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## Presidential Authority Transcript

Charles Swift

Bruce Fein

Chief Judge Robert Lasnik

Jules Lobel Deborah Pearlstein & Robert Turner

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## A Forum on Presidential Authority

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### INTRODUCTION

The Presidential Authority Forum took place at Seattle University School of Law on November 3, 2006. Six panelists convened to discuss issues of presidential authority that have emerged from the actions of the Bush administration. Many Americans, particularly those in the legal profession, hold a great reverence for the rule of law and the notion that no individual is immune from the protections or the constraints of the law. However, when the safety of our nation is threatened, fear dominates, and it is in this climate that our adherence to the rule of law is tested.

The panelists addressed the law pertaining to a wide range of topics, including the holding of detainees at Guantánamo Bay, the treatment and interrogation of enemy combatants, torture, National Security Agency surveillance programs, the Military Commissions Act of 2006, Combatant Status Review Tribunals, and the role of Congress and the judiciary in upholding the rule of law.

This transcript has been substantially edited for length, clarity, and content to make this conversation more accessible for the reader. Each participant has had the opportunity to review and edit his or her remarks.

Following are the biographies of the panelists:

#### **Lieutenant Commander Charles D. Swift, Keynote Panelist**

*Office of Chief Defense Counsel, U.S. Department of Defense*

Lieutenant Commander Charles D. Swift was assigned as defense counsel in the Office of the Chief Defense Counsel in the Department of Defense Office of Military Commissions. He represented Salim Ahmed Hamdan, who faced trial by military commission, and successfully argued

that Mr. Hamdan's trial was illegal under both U.S. domestic law and international law. The Supreme Court's decision in Mr. Hamdan's case was immediately regarded as a landmark decision, addressing the constitutional limitations of executive power and international human rights law as it is incorporated into U.S. domestic law.

Lieutenant Commander Swift is a graduate of the United States Naval Academy, Class of 1984. He left active duty service to attend law school at the University of Puget Sound School of Law (now Seattle University School of Law) in 1991. After graduating cum laude, he returned to active duty status and was assigned to the Navy's Judge Advocate Corps. His initial assignment as judge advocate was as defense counsel and legal assistance officer at Naval Legal Service Northwest where he was selected as the 1997 Junior Officer of the Year. His next assignment was as staff judge advocate and special assistant U.S. attorney for Naval Station Roosevelt Roads, Puerto Rico, where he participated extensively in the litigation involving the Navy's target range at Vieques, Puerto Rico. Most recently, he was assigned as the officer in charge of the Navy's second largest Naval Legal Service Detachment at Naval Station Mayport, Florida, where, in addition to representing individual service members, he was responsible for the oversight of military and civilian attorneys assigned to his detachment.

Lieutenant Commander Swift has nine years of litigation experience, with six of those as defense counsel. He has represented more than 150 service members in military justice proceedings, serving as lead military counsel in more than twenty contested courts-martial. He is admitted to practice before the United States Supreme Court, as well as the North Carolina Supreme Court. He is a native of Franklin, North Carolina. He is currently visiting associate professor and acting director for the International Humanitarian Law Clinic at Emory School of Law in Atlanta, Georgia.

**Bruce Fein**

*The Lichfield Group, Washington, D.C.*

Bruce Fein graduated from Harvard Law School with honors in 1972. After a federal judicial clerkship, he joined the U.S. Department of Justice, where he served as assistant director of the Office of Legal Policy, legal adviser to the assistant attorney general for antitrust, and the associate deputy attorney general. Mr. Fein was then appointed general counsel of the Federal Communications Commission, followed by an appointment as research director for the Joint Congressional Committee on Covert Arms Sales to Iran.

He has authored several volumes on the U.S. Supreme Court, the U.S. Constitution, and international law. He has assisted two dozen countries in constitutional revision and consulted for foreign nations on matters ranging from telecommunications and cable regulation to sugar quotas, oil and gas pipelines, and human rights issues.

Mr. Fein has been an adjunct scholar with the American Enterprise Institute, a resident scholar at the Heritage Foundation, a lecturer at the Brookings Institute, and an adjunct professor at George Washington University. He has also served as executive editor of the *World Intelligence Review*, a periodical devoted to national security and intelligence issues. He was recently invited by the Foreign Policy Institute of Turkey and Bilkent University to lecture on constitutional models for Iraq.

At present, he writes a weekly column for the *Washington Times* devoted to legal and international affairs, guest columns for numerous other newspapers, and articles for both professional and lay journals. He is frequently invited by both Democrats and Republicans to testify before Congress and various administrative agencies. He appears regularly on national broadcast, cable, and radio programs as an expert in foreign affairs,

international and constitutional law, telecommunications, terrorism, national security, and related subjects.

**Chief Judge Robert S. Lasnik**

*United States District Court, Western District of Washington, Seattle, WA*

Judge Robert S. Lasnik became Chief Judge of the Western District of Washington on September 1, 2004. He was appointed to the United States District Court by President Clinton in 1998. Prior to that, he served as a King County superior court judge for nine years and before then as chief of staff in the King County Prosecuting Attorney's Office. Judge Lasnik graduated from Brandeis University with a degree in psychology and sociology, and he later obtained two master's degrees from Northwestern University in journalism and in counseling. He is a graduate of the University of Washington School of Law and was an instructor there in Interviewing and Counseling for Lawyers.

Judge Lasnik is chair of the Ninth Circuit's Public Information and Community Outreach Committee. He is the chair of the 2007 Ninth Circuit Judicial Conference and was the program chair for the 2006 Judicial Conference. In 2005, he was appointed by Chief Justice Rehnquist to the Judicial Conference U.S. Budget Committee where he chairs the recently created Congressional Outreach Subcommittee. He was chair of the Washington State Committee of Selection for the Rhodes Scholarships from 2001 to 2004.

**Jules Lobel**

*University of Pittsburgh School of Law*

*Vice President, U.S. Center for Constitutional Rights, Pittsburgh, PA*

Through the U.S. Center for Constitutional Rights, Professor Jules Lobel has litigated important issues regarding the application of international law

in the U.S. legal system. He currently represents Maher Arar, a Canadian citizen born in Syria, in a lawsuit against U.S. officials who sent him from New York to Syria where he was tortured and detained for one year. He teaches constitutional law, international law, human rights law, and foreign relations law.

Professor Lobel is co-author with David Cole on the book, *Less Safe, Less Free: Why America is Losing the War on Terror* (New Press, 2007), author of *Success without Victory: Lost Legal Battles and the Long Road to Justice in America* (NYU Press, 2003), and editor of a collection of essays on the U.S. Constitution, *A Less Than Perfect Union* (Monthly Review Press, 1988). He is author of numerous articles on international law, foreign affairs, and the U.S. Constitution in publications, including *Yale Law Journal*, *Harvard International Law Journal*, *Cornell Law Review*, and *Virginia Law Review*. He is a member of the American Society of International Law.

**Deborah N. Pearlstein**

*Visiting Scholar*

*Woodrow Wilson School of Public & International Affairs*

*Princeton University*

Deborah N. Pearlstein joined the Woodrow Wilson School of Public and International Affairs at Princeton University in 2007 as a visiting research scholar in the Law and Public Affairs Program. An expert in U.S. constitutional law, Ms. Pearlstein's work focuses on U.S. counterterrorism and national security policies, executive power, and the role of the courts. She has published numerous popular and academic writings on the Constitution, executive power, and national security. Her most recent articles consider the role of the military as a constraint on executive power, and the Constitution and changing executive competencies in the post-Cold War world.

From 2003 to 2006, Ms. Pearlstein served as the founding director of the U.S. Law and Security Program at Human Rights First, where she led the organization's efforts in research, litigation, and advocacy surrounding U.S. detention and interrogation operations. Among other projects, Ms. Pearlstein led the organization's first monitoring mission to the U.S. Naval Base at Guantánamo Bay, Cuba, and coauthored a series of reports on the human rights impact of U.S. national security policy, including a landmark report on U.S. secret detention facilities, "Behind the Wire." She also worked closely with members of the military and intelligence communities in launching a series of off-the-record workshops to address key policy challenges in U.S. counterterrorism efforts. A frequent public speaker on security-related topics in U.S. constitutional law, Ms. Pearlstein has testified before Congress on the human rights impacts of U.S. detention and interrogation operations.

Before embarking on a career in law, Ms. Pearlstein served in the White House as a senior editor and speechwriter for President Clinton. Ms. Pearlstein received her B.A. in literature and politics from Cornell University and her J.D. magna cum laude from Harvard Law School, where she was articles editor of the *Harvard Law Review*. She also served as a teaching fellow in Harvard College and in the law school. Following law school, Ms. Pearlstein clerked for Judge Michael Boudin of the U.S. Court of Appeals for the First Circuit, then for Justice John Paul Stevens of the U.S. Supreme Court.

**Robert F. Turner**

*Professor General Faculty*

*Associate Director, Center for National Security Law*

*University of Virginia School of Law*

Professor Robert F. Turner holds both professional and academic doctorates from the University of Virginia School of Law. He cofounded

the Center for National Security Law with Professor John Norton Moore in April 1981 and has served as its associate director since then, except for two periods of government service in the 1980s and from 1994 to 1995, when he occupied the Charles H. Stockton Chair of International Law at the U.S. Naval War College in Newport, Rhode Island.

A veteran of two army tours in Vietnam, he served as a research associate and public affairs fellow at Stanford's Hoover Institution on War, Revolution, and Peace before spending five years in the mid-1970s as national security adviser to Senator Robert P. Griffin, a member of the Senate Foreign Relations Committee. Professor Turner has also served in the Pentagon as special assistant to the under secretary of defense for policy, in the White House as counsel to the President's Intelligence Oversight Board, at the State Department as acting assistant secretary for legislative affairs, and as the first president of the congressionally established United States Institute of Peace.

A three-term chairman of the American Bar Association (ABA) Standing Committee on Law and National Security (and for many years editor of the ABA *National Security Law Report*), Professor Turner has taught undergraduate courses at Virginia on international law, U.S. foreign policy, the Vietnam War, and foreign policy and the law in the Woodrow Wilson Department of Government and Foreign Affairs, in addition to coteaching Advanced Topics in National Security Law I & II. The author or editor of more than a dozen books and monographs (including coeditor of the Center's *National Security Law* and *National Security Law Documents*) and numerous articles in law reviews and professional journals, Professor Turner has also contributed articles to most of the major U.S. newspapers and has testified before more than a dozen different congressional committees on issues of international or constitutional law and related topics.

Professor Turner is a member of the Committee on the Present Danger, the Council on Foreign Relations, and other professional organizations.

## TRANSCRIPT

**Lt. Cmdr. Swift:**<sup>1</sup> I came to the Military Commissions with a background in the law of war. I had been trained to advise military officers, principally carrier battle groups, in war situations. Over the past thirty years, the navy had often found itself on the edge of—or in the midst of—active hostilities. The principal question posed in each of these operations was whether the hostilities amounted to armed conflict governed by the law of war. Discerning between the gray area of civil unrest and violence versus armed conflict was often a question of degree. These questions were played out in the Arabian Gulf, the Philippines, the Horn of Africa, and other areas. My role was operational in that I advised the commander on what regime governed a particular situation and the battle group's obligations in the use of force under that particular regime. My co-counsel, Lt. Cmdr. Phil Sundel, now at the International Committee for the Red Cross, had actually come from being a prosecutor at the International Criminal Tribunal for Rwanda. This background gave him a prosecutorial mindset focused on enforcement of war crimes.

The situation that we were faced with and the first question that we asked after being assigned to the Military Commissions was: what is war? What is war now? It quickly became very clear to us that the traditional definition of war was being redefined. No one really understood that at the time. For the American public it seemed pretty clear what war was. They had seen on their television screens what had happened in Afghanistan, and they heard all of the rhetoric that all of the persons held in Guantánamo Bay are combatants who had rifles and were captured on the battlefield. That certainly worked into our concept of what war was, and we began from there.

As the charges and rules began to take shape in front of us, we realized that those weren't actually the boundaries of what was being defined as war. Instead of beginning after 9/11 in Afghanistan, this war was being

defined as having started as early as 1991 against al Qaeda, an unnamed and undefined criminal group. In other words, the entire time I had been in the military I had been at war and I didn't even know it. The rules of when this combat started were based on the actions of a single man, and the best evidence that was given to us was that a guy had gone up onto a mountain top and said, "I'm at war with the United States." And that created an entirely different legal regime that was based not on a country, but an individual, declaring war. The rules of war weren't set up to deal with that.

It had never been considered that an individual, rather than a state, or at least a group that was organized like a state, could be at war with the United States. But the administration asserted that yes, indeed, that was, in fact, war. Why Timothy McVeigh's bombing was not war was never clarified, but in this particular case it was war. This view was at odds with the view that Lt. Cmdr. Sundel and I had shared when we reported to the Commission. In our view, the war and war crimes were limited to the period of the United States' active involvement in Afghanistan. In our classical training, that's when the war started and the law of war became applicable. Terrorism was not traditionally considered to be "war." It was a tactic one could find in war, but terrorism simply in and of itself was not war.

The next question that we had to ask was: where is the war being fought? Where is the battlefield? This is an essential question for a military officer because, quite rightly, an admiral or a general reigns supreme on the battlefield. Yet, what we quickly saw asserted was that New York City was a battlefield, Chicago was a battlefield, and the battlefield was literally everywhere that the administration said there was a battlefield. The question became an incredibly grey area, wherein we were in a worldwide war with an undefined battlefield, which was an incredible expansion of presidential power.

The next question we had to ask was: who was a combatant? Combatants, as we understood them, were those who engaged in armed

hostilities. But, in this particular case, we found that it wasn't limited to just those who engaged in armed hostilities. It is fairly easy to determine who is an armed combatant whether or not the person is wearing a uniform. If he or she had an AK-47 and was shooting from a rock then he or she was probably a combatant. But the view that anyone who supported combatancy was now in fact a combatant as well was particularly scary because military officers have another word for combatants—we call them targets. The idea on a battlefield is to kill the other side. So if you support a combatant, you are now a legitimate target under the laws of war. And that especially bothered me because it blurred the distinction between civilian and combatant that lay at the heart of the rules of war.

When it was argued that a little old lady in Switzerland could in fact be detained as a combatant for writing a check to an organization that might support terrorist activities, one really has to ask himself: if this is applied universally, then is every U.S. taxpayer a combatant? We are also supporting combat activities with those tax dollars. So we have now broadened the definition of combatant to the possibility that anyone on our opponent's side, or in any way aligned with our opponent, can probably fit within the definition. In other words, armed enemies and their friends are combatants.

The next question we asked was: what rules apply to this combatancy? The interesting thing here was that following the rules was a one-way street. These individuals could be held liable for war crimes; they had to comply with the laws of war. But we didn't, based on the argument that they were not complying with the laws of war; therefore, we don't have to follow the rules either.

The next argument that was made was that they are terrorists and terrorists don't have rights—they are illegal combatants. That phrase really bothered me because I knew from the rules of war that the other word for an illegal combatant is war criminal, so why would we bother to have a trial since they have already been found guilty? If they are, in fact, illegal

combatants, they are guilty of a violation of the laws of war. Essentially, we had the trial before we even started.

The result was that there were no rules that were actually supposed to apply to the executive. Every time I tried to call Mr. Hamdan a combatant, the administration would call him a criminal. And every time I tried to call him an accused criminal, the administration would call him a combatant. The result of that logic was to cancel out all forms of law so that the president, or military commanders, had all of the powers that necessarily go with the rules of war—but none of the restraints. They simply did not have to follow any rules of war. This “logic” was furthered by arguing that Guantánamo Bay belongs to Cuba for the purposes of protecting the U.S. government against lawsuits for human rights violations. It was beyond federal court jurisdiction even though it was exclusively in our control. So even if a court wanted to take a look at what was going on, it didn’t have the power to do so. Ultimately, we asserted all the powers of war that are absolutely necessary to wage war, but without any of the restrictions that had previously governed such power.

David Hicks’s case is a good example. David Hicks was an Australian charged by the Military Commissions for joining the Taliban, which was probably not a great career choice, but one he made nonetheless. The Taliban was the national army of Afghanistan, whether we liked that or not. And they were, in fact, organized and under command. David had joined this army and was, at the time that he was captured, guarding a tank. Not something he did very well, because he ran away when U.S. forces arrived. But he was captured while running away. He had been guarding that tank in the context of a civil war in which the Northern Alliance was fighting the Taliban. No one had argued that it was illegal for him to fight for the Taliban in this context. However, once the United States began fighting the Taliban, it suddenly became illegal for him to fight for them. David was charged with illegal combatancy for the simple act of guarding a tank.

Thus, as an illegal combatant, David could be legally shot on a battlefield, but he couldn't legally shoot back.

So, there were no limitations on the laws of war. And that's what we pressed forward with on the Commissions and said this can't be, that it simply cannot work in this vacuum, and that we have arrived at what Justice Jackson would have called a "true blank check." The *Hamdan*<sup>2</sup> case was about challenging that blank check. It wasn't about asking for free passes or no trials. It was a question of where do the rules begin, what rules will apply, and who makes these rules. The courts have recognized that the commander in chief's powers existed even before there was a constitution. These powers are inherently necessary for a ruler to successfully wage war; however, the commander in chief is also constrained by those same powers and the international rules for war. The United States is a lawful country. And what we found here was an exercise that says, well, at best, the rules are quaint and antiquated, so we are in a position to write new ones. And we can do so as we go along, which resulted in a commission process where, quite literally, they changed major procedures in the trial on three different occasions as it was going on. We didn't know what the rules were going to be in the morning; they could change from the night before. And this was because they weren't based on the rule of law—they were based on executive decree.

*Hamdan* challenged that. Who is Salim Hamdan? Salim had gone to Afghanistan with the intent of going to Tajikistan with other Arabs to be part of a resistance there against the holdovers of the Soviet government. He never made it. Instead, he ended up working for Osama bin Laden, which he readily admits. He was a chauffeur, but more accurately, he worked in a motor pool, fixing vehicles. There is no accusation that he ever carried a rifle against the United States or fired a shot or killed anyone, or that he actually fought against anyone at any time. He drove a vehicle. And at the time that he was captured, he was running away from the fight. He was trying to get out with his wife and children. So *Hamdan* presented

this question: do the rules of war deem Salim a combatant solely for driving a truck? And I am not dealing here with the very real and difficult questions of whether we are treating terrorism as a federal civil case, or whether that should be considered criminal action, under something like material support of terrorism? But, the question is: is it illegal to drive a truck under the laws of war?

Professor Katyal,<sup>3</sup> I, and others saw this as a test case to take forward because if Salim was a combatant, then everyone could be a combatant if he had violated the rules of war simply by driving someone—without actually shooting or being a part of any plot. No one had alleged that he had been part of a plot for 9/11 or the Cole bombings or the embassy bombings. No one believed that. It was not alleged against him. It was not even alleged that he was a member of al Qaeda, only that he had provided them with material support. If that made him a combatant subject to the rules of war, then these rules truly had expanded to such a point that everyone in the world could be considered a combatant under them. And this is particularly concerning and should be concerning to this audience even if you are not Yemeni and you are not in Afghanistan. The Supreme Court made it clear in *Hamdi* that citizenship is irrelevant in the rules of war.

If you are a U.S. citizen and inside a zone that is a battlefield, or if you are fighting for the other side, you're in the zone governed by the laws of war. Americans can be held and tried as combatants if they are found within a battlefield zone. Citizenship is not the test; historically, the test has always been whether you are within the battlefield. This is an area that the courts have controlled rigorously. When the executive was within his zone, the courts backed off. And I personally believe that is right—that a military commander should not be controlled on a battlefield by a court. But there is always that danger that the founders understood: the battlefield can get bigger. And continue getting bigger. And keep getting bigger. Some of the most historic cases approached by the courts deal with the expansion of the battlefield as it encompasses an entire country. It's particularly

concerning here, in the time of the War on Terror, because we don't know when the war is going to end. In fact, no one can define what the end would look like.

Terror isn't someone or even an organization. It's a tactic. And the tactic has been around for about as long as there have been human beings, and certainly as long as they've organized into military or semi-military or hostile groups. So I doubt that anyone can put forward a strong argument that the tactic is going away. Both the Military Commissions Act (MCA) and the president's Military Order that preceded it purport to create a system of detention and trial for the nebulous category of unlawful combatant defined broadly as terrorist or those who support terrorists. Neither order is limited to al Qaeda. Both vest the power in the executive to exclusively determine under what circumstances to exercise military power. As a military officer, I understood at the beginning of this that the Constitution required the military to be particularly aware of exerting power beyond its prescribed limits.

In the United States, there was great concern that the MCA and the president's order could be used for abuse. Military officers do not swear an oath of allegiance to the executive. The officers swear an oath of allegiance to the Constitution of the United States—the same oath that the executive swears—that we are to protect the ideals contained in the document. It was in respect of that tradition that I brought the lawsuit against the secretary of defense because I saw it as the right thing to do on behalf of my client, the right thing to do as a zealous advocate, and the right thing to do as a citizen of the United States. I felt it was necessary to define these boundaries. The Supreme Court left some things unresolved, but it was a huge win for us and a tremendous vindication.

But the MCA followed shortly thereafter, and there is a question in the plurality as to what's left open. Both Justice Stevens, writing for the plurality, and Justice Kennedy, in his concurrence, agreed that Common Article 3<sup>4</sup> of the Geneva Conventions governed the United States' treatment

of Mr. Hamdan. Common Article 3 was added to the 1949 Geneva Conventions in recognition that armed conflicts outside of the nation-state against nation-state paradigm posed equally great or greater humanitarian concerns and that the basic principles of the Geneva Conventions were binding in these conflicts.

One of the principles contained within Common Article 3 was that persons accused of crimes, in context of armed conflict not of an international character, must be tried by a regular court, providing all of the safeguards considered essential to a civilized people. It was shocking to me that the administration had maintained that Common Article 3 did not apply and that somehow they could hold a fair trial without meeting the safeguards considered essential, and that if this standard had to be met, the trial would not be held. One point of extraordinary concern is that the administration maintained that a military commission was a full and fair trial. It was considered a full and fair trial even though the accused did not have to be present, could be removed even though he was not disruptive, did not have the right to see or know the evidence against him, and did not have the right to represent himself. In addition, evidence obtained by physical or mental coercion was admitted and could be used to convict the accused, and the charges could be created by the administration after the fact.

The Bill of Rights did not apply to these trials. And according to the Bush administration, they were never actually essential for a full and fair trial. There was also a hierarchy of human beings—one level of people who are U.S. citizens and another who are not. And the non-U.S. citizens get less. I found that to be extraordinarily un-American. Throughout the trial, we argued that Mr. Hamdan, for committing a valid war crime, could be court-martialed, and that made absolute sense to me. If I could be court-martialed, it makes sense that he could be court-martialed. The law applies equally to everyone in the United States. This ideal is one of our great

strengths, and that is what we derived from the Geneva Conventions prior to 9/11.

Justice Stevens found, in his majority opinion, that the war did not start until 9/11. He found that Common Article 3 applied and that conspiracy, with which Mr. Hamdan was charged, was not in fact a war crime because there was no international agreement on it. Conspiracy as a war crime had been rejected at the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, and Nuremberg. And so he said, you can only charge those war crimes that have been designated as war crimes under international law, or you could create future crimes, but you can't go back in time. He held that the tribunal had to comply with U.S. statutes, the Uniform Code of Military Justice, and international law.

Justice Kennedy agreed that the Commissions failed to meet the Common Article requirements but found that because the commissions failed to meet these basic standards, it was not necessary to reach the merits of the questions raised as to the whether Mr. Hamdan could be tried in a military tribunal for conspiracy and/or the administration's claim that the war included actions prior to 9/11. Justice Kennedy's concurrence, therefore, leaves open the very basic question of when the war began. Following the passage of the MCA, which the administration argues has cured the statutory problems, the administration renewed its claim that the war actually began in 1991, and that we can go back and charge all of these crimes that weren't previously considered war crimes and that would normally be considered ex post facto. In addition to ex post facto application, the MCA purports to strip both the right to habeas under which *Hamdan* was brought and further judicial enforcement of Common Article 3. So we're really kind of right back where we started, despite what was considered a huge victory in *Hamdan*.

That throws it back to the courts, which is unfortunate. Senator Specter said that when he voted for the bill he found that significant portions of it

were unconstitutional, but he is counting on the courts to clean it up. Now, we find ourselves still arguing over these basic definitions of war. How are we going to define war in the future? It is of concern to every one of us because it will set out a legal regime under which we are going to conduct both military and civil operations. The questions of “what is war?” and “is this a time of war?” will find their way into every part of the discussion tonight. I talked about military commissions, but I also understand that it affects every single area under security, surveillance, immigration, etc. There are different regimes for times of war. And we arguably now find ourselves in this new era, which at the far end is somewhat scary and reminiscent of *1984*. We are in a perpetual war against an unknown enemy. And this justifies departures from known civil liberties for an indeterminable period of time.

I argue that this is not unprecedented. We’ve been here before, quite recently, in fact. Following the end of World War II, we saw the rise of the Soviet Union, which was a far greater opponent than al Qaeda. There was no debate on whether they had weapons of mass destruction—they were going off in test yards. They had missiles and submarines to deliver them, which were positioned off our coasts. The cold war began with similar legislation and fear, and it had similar periods of hot war like Afghanistan and Iraq. Some were successful. Some were not. But it’s my argument that when we decided that we were going to uphold the rule of law, that the power of that to persuade the citizens of those states that opposed us, to come to our side, to see it our way, inevitably wore down support for the Soviet Union among both allied communist nations, like Poland and East Germany, and the Russian people themselves. Ultimately, the Soviet Union was unable to continue a repressive regime in opposition to the demonstrable freedom and opportunity present in America and its allies. I believe that the same is true here, too.

I told a story last night that illustrates this point, and I will tell it here now. I went to Yemen to visit my client’s family, and on the last night, the

grandmother of the house invited all the little girls of the house up to the top floor. My client has two little girls, Fatma and Selma, and they have a lot of cousins. There had to be twelve, thirteen, or fourteen of these little girls in blue jeans, t-shirts, and Keds or flip-flops. They were all talking and doing everything that little girls do. The grandmother finally got them all down on the floor and quieted them down. She looked out at their faces and pointed at Susan, a female attorney who had come with me to help with depositions. She pointed to Susan and said, "She studied very, very hard in school and she got very good grades and now she is an attorney." And then she looked at them and said, "If you study very, very hard in school and get good grades, you can be anything."

She is the single most dangerous weapon in the world against Osama bin Laden. He cannot beat her. He fears her more than any bomb. It was the rule of law and that promise of equal treatment under the law that beat the Soviet Union. And it will beat al Qaeda. It will beat back fundamentalism every single time because the world wants to be free. And part of freedom is the rule of law.

**Judge Lasnik:** I'm very proud to be here, thank you. Some of you may know that the *Hamdan* case actually started in the Western District of Washington. At the time it was assigned to me, it was called *Swift v. Rumsfeld* because it was not clear whether Mr. Hamdan even had standing to bring the suit. He needed a next friend to bring the suit, so Commander Swift stepped in. The very first hearings on the case were conducted in front of me. I took the opportunity to point out that there were certainly serious issues at play here, and that any time there was a crisis in America, any time we'd been invaded, whether it was Pearl Harbor, the Civil War, or whatever, there arises a tension in the separation of powers about whether we really are going to retain our civil liberties. We need to be mindful of that whenever the latest threat comes along and whenever people tell you that this one is different. You need to remind them and yourselves that that's what they said about the Japanese Internment, that's what they said

about loyalty oaths, and that's what they said about many things that we now look back on with a certain degree of shame and horror.

The U.S. Supreme Court decided a case that ruled that all of these habeas petitions would be heard in federal court but moved to the D.C. District, isolating them in one district. Jim Robertson handled it. And unlike me, who got a decent number in the draft and didn't have to go to Vietnam, Judge Robertson did know a great deal about military service and a great deal about military justice, and I think he turned out to be a superb judge for that case because he really understood the issues that Commander Swift was talking about.

When you look at the Constitution, it's a very simple document in a lot of ways. Article I vests the legislative power in Congress. Article II vests the executive power in a president. Article III vests judicial power in the Supreme Court. And, in Article I, Congress is given certain powers to create lower tribunals than the U.S. Supreme Court to hear cases. Now I think it was understood by the founding fathers that we were going to need lower courts eventually.

The idea of jurisdiction stripping is that if Congress has the power to create lower courts, it has the power to destroy, or uncreate lower courts, and if it has the power to uncreate the district courts and the circuit courts, it infers that it must have the power to limit what those courts can hear. And I think it's kind of a theoretical argument, although it was looked at in the mid-1800s in a couple of cases that are very difficult to read, let alone understand. But I think it's fair to say that the attempt in what Commander Swift referred to in the Military Commissions Act (MCA)—to deprive the court of jurisdiction to hear anything that comes from habeas review of these cases—is very different from anything that's been ruled on before. But I'm not here to talk about whether that's constitutional or unconstitutional. I'm here to talk about why jurisdiction stripping is a bad idea. And, no less, it was Chief Justice John Roberts, a conservative jurist, who, at his confirmation, said that jurisdiction stripping is bad policy.

And I think that the word conservative, and I think you'll hear from somebody who is a legal conservative when you hear from Bruce Fein, doesn't mean you always support whatever George Bush or some elected president says; it means you believe in conserving and preserving institutions that were created by our founding fathers, who by the way, if ever there were rebel insurgents, it was those individuals who, despite the fact that they had it better than 99.9 percent of the people on the face of the earth, decided they could do better by creating their own government than by being subjects of England.

What does vesting judicial power mean? It means that judges need to have the ability to decide certain kinds of issues. Those issues that we are good at deciding include: is a law constitutional or unconstitutional, are people getting the process that they are due, is there fundamental fairness—things like that. Believe me, you do not want judges performing executive functions.

But, what you do want is the judiciary to be able to decide what a law means, what is and is not constitutional, what is fundamental fairness, what is due process, what is equal protection, and the like. And attempts to strip away from the courts the ability to have their say in those areas is something that has happened very rarely in this country, and there is absolutely no reason to apply it now as a function of policy. It's only been in the last ten or fifteen years that we have seen it as a strategy—let's get the Pledge of Allegiance away from the judiciary, let's get the Defense of Marriage Act away from the judiciary, let's get habeas corpus away from the judiciary. It's kind of surprising to see some of the people who are speaking in favor of this who, at the same time, call themselves conservatives but do not believe in conserving what has worked so well in this country for over two hundred years.

The federal judiciary is, as Alexander Hamilton said, by far the weakest branch of government. We have neither the power of the purse, which is vested in Congress, nor the power of the sword, which belongs to the

executive. We are also the most vulnerable when the two other branches of government gang up on us. John Yoo, a professor at Berkeley who gave the advice that turned out to be incorrect about habeas jurisdiction over the detainees in Guantánamo, was definitely crowing after the passage of the MCA that it wasn't that the president won, it's that the courts lost. Believe me, we don't win or lose. It's the people who win or lose when this happens. It would be just as dangerous if the executive branch and the courts ganged up against Congress or if Congress and the courts ganged up against the executive. That is what Alexander Hamilton was concerned about.

The balance of power and the separation of powers is a very delicate balance that we always have to be very careful to preserve. The media did a terrible job on the MCA because they treated it like a sporting event; it was Senator McCain and Senator Graham versus the White House on torture, and virtually no one focused on the jurisdiction stripping aspect of taking habeas review away from the federal courts. I think the media did us a great disservice in that area.

The courts are here for a reason. Seven out of the nine Supreme Court justices have been appointed by Republican presidents. More than two-thirds of my bench were appointed by Republican presidents. The vast majority of federal judges in this country were appointed by Republican presidents and they are not dangerous liberal activists; I can assure you of that. We are a group of relatively conservative people. Recent surveys show that only 20 percent of the American people have confidence in Congress. The president's approval ratings are at about 30 percent. The U.S. Supreme Court had approval ratings as high as 75 percent two years ago and about 67 percent now. So I think the attempts to strip us of our jurisdiction are very bad policy, whether they are constitutional or not, and should be opposed.

**Deborah Pearlstein:** I would like to add my thanks to Seattle University for hosting this forum. As I was listening to Charlie Swift's remarks, they

reminded me very much of my own reactions to the military commission trials. I was among the first group of human rights lawyers who the Department of Defense (DOD) decided to allow into Guantánamo to observe the commission's opening hearings back in 2004, and Charlie's point about the rules at Guantánamo Bay changing as the train was leaving the station is incredibly apt. If I can just start with this aside, we had been arguing with the DOD for about a year and a half for the right to have human rights monitors at the trials. We were losing that battle until a reporter asked the DOD spokesperson at a press conference why is it they couldn't have three, four, or five human rights lawyers down there just to observe the trials. The reporter asked why, if they were allowing media down there, the human rights lawyers couldn't come as well. And the spokesman's response to that was, in essence, that there was not a lot of room on the base and they really didn't have enough to feed the human rights lawyers. At that point, my colleagues and I began joking that we would volunteer to bring our own peanut butter crackers to Cuba. It wasn't long after that rather public episode that the DOD decided to change its mind and allow us down there.

A few months after that initial visit, a colleague of mine went down to Guantánamo to observe proceedings in the military commissions and was sitting in the courtroom when the proceedings were paused. A young military officer came into the room and handed the presiding officer a piece of paper, which the presiding officer read and then announced to the courtroom and all assembled: "These proceedings are being indefinitely adjourned. We'll get back to you and let you know what happens." Judge Robertson, a sitting federal judge in the D.C. District Court, had issued a ruling that the proceedings were a violation of the laws and treaties of the United States and they needed to be stayed indefinitely. And it was at that moment, I think, for one of the first times since 2001, 2002, that I started to feel that there remained a very active commitment to the rule of law in this country. On a military base far removed from any federal court of

jurisdiction, somebody walked in with a piece of paper and said to a military officer in a room filled with armed guards, stop what you're doing. And, on the basis of this piece of paper alone and the force of the court's ruling, court proceedings were stopped.

I think that was certainly one of the most dramatic moments that I can recall of the proceedings, but also one of the most hopeful. The role of courts has been essential and, in many respects, hugely positive in pushing back against expansive assertions of executive power in the post-9/11 era.

So, with those brief remarks out of the way, let me turn to what I've been asked to talk about—the interrogation and treatment of detainees held in, what the administration has called, the War on Terror. The topic, as I'm sure you all know, remains pressing. According to the latest statistics from the DOD, there have been about six hundred criminal investigations into detainee abuse, including the abuse of those detained in Iraq and Afghanistan, and those held in Guantánamo Bay and here in the United States. About 250 soldiers have been disciplined through courts-martial and nonjudicial or administrative punishments for their actions. Thus, beyond the few cases at Abu Ghraib that everyone is familiar with, I think it's important to begin with the understanding that our treatment of detainees in the field has been broadly problematic for the past several years.

Human Rights First has identified, based almost entirely on official records, more than 147 detainees who have died in U.S. custody in Iraq and Afghanistan since 2002. These cases include at least forty-five homicides, again, homicides as classified by the DOD. And this number includes eight detainees who were, I think all would agree, tortured to death. Out of these 147 deaths, only about fifteen have resulted in the punishment of any U.S. officials involved.

Now these statistics exist in a context where Vice President Cheney appeared to confirm, or at least suggest, on a radio talk show that detainees in U.S. custody had been subject to water boarding. Water boarding is the

act of dousing someone in water to make them feel as if they are drowning; indeed, for all intents and purposes, they are drowning. In that interview, the vice president essentially said that water boarding is an acceptable interrogation technique. And these issues were on the front page for several weeks at the end of the past legislative session when Congress debated the meaning of the Geneva Convention standard on basic humane treatment for detainees.

So given the very rich, complicated, and, in many respects, troubling factual situation in which we find ourselves, I thought it most helpful to briefly lay out what laws might have some bearing on executive power to detain and interrogate detainees. In addition to relevant constitutional and international law provisions, Congress has had a fair bit to say about this, particularly in the last two years, where there's been a great deal of activity on Capitol Hill surrounding these issues, after four years of relative silence. At the end, I'm going to flag a few more big picture concerns that I have with the approach to law that has informed policy judgment in this context.

First, there's a rich body of case law primarily under the Sixth Amendment, and to some extent the Fifth Amendment as well, on how detainees may be treated in U.S. domestic criminal custody, focused on how that treatment might impact the subsequent admissibility in a criminal proceeding of any statements made. These cases are partly decided based on due process concerns, but more specifically on the right against self-incrimination. Constitutional law decisions have been very strong in announcing that information elicited through coercion is not admissible in court. Information gleaned under such circumstances isn't reliable enough, and, in any event, the Court has held that it's just not what a civilized society would do. Thus, there is very strong language dating back to the 1940s in a series of dramatic cases involving lynchings and the treatment of detainees in custody in the South. The cases dealt with not only serious abuse, but with long periods of solitary confinement; locking a prisoner in a cold room; exposing a prisoner to harsh conditions; denying the prisoner

access to an attorney for prolonged periods of time; and denying the prisoner access to basic necessities such as toilet facilities, food, and water. If you do any of these things to a detainee, the information you get is not admissible in court. In this respect, the Sixth Amendment, at a minimum, sets up something of an exclusionary rule type of deterrence in the domestic setting. That law is rich and very well established.

However, that doesn't tell you what a federal officer can or cannot do to a detainee in the course of simply trying to elicit information—information that you may not have any intention of ever using in a criminal or any other court proceeding down the road. In over two hundred years, the Court has had almost nothing to say about whether coercive tactics may be used solely to obtain information. To the extent the Court has had something to say about this, it has framed the issue almost entirely as a Fifth Amendment issue. The Eighth Amendment is also implicated, but it largely arises only in cases where there's already been a criminal conviction. So the administration and others would say that the Eighth Amendment, which addresses cruel and unusual punishment, is not relevant here. We can talk about whether or not that argument is valid, but let's just focus for the time being on the Fifth Amendment jurisprudence that does exist. This is what's usually known as substantive due process case law. Here, the Supreme Court has said that any treatment that "shocks the conscience," and that's the standard, is out of bounds under any circumstances. So what treatment "shocks the conscience"? Well, again, that's not very well defined.

I would say that there have been maybe three cases in the history of the Supreme Court in this context that have tried to elucidate that standard. Holding up those cases and those facts against what we hear in the news today about how detainees have been treated in the context of this conflict, purportedly in the interest of gathering intelligence information, it's not entirely clear how the Court would come out on some of the techniques that have been reportedly used, like water boarding, prolonged solitary confinement, sleep deprivation, and exposure to extreme temperatures—

suffocating heat, or cold sufficient to induce hypothermia. I would like to think, and I do think, there are incredibly strong arguments from a substantive due process point of view that this kind of treatment, under any circumstance, is always out of bounds. But, that has yet to be fleshed out and fully established by the Supreme Court.

What does the Bush administration say about the applicability of these or other constitutional rules that might restrict detainee treatment? Well, first and foremost, the administration says that the Constitution is irrelevant and that the only places where the United States is really detaining people whose treatment you're concerned about is outside the territorial borders of the United States—in Iraq, Afghanistan, and Guantánamo Bay. It really doesn't matter what the Fifth, Sixth, Eighth, or Fourteenth Amendments might have to say, because the Constitution provides no protection to aliens held extraterritorially. Evidence of this position can be seen in memos by John Yoo, Jay Bybee, and others that were written in 2002 and 2003, which have not been fully repudiated yet by the administration. Indeed, these memos argue that even if the Constitution did apply extraterritorially, it can't be interpreted so as to constrain the president's authority as commander in chief to interrogate detainees as he sees fit in the interest of national security and the global War on Terror. So even if the Constitution applied, or even if Congress passed a statute expressly stating that you can't do this to a detainee in U.S. custody, the president contends that he has unlimited power to apply whatever techniques he feels are necessary in fighting the War on Terror.

Now, whatever objections one may have to that position—and I have several—the bottom line remains that this position is largely untested in court, both because there's been little case law on the absolute treatment of detainees by the Supreme Court and because, as the Military Commissions Act (MCA) and other actions by Congress and the administration have made clear, it is very difficult to challenge the treatment of detainees in a federal court.

As I turn to international law, let me digress for a moment to note that one of the dramatic and positive, if I can say that, effects of these last four to five years of detainee treatment, policy, and trials, is that treaty law—a subject that was largely avoided, not by all federal judges, but by many federal judges, and not given much attention in most law schools—has emerged on the national stage, and certainly in the domestic legal community, as a hot topic and a major area of interest. The national legal consciousness raising about things like the Geneva Conventions and other international laws that govern U.S. conduct in this conflict and others has been really tremendous in the past several years. I think that of any positive outcome I could point to, this is certainly one of them, if not the only one.

There are a variety of treaties that have some bearing on how the United States can treat detainees in its custody. A first key set, of course, is the Geneva Conventions, which apply in situations of either international armed conflict or non-international armed conflict. There are four Geneva Conventions. There are really two that bear most directly on the conflict today, the Third and Fourth Geneva Conventions. The Third Geneva Convention addresses the treatment of prisoners of war, who are a very specially defined category of detainees. What distinguishes a prisoner of war under the law of war from any other detainee who might be caught in the course of armed conflict is primarily, and almost entirely, what's called the combatant's privilege. In other words, if you are a lawful combatant and are captured as a prisoner during the course of war, you can't be tried criminally, in a federal court, in a military commission, or otherwise, for killing somebody on the battlefield. In what would be considered murder in any other setting, you have a privilege as a combatant. It's your job as a soldier to kill people. So we're not going to prosecute you criminally. It's not a war crime to kill people in the course of war.

The basic standard of detainee treatment that applies to prisoners of war is also found in the Fourth Geneva Convention, which deals with civilians caught in the course of international armed conflict or non-international

armed conflict. This basic standard is found in Common Article 3, so called because it appears in all four of the Geneva Conventions. Common Article 3 sets a basic standard of humane treatment for all detainees, whether they are civilians, prisoners of war, unlawful combatants, or whatever you might want to call somebody. Anybody caught up in the course of armed conflict at any time is subject to this protection, including a prohibition against violence to life and person—particularly murder, mutilation, cruel treatment and torture, and outrages upon personal dignity—specifically, humiliating and degrading treatment.

The Bush administration had argued, since 2002, that while the United States has a *policy* interest in treating detainees humanely, it is under no *legal* obligation to do so. The administration position applied to members of al Qaeda and the Taliban or anyone caught up in the course of this broadly defined War on Terror. The White House argued, in a memo, that Common Article 3 doesn't apply because, among other things, Common Article 3 applies only to conflicts not of an international character and the relevant conflict, this war against terror, is international in scope. To be clear, according to the administration's theory, the War on Terror is not international in scope because it's not state against state. The War on Terror is also not non-international in scope, which is the only other category of conflict to which the Geneva Conventions apply, because it transcends national boundaries. The War on Terror is global in scope; it's not taking place simply in any one country. The administration's argument thus defined the War on Terror to be perfectly outside of the Geneva Conventions because the war is neither international nor non-international.

If you've followed me thus far, then you'll well understand the significance of the Supreme Court's decision in *Hamdan v. Rumsfeld*, which Charlie discussed. *Hamdan* held that the military commissions, as they had been designed at Guantánamo, could not go forward because they were in violation of U.S. law. But more than that, *Hamdan* also held on the way to that conclusion that, contrary to the administration's position,

Common Article 3 was indeed applicable to detainees in the War on Terror. Common Article 3, as far as it concerned the *Hamdan* case, includes the basic fair trial standard that Charlie was talking about as well as a basic standard of humane treatment for detainees. The debate that followed on Capitol Hill around the MCA was, thus, in part, about the procedures that needed to be included in the military commission trials and war crimes trials to be fair. But a substantial part of that debate, and the vigor and speed with which it was pursued, was an attempt to respond to the Court's ruling that the Common Article 3 standard of humane treatment applies. The United States has had, and still has, detainees in custody who have not been treated according to the Common Article 3 standard. And the administration was facing a serious problem, in particular under the federal statute called the War Crimes Act, which is a law that criminalizes any violation of Common Article 3. So after *Hamdan*, if it hadn't been clear before, there was now no denying that any U.S. official who had been engaged in detainee treatment that violated Common Article 3 in the past several years could arguably be facing liability for committing a war crime. This argument had been made vigorously by many JAG lawyers inside the Pentagon and others in 2002, 2003, and 2004, as these policies were being debated. Indeed, among the many reasons that these policies were objected to by many of the extraordinary military lawyers and other members of the uniformed military inside the Pentagon was that it might expose our own troops to war crimes prosecution. This danger was very much facing people following the Court's decision in *Hamdan*.

Let me now pause to put out the one other treaty that I think is centrally relevant to this debate and the question of detainee treatment: the Convention Against Torture<sup>5</sup> (CAT), which was ratified by the United States in 1994. Under the Convention Against Torture, which has been ratified by the vast majority of countries around the world, torture is absolutely prohibited. Under Article 16, each state party to the convention is also obligated to prevent, in any territory under its jurisdiction, other acts

of cruel, inhuman, or degrading treatment or punishment which do not amount to torture. Unlike the Geneva Conventions, the CAT isn't limited to application during periods of armed conflict; it applies under any circumstances, at all times. So you don't need to get into this complicated debate about what's war, what's an armed conflict, and whether we are in one or not. The CAT is binding on the United States at all times in regard to all persons.

However, the White House position is that the CAT doesn't apply to aliens held by the United States, military bases, or elsewhere overseas. And, in particular, the administration cites a reservation that the U.S. Senate adopted when it ratified the CAT saying that Article 16 and the standard "cruel, inhuman, or degrading treatment" is limited to the meaning of those terms as elucidated by the Fifth, Eighth, and Fourteenth Amendments of the Constitution. On its face, such a reservation is potentially fine. But recall the Fifth Amendment standard, "that which shocks the conscience," is not well defined. Moreover, by equating the Article 16 prohibition to a U.S. constitutional protection, the White House could then argue, as it has, that the CAT prohibition was irrelevant to U.S. operations overseas. Recall that, in the administration's view, the Constitution doesn't apply extraterritorially. Now this reading of the treaty raises the puzzling question of why the United States would go to the trouble of signing onto an international treaty binding itself to a standard if all it really wanted to do was bind itself to the constitutional standard that already applies inside the United States. But that was the White House's argument. Distinguished conservative scholar Abe Sofaer, who was the State Department legal advisor under the first President Bush, is among others who have categorically rejected that interpretation of the treaty reservation. But in the meantime, these questions about the scope of the prohibition on cruel, inhuman, or degrading treatment under the treaty have been on the minds of many in Washington since 9/11.

So let me now return to the debate on these matters on Capitol Hill. After having been all but silent on the question of detainee treatment for the first four years after 9/11, Congress responded in full force in December of 2005, and again, just a few months ago, in response to the *Hamdan* decision by the Supreme Court. In December 2005, Congress passed the Detainee Treatment Act, which did many things, including a lot with respect to the jurisdiction of the federal courts over habeas cases. Among other things, it included the so-called McCain Amendment,<sup>6</sup> which prohibited the cruel, inhuman, or degrading treatment of anyone in U.S. custody. This provision was meant to apply not only to the U.S. military, but also to U.S. intelligence agencies engaging in detention operations overseas. The administration vigorously resisted signing this bill up until the end, with Vice President Cheney personally advocating against it repeatedly. Nonetheless, the McCain Amendment passed the Senate by a vote of ninety to nine before it went on to be included in the Detainee Treatment Act itself that was passed by both houses.

In signing the bill into law, the president's signing statement cautioned that the executive branch would construe the act relating to detainees in a manner consistent with the constitutional authority of the president to supervise the executive branch as commander in chief and consistent with the constitutional limitations on judicial power. This statement was widely, and I think accurately, understood to be a reminder that, in the administration's view, neither Congress nor the courts could limit the commander in chief's ability to interrogate detainees in a way he sees fit. Administration legal memos had indeed argued that it would be an unconstitutional limitation on the president's authority to do so. And the administration continued to advance the view that statutory restrictions on interrogation techniques could unconstitutionally limit the president's power. It also indicated it thought the meaning of cruel, inhuman, or degrading treatment was entirely unclear, and in any event the McCain Amendment was passed with no enforcement mechanism attached, and the

administration continued to argue, and still argues, that it is unenforceable as a civil matter in federal court.

So that's where matters stood when *Hamdan* came out in the summer, and after a very short period of time, Congress passed the MCA, which I've mentioned. The MCA took direct aim at the Common Article 3 holding of *Hamdan*, that this basic standard of humane treatment, which includes this language of "cruel, inhuman, or degrading treatment," not just torture, applied in the War on Terror. The White House didn't get everything it wanted included in the act. In particular, the White House's initial proposed version of the MCA would have said the meaning of Common Article 3 is no broader than what is contained in the McCain Amendment. Just as in the U.S. reservation to the CAT, the phrase "cruel, inhuman, or degrading treatment" can't mean anything more than what is covered under the Fifth, Eighth, and Fourteenth Amendments. And in the administration's view, the Fifth Amendment's standard prohibiting only severe treatment that "shocks the conscience" allows many coercive interrogation techniques to continue. There should be no mistake, however, that that provision was rejected in the final bill. Instead, the MCA amended the War Crimes Act. The War Crimes Act, which, recall, had criminalized all violations of Common Article 3, now only criminalizes selected violations of that article, including murder and torture, and including, only in a limited way, cruel or inhumane treatment other than torture. In the administration's view, this provision, in combination with other provisions in the MCA, could thus be used to retroactively immunize anyone who had engaged in "cruel, inhuman or degrading" detainee treatment since 1997, absolving any U.S. official who might have violated this aspect of Common Article 3 of any war crime responsibility.

So what does this all mean? Well, first of all, it means that there is a lot more litigation to come. I called the MCA when it passed a full employment bill for lawyers, and I still believe that will be the case. However, in terms of how the United States can currently treat detainees, I

think the administration would like to view the MCA as a substantial victory. Not only does it retrospectively immunize certain violations of Common Article 3, it suggests, or the administration would like to interpret it to suggest, that there is still wiggle room with respect to the treatment of detainees going forward—including water boarding, which is effectively a simulated execution, induced hypothermia, and prolonged solitary confinement for months on end. This, despite the Supreme Court having recognized, since the beginning of the twentieth century, that prolonged solitary confinement, among other things, is so profoundly damaging to psychological health that it shouldn't be practiced by a civilized society.

I believe that the act doesn't allow the administration nearly as much wiggle room as it would like to think it does. The *Army Field Manual*, newly adopted in the wake of the *Hamdan* decision, I believe, comes very close to embodying the Common Article 3 standard as we would interpret it. Whether, and to what extent, the CIA or other agencies involved in detention and interrogation operations will view themselves as bound by that standard remains to be seen. At worst, what the MCA might be seen to do is to create a legal regime in which if you torture or engage in any of these other forms of "cruel, inhuman, or degrading" treatment, there is less criminal liability for that conduct than there was before. There is, likewise, little hope of civil enforcement and, indeed, the MCA contains a provision that purports to deny courts the ability to consider the Geneva Conventions as a source of rights in any U.S. court. And if you do engage in this treatment, you may, in the context of a military commission trial, be able to use the fruits of cruel and inhuman treatment as evidence in a military commission prosecution. That is a curious anti-torture regime at best. Indeed, I would say that rendering laws against torture and "cruel, inhuman, or degrading treatment" legally unenforceable—as has now been effectively done—undermines America's claim to be committed to government under the rule of law. Torture and cruel treatment are anathema to the idea of

human rights and the idea of human dignity. We may pass laws that say as much, but until we vigorously enforce them, they are little more than paper.

**Professor Lobel:** I would like to begin by telling you about Mr. Arar, a Canadian citizen who was born in Syria and, therefore, has dual Canadian-Syrian citizenship. In 2002, he and his family were vacationing in Tunisia when his Canadian employer asked him to come back to Canada. He arranged for a flight from Tunisia to Switzerland to Canada with a stop to change planes in New York City. He was pulled out of the immigration line by INS officials at JFK and interrogated by FBI and INS officials about whether he had any membership in, or affiliation with, various terrorist groups. U.S. officials then transferred Arar to the Metropolitan Detention Center in Brooklyn, denied his requests for a lawyer, incarcerated him for two weeks, interrogated him at length, and ordered his removal based on secret evidence alleging that he was a member of a terrorist organization.

The regional INS director found that Arar was clearly and unequivocally a member of al Qaeda. Yet, we now know that the Royal Canadian Mounted Police told the FBI that, in fact, all they had were suspicions that Arar had some connection to terrorism, suspicions which turned out to be untrue. The Canadians told the INS that if Arar was returned to Canada, he would be placed under surveillance. But, instead, the INS told him that he would be sent to Syria. Arar vigorously objected, telling the INS officials that the Syrians would torture him. In fact, the U.S. State Department has condemned Syria for routinely torturing prisoners.

The INS refused to let Arar see the Canadian consulate and refused him access to a lawyer. They secretly sent him to Jordan. From there, he was shipped to Syria. In Syria, he was detained for one year. In Syria, he was put in what Arar termed a grave cell, a cell measuