epstein.

PROFESSOR EPSTEIN: I think it is somewhat extraordinary to hear this constant praise of presidents who have managed to violate the Constitution in the course of war, particularly since it's not at all clear to me that those parallels are exact to the ones that we face today. So let me just start with a couple of simple observations.

First on the comparison between executive power and the congressional

74. 339 U.S. 763, 777-78, 785 (1950).

75. *Rasul v. Bush*, 542 U.S. 466, 480-81 (2004).

76. See Detainee Treatment Act, Pub. L. No. 109-148, §§ 1001-06, 119 Stat. 2739, 2740 (2005).

77. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764 (2006).

78. See Military Commissions Act of 2006, Pub. L. No. 109-366, §§ 7, 9, 120 Stat. 2600, 2601-03, 2635-37 (to be codified at 10 U.S.C. § 948a-d); see also Jesse H. Choper & John Yoo, *Wartime Process: A Dialogue on Congressional Control of the Jurisdiction of the Federal Courts*, 95 CAL. L. REV. ____ (forthcoming 2007).

power, I strongly disagree with Roger that somehow or other the modern struggle is just a replay of the Progressive Era with respect to the Commerce Clause. When I read the phrase "to make Rules for the Government and Regulation of the land and naval Forces,"⁷⁹ I don't think of setting up a set of tribunals to handle court-martials. That's done elsewhere in the Constitution where the Congress receives the power to "constitute Tribunals inferior to the supreme Court."⁸⁰ I think in effect that the distribution of powers, as originally understood, was without any doubt, what I said before: the basic rules of the game are going to be set by the Congress, and the President, both as a duty and a right, has to take care that the laws are faithfully executed. That general command includes the laws that deal with the regulation and operation of military forces in time of war.

To the extent, therefore, that FISA contains an explicit command that addresses this topic, and a president who decides to disregard that law, his actions raise a very serious challenge to our constitutional order. One ought not to be so cavalier with language and to argue that for reasons of current necessity a commander-in-chief power, which looks to be one to execute rather than one to frame policy, is in effect a giant club that operates free of constitutional constraint.

The second point goes to the position of individual claimants seeking habeas corpus. Again one has to be very clear. Cases like *Johnson v. Eisentrager*⁸¹ did not deal with the legality of the detention, in the sense that there was no dispute as to whether or not these detainees were German nationals who fought against the United States. Their incarceration was also extraterritorial. Guantánamo Bay will not be treated, I think, as though it's extraterritorial with respect to whether habeas corpus will reach these cases.⁸² And in terms of the question of saying that the attack of 9/11, which took place over five years ago places us in a perpetual state of war, I think that broad proposition misconstrues very seriously what was at stake in the original idea of an emergency exception to the requirement that the President needs a declaration of war in order to act.

Any sudden attack does not afford the luxury. So of course the President better act with dispatch because there is no one else who could do so. That proposition has never been disputed by anybody on either side of this debate. But when five years go by and there is simply a cat-and-mouse game in which nobody wants to speak out, then you really do want some congressional authorization for further action. One should fault the President very seriously

79. U.S. CONST. art. I, § 8, cl. 14.

80. *Id.* art. I, § 8, cls. 9; *see id.* art. III, § 1.

81. 339 U.S. 763 (1950).

82. *But see* Boumediene v. Bush, 476 F.3d 981, 986-87, 989-91 (D.C. Cir. 2007) (holding that the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (MCA) stripped federal courts of habeas jurisdiction over detainees held at Guantanamo Bay and that the MCA did not violate the Suspension clause because habeas does not apply to those held outside U.S. sovereignty, including military bases leased from foreign governments).

for not going to Congress and saying he needs to revise these laws. It is not as if, as John suggests, that you want the administration to explain exactly every intelligence technique it possesses. It surely is not supposed to do that—

JUDGE PRYOR: I'm going to have to end your filibuster again.

PROFESSOR EPSTEIN: —but to act under circumstances where they make clear what the rules should be. I do think that this impasse is a real national tragedy.

DR. PILON: Well, let me start by commending Richard for pointing to the difficult problem of resolving the tension between the history surrounding these issues and his reading of the Constitution, which suggests that maybe the problem is in his reading of the Constitution. And on that I will point to something he just said concerning rules for the government and regulation of the armed forces. That Article I power has always been understood to allow Congress to establish rules like the Uniform Code of Military Justice. I refer you to the essay on the subject in *The Heritage Guide to the Constitution*, which discusses that clause in some detail and then gives further references on the point.⁸³

Richard also talked about how low-level actions could be taken without a declaration of war. That would get us into the kind of line-drawing problem that would eventually end up in the courts, and the courts are the least qualified branch to make that kind of judgment. That is simply a non-justiciable issue, even if it were a correct reading of the Declare War Clause. The President has a wide range of foreign affairs powers—everything from diplomacy to the Korean War—by way of conducting foreign policy. When you invite micromanagement of that by the Court, you're asking for something that I think none of us wants. Indeed, in *Campbell v. Clinton* the court addressed the issue and said that it is a political question.⁸⁴

With respect to some of the points Geoffrey made, I would note that the *Keith* case involved a domestic threat.⁸⁵ The Court there clearly distinguished the power to address that situation under the ordinary law enforcement paradigm versus the power to do so under the foreign affairs paradigm.⁸⁶ And every other court, as the *In re Sealed Case* appellate opinion made clear,⁸⁷ has done the same thing—made that clear distinction between domestic law enforcement, on one hand, and foreign affairs or national security, on the other.

I would just close with one point, in two parts. Are we to conclude from what the other side has said that all these undeclared wars were unconstitutional—that they were all examples of unconstitutional power? Second, are we to

83. David F. Forte & Mackubin Owens, *Military Regulations*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 136-38 (Edwin Meese III et al. eds., 2005).

84. 203 F.3d 19, 24 (D.C. Cir. 2000) (“[T]he War Powers Clause claim implicates the political question doctrine.”) (Silberman, J., concurring).

85. *United States v. United States Dist. Court (Keith)*, 407 U.S. 297 (1972).

86. *Id.* at 308-15.

87. *In re Sealed Case*, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002).

suppose that FISA should have controlled everything in its domain over the past year—the period since the *New York Times* first broke the story, during which Congress has been unable to come up with any revision of the statute?⁸⁸ Should the President have stopped the surveillance? I daresay that in the world in which we live today, I don't think there are many in this room who would call for that, and I hope the other side would not call for it either.

JUDGE PRYOR: Geof.

PROFESSOR STONE: I would. I think it's illegal, and I think therefore Congress would act one way or another if, in fact, the President stopped the program. But by continuing the program, he makes it unnecessary for Congress to address the issue.

I also want to respond briefly to John's invocation of Lincoln and Roosevelt. Because people admire Roosevelt and Lincoln does not mean they should or do admire everything they did. They were both, in their own way, great presidents, but that does not mean that the internment of Japanese-Americans or the suspensions of the writ of habeas corpus in the middle of the Civil War were justified. So it's possible to be a great president and also to make some terrible blunders, and I think in both Roosevelt's and Lincoln's cases, that's clearly the case.

The invocation of cases like *Quirin* and *Johnson v. Eisentrager* poses an interesting question.⁸⁹ These are cases that go back 60-some years. But constitutional law, for better or worse—and many people may say for the worse—has changed profoundly over that period of time. The notion that one would invoke a 60-year-old constitutional precedent and assume that it necessarily disposes of a question today wouldn't be true in almost any area of constitutional law, and I see no reason to assume it should be true with either *Johnson* or *Quirin*. That isn't to say they were wrong or that a court shouldn't reach the same result today, or that they have no precedential value. But our entire constitutional system has radically changed, and we therefore should not slavishly follow decisions that were reached in a different constitutional world.

JUDGE PRYOR: Professor Yoo.

PROFESSOR YOO: I'll waive my time for the audience.

JUDGE PRYOR: All right, now one of the favorite times. All right, I'm going to remind every questioner of one thing: Ask a question.

AUDIENCE PARTICIPANT: Judge, we always follow your orders. Principally for Geof and Roger, could Congress amend FISA to constitutionally provide that except for 15 days after it declared war, the President has to go to this newly named FISA and Collateral Damage Bombing Court to get approval for every single one of his bombings during such a war, except maybe he could get 72 hours to continue certain ones that he can't get prior approval for? And if

88. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

89. *Ex parte Quirin*, 317 U.S. 1 (1942); *Johnson v. Eisentrager*, 229 U.S. 763 (1950).

not, why is that any more in the core of the commander-in-chief power than military intelligence decisions to determine who is and is not the enemy?

PROFESSOR STONE: I would say that the hypothetical statute is unconstitutional because it intrudes too directly on the core of the commander-in-chief power. The distinction I would draw is that decisions about where and when to bomb in the midst of a conflict are very different from deciding whether to engage in electronic surveillance of American citizens on American soil. They're both related to the fighting of the war, but one is much more bound up in what is at the core of what a commander-in-chief does. And I agree with Richard that the commander-in-chief is much more like a senior admiral or a senior general than like the commander-in-chief of the *nation*.

So we need to draw lines between the core of the commander-in-chief power and the outer boundaries of that power. If Congress decides and the President agrees that the President should not engage in surveillance of American citizens on American soil, that limitation is constitutional but that authority is not at the core of the commander-in-chief power.

DR. PILON: Geof and Richard are taking the domestic model and transposing it over to the international foreign affairs side, and I think that's the fundamental mistake that we're seeing here. The Framers, and Locke too, were quite clear on the point that particular rules are not the way you handle foreign affairs.⁹⁰ The Framers were very clear that the President has the primary responsibility here, and Congress's powers are to be narrowly construed.⁹¹ That kind of a statute, it seems to me, Todd, would be clearly unconstitutional.

Let me also respond to something Geoffrey said about the President agreeing to something like the FISA statute. When the Carter administration agreed to that bill, Attorney General Griffin Bell made it very clear that he did not understand it to be intruding on the inherent foreign intelligence gathering powers of the president.⁹² And of course the point has never been tested. The FISA appellate court's opinion in *In re Sealed Case*, which is the most definitive opinion on FISA, was a test with respect to the Fourth Amendment, not with respect to the separation of powers issue.⁹³

PROFESSOR EPSTEIN: Could I make a comment? I think in effect—

JUDGE PRYOR: Professor Epstein has pulled out his copy of the Constitution, printed by the Cato Institute.

PROFESSOR EPSTEIN: —it's the Cato—

DR. PILON: It's the Cato Constitution.

PROFESSOR EPSTEIN: —which Roger ought to read.

90. As Locke put it regarding what he called the "federative power" (the power of dealing with foreign affairs), "it is much less capable to be directed by antecedent, standing, positive Laws, than [by] the Executive; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good." LOCKE, *supra* note 25, ¶ 147.

91. See THE FEDERALIST No. 70 (Alexander Hamilton); JEFFERSON, *supra* note 42.

92. *In re Sealed Case*, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002).

93. *Id.*

DR. PILON: My son once asked me, "Daddy, did you write 'We the people.'" How could I disappoint him?

PROFESSOR EPSTEIN: Well, he's rewriting it.

One of the points that is so striking about the document is that nowhere does it say that the foreign affairs of the United States shall be vested in the President of the United States. It says the President shall have the power to receive ambassadors, to make treaties subject to the consent and so forth.⁹⁴ One practice that you have to worry about in all of these analyses is taking particular clauses that are narrow in their scope and then giving them very broad readings, so as to create the impression that somehow or other all foreign affairs belong to the President. That's not there, nor should it be there. We do have a division of powers, and I think what one has to ask is how we respect it.

This, then leads to the other point. There's nothing in the Constitution which says that the powers of Congress in Article I with respect to the regulation of war shall be narrowly construed. What's really happening in the administration is that it insists that explicit powers should be narrowly construed while implied powers should be broadly construed. That's a very dangerous way to undertake constitutional interpretation.

JUDGE PRYOR: John.

PROFESSOR YOO: Just a brief point about Richard's comment. He's really illustrating, I think quite well, the difference between textualism and originalism because he has pulled out a little Constitution and started reading the text without any mooring in the context of how it was written and the understandings of the time. And I know he doesn't carry the Federalist Papers around with him because he didn't refer to how they referred to the Executive and the understanding of Executive control of foreign affairs. You look at the British practice and you look at what people said. There's no one in the framing of debates who calls the foreign affairs power a congressional power. Instead, it's thought to be by all philosophers of the time, and in British practice, an executive power. And then the Framers vested the executive power, all executive power, in the President, in contrast to Article I, which says the legislative Powers herein enumerated are vested in the Congress, and there has to be some—⁹⁵

PROFESSOR EPSTEIN: This is—

JUDGE PRYOR: Go ahead, Richard.

PROFESSOR EPSTEIN: —Look, I mean when you read Federalist 69, the one thing they do is explicitly reject the British analogy with respect to the distribution of powers.⁹⁶ Their attitude is the commander-in-chief is the most important general in the entire system. It is not that he is some kind of

94. U.S. CONST. art. II, § 2, cl. 2; *id.* art. II, § 3.

95. See U.S. CONST. art. I, § 1, cl. 1 ("All legislative Powers herein granted shall be vested in a Congress. . ."); see also *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819).

96. THE FEDERALIST No. 69 (Alexander Hamilton).

übermensch. He's the commander-in-chief of the army and naval forces; he's not the commander-in-chief of the United States.

DR. PILON: The Madison quote I gave you earlier⁹⁷ goes exactly opposite what Richard just said, and of course every decision since then does as well.⁹⁸

JUDGE PRYOR: Well, at least Professor Epstein has now referred to the Federalist Papers.

Next question.

AUDIENCE PARTICIPANT: Good morning. This question is directed to Professor Yoo, but I'd like the other panelists to comment if they so choose. My question has to do with the Military Commission Act of 2006.⁹⁹ It's a question I asked yesterday but didn't get a very satisfactory answer.

PROFESSOR YOO: You didn't ask me though.

AUDIENCE PARTICIPANT: My question has to do with the presidential power and the jurisdiction, specifically, of military commissions to prosecute for violations of the laws of war. Under pre-existing Supreme Court precedent and under the laws of war, the president had authority to institute military commissions to try unlawful enemy combatants, whether alien or citizen. Under the Military Act of 2006, they specifically excluded citizen unlawful enemy combatants because the jurisdiction only has to do with alien unlawful enemy combatants.¹⁰⁰ And my question is, in doing so, did they effectively adopt Justice Scalia's dissent in *Hamdi*,¹⁰¹ which said, if you have citizen unlawful enemy combatants, they have to be tried for treason in a civilian court as opposed to a military tribunal?

PROFESSOR YOO: That's a good question. I don't know if I read the Military Commission Act that way. It defines illegal enemy combatants and then legal enemy combatants, and I believe also makes clear that Al Qaeda fighters are illegal enemy combatants and they're subject to military commission trial.¹⁰² I don't think it draws the distinction you're talking about in terms of who's subject to the commissions.

The distinction you're talking about is drawn, I think, in the writ of habeas corpus, so the thing that's actually extraordinary about the Act is that it overrules the Supreme Court's previous case that said alien enemy combatants on U.S. territory could still file for a writ. And that's really what *Rasul* and *Hamdi* were about.¹⁰³ If you read the MCA closely, it actually removes the right of aliens who are enemy combatants to file for a writ of habeas corpus even if they're in the United States.¹⁰⁴

97. See THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 30.

98. See, e.g., *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304 (1936).

99. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

100. See *id.*

101. *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting).

102. 10 U.S.C.S. § 948(a) (LexisNexis 2007).

103. See *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi*, 542 U.S. 507.

104. 28 U.S.C.S. § 2241(e)(1) (LexisNexis 2007).

AUDIENCE PARTICIPANT: Actually, it does. In the personal jurisdiction of the Act, it says "alien unlawful enemy combatants."¹⁰⁵ It specifically excludes citizen enemy combatants.

PROFESSOR YOO: I would have go back to check. The other thing I would say is that this may also be just because President Bush's original order also said citizens who are illegal enemy combatants would not be tried by military commission.¹⁰⁶ And in asking for *Hamdan*'s repeal, he said he would not do that. And so in seeking support from Congress for the system he put together, I wouldn't think he would ask for it anyway, but I don't think that means he's given up any constitutional authority to—

AUDIENCE PARTICIPANT: I guess that's my question—

JUDGE PRYOR: We've got the room until 10:30. We need to make both the questions and answers as brief to allow as many as we can. Jerry Waltham.

AUDIENCE PARTICIPANT: This is addressed to Professors Stone and Epstein. I noticed that neither of you referred to the famous Justice Jackson and Justice Goldberg statement that the Constitution is not a suicide pact.¹⁰⁷ I notice, in that regard, that Professor Stone claimed the reason our administration didn't go to Congress for approval of a change of FISA was purely politics. Would you comment on whether there isn't some basis for not going to Congress to tell the world what methods the government is using in order to defeat the enemy, that is, the Surveillance Act, the wiretapping? And the second part of the question is, given your statement about Abe Lincoln being a great president but he might have done things unconstitutionally, would you favor a statute now similar to that granted to Japanese-Americans, compensating southern slave owners for the unconstitutional deprivation of property in the slaves because that was, at that time, property?

PROFESSOR STONE: Obviously, on the latter question, that was a serious issue at the time—whether the government could take property in that context. Except for the passing of 150 years, a problem that also limits what we can and should do about reparations for slavery, I don't think that's a crazy question at all. I think that destroying the right of property in slavery states, where it was legal, posed a serious question about whether that was a deprivation of property without due process requiring compensation. But 150 years later it's no longer a useful question, any more than it is on the reparations issue for slavery. But the principle you raise is perfectly legitimate.

On the suicide pact question: Well, first of all, Attorney General Gonzales has been quoted as saying that the reason the Bush administration didn't go to Congress was because they didn't think they could get a law passed, that is, a

105. 10 U.S.C.S. § 948(c) (LexisNexis 2007).

106. Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001).

107. See *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting); see also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

law to change FISA.¹⁰⁸ But, beyond that, there's obviously a possibility that seeking a change in FISA would have revealed information, the public disclosure of which would have been harmful to national security. But I'm very skeptical about that claim, because it's perfectly possible to amend the statute without having to go into any of the technical details of the investigations you're planning to do. You simply say you want to jettison the warrant and probable cause requirements. You don't need to explain exactly what you're doing and how you're doing it. So, I don't think the question of amending FISA needed to pose any real danger to national security.

And third, I want to make a point that my colleague, Dick Posner, has made in a book called *Not a Suicide Pact*—which is that in the War on Terrorism, it may be much more important to prevent terrorists from using effective means of communication than it is to actually catch them, so that if we alert them to the fact that they can no longer safely use cell phones or e-mail, and they stop using e-mail and cell phones, it would make it virtually impossible for them to be effective.¹⁰⁹ On that theory, we would want them to know that they should no longer feel safe using these means of communication. Posner's argument is that, as a national security matter, we might be better off deterring terrorists from using these means of communication than occasionally catching one.¹¹⁰

PROFESSOR EPSTEIN: Look, if this point were seriously taken, then we couldn't even have this discussion. But frankly, I had figured out that cell phones would be an ideal mode of communication for terrorists independent of any revelations by Congress. The position of taking that objection seriously would mean that you couldn't even have a congressional oversight hearing to talk about any of these issues because that simple discussion might tip your hand.

We've dealt with intelligence issues in the CIA, with confidential hearings on some parts of the agenda and public hearings on the others for centuries in and out of war. It seems to me that there's no reason to suspend that practice or repudiate the judgment that lies behind it when it comes to FISA and its potential revision.

JUDGE PRYOR: Yes.

AUDIENCE PARTICIPANT: Professor Epstein, you had briefly mentioned the idea that Guantánamo should not be considered extraterritorial for the purposes of habeas. How would you or anyone on the panel view habeas petitions filed on behalf of the people in Baghram or Iraq, non-U.S. citizens? Is there an extraterritorial problem or do you think those should be legitimately considered by non-U.S. citizens?

PROFESSOR EPSTEIN: You are about to see my true "dovish" sentiments

108. See Press Briefing by Attorney General Alberto Gonzalez and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), <http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html>.

109. See RICHARD A. POSNER, *NOT A SUICIDE PACT* 78-79, 132-33, 142-43 (2006).

110. See *id.*

on all these issues. The main question here concerns the conditions that have to be satisfied before the writ of habeas corpus may be suspended consistent with the Constitution. The suspension clause contains no territorial limitation with respect to its scope, so I think it's a perfectly natural reading to say wherever the United States exerts power, there habeas corpus will run. Also, when you start to look at the Due Process Clause it was—

AUDIENCE PARTICIPANT: Wow.

PROFESSOR EPSTEIN: —I'm a wow guy.

But let me just make the rest of the argument; then we can figure whether it holds up. Similarly, the Due Process Clause on its face does not apply only to citizens. It applies to all persons. It, too, contains no territorial limitations. Those two textual points don't mean that the "dueness" it requires doesn't take into account territory or perhaps citizenship in some way. But the thought that somehow or other it's correct to read the due process clause to erect categorical immunizations from review of individual detentions on either of those grounds seems to me to be a mistake. Second, if you regard the issue of territory as important, it seems to me that treating Guantánamo, a place where we have absolute and total control, as something not in American hands solely because we might thereby offend Cuban sovereignty, contains so many levels of irony that I don't know where to begin.

DR. PILON: Jerry, there is a school of thought that will not be happy until soldiers are required to Mirandize those they capture on the battlefield.

(Applause.)

DR. PILON: I'm not one of them.

PROFESSOR YOO: The main point is Richard's approach and his interpretation here are inconsistent with originalism, even as he himself has practiced it. The Supreme Court employs a broad interpretation of Commerce. Commerce doesn't have any limitation written in it, but Richard actually favored a very narrow interpretation of the Commerce Clause. Why? Because he looked at how people understood the word "commerce" in the 18th century. He doesn't say today what did the framers think the habeas corpus writ meant in the 18th century? If you go back and look, there's no evidence of the use of habeas corpus by enemy prisoners in wartime to seek their release because they were unlawfully detained in an illegal war. Why weren't there millions of habeas corpus petitions filed by German and Italian and Japanese prisoners in World War II? This is extraordinary.

You really can't rip the text out of its historical context and give it this unlimited reading.

PROFESSOR EPSTEIN: Look, John, there's a serious difference here. No one is arguing that you're going to give habeas corpus to ask the question of whether or not somebody is an enemy combatant when they're taken in uniform. That's the only question that arose in the German cases. But in these cases where you get people who are not in uniform, there is a genuine issue of fact as to whether they're there by virtue of circumstance, or being falsely

turned in by somebody for a reward, or by being enemy combatants. And the question of whether or not they fall into a class of people who do not get protection is a question for which I think they're entitled to have the protection of independent review.

And I think the national security interests are at their low ebb in circumstances where you let people rot in Guantánamo for five years when in fact they're innocent bystanders, as opposed to dealing with people whom you capture on the battlefields who are firing guns at you. And if we can't draw that distinction, then we lose all sense of proportion about what is and is not liberty and what is or is not consistent with our own traditions.

This is a country of limited government, and your position is sounding awfully despotic to me.

(Applause.)

JUDGE PRYOR: Next question.

AUDIENCE PARTICIPANT: I have just a very narrow question, I guess, for Professor Stone. You referred before to perhaps considering cases like *Quirin*¹¹¹ as having less vibrancy and predicting outside of their particular facts because of the passage of time, even though perhaps on some of those areas the Supreme Court in particular hasn't really spoken so much—

JUDGE PRYOR: You need to get to the question.

AUDIENCE PARTICIPANT: —in the intervening years. And I guess my question is, is the same true of the *Keith* case?¹¹² Thirty-four years have passed. There have been a lot of expansions of exceptions to the warrant requirement, and does this perhaps undermine the ability to apply *Keith* outside of its specific circumstances?

PROFESSOR STONE: To the extent there have been relevant exceptions to the warrant requirement that undermine anything said in *Keith*, I would agree that that would be relevant to understanding its vitality today. I don't agree that that's an accurate statement of the law in *Keith*, but to the extent—if it were true, I think it would be relevant in deciding how much precedential force to give *Keith* today.

JUDGE PRYOR: Last question.

AUDIENCE PARTICIPANT: I have a question for Mr. Pilon. I'd like your response to two matters which I think appear inconsistent with your position. Article I, Section 10 of the Constitution explicitly says, "No State shall, without the consent of Congress, engage in war unless actually invaded or in such imminent danger as will not admit a delay." Why would the Framers have given the authority to consent to engaging in war by a state if the power lay with the Executive and not Congress?

Secondly, Louis Fischer, in his book on executive power, writes and documents that the Founding Fathers, when they were in office, when it really

111. *Ex parte Quirin*, 317 U.S. 1 (1942).

112. *United States v. United States Dist. Court (Keith)*, 407 U.S. 297 (1972).

counted—that is, Washington, Madison, Monroe, and Jefferson—all took the position that they did not have the authority to wage war without some form of congressional authorization. Do you agree with his reading of history, and aren't they in a better position than we are to tell us what they meant regarding the war powers?

DR. PILON: The second question, the answer is no, I don't agree with Louis Fischer's reading of the Declare War Clause, or with his interpretation of the Founders' understanding when in office. Regarding your first question, obviously they were dealing under the Articles of Confederation with the governors having the authority over the militias and with a weak central government, and under the new Constitution they wanted to make sure that states were not off on their own making foreign policy and waging wars that the federal government would then have to address. And so they simply centralized it in the President, but with—

PROFESSOR EPSTEIN: In the Congress.

DR. PILON: —No, not in the Congress. Richard, are you—

PROFESSOR EPSTEIN: (off mic.)

DR. PILON: —I know, but that does not mean that every act of the Executive requires a declaration of war. I mean, let's think about what is entailed in that view. With numerous federal statutes kicking in under a declaration of war¹¹³—excuse me, you asked your question, let me answer—authorizing the federal government to do everything from requisition ships and property and so forth, do you really want a declaration of war every time we seize Noriega or whatever the case may be?

JUDGE PRYOR: Professor Yoo—no, no. Thank you. The last sentence goes to Professor Yoo.

PROFESSOR YOO: I just want to say I think Article I, Section 10 is extremely important and a great point, but the question to ask is why would the Framers have written such a precise provision saying that the states have to get the consent of Congress, and include exceptions for invasion and imminent danger, and then not write exactly the same provision with the presidency? I think it's a negative implication that proves the exact opposite.

(Panel concluded.)

113. See *supra* note 31.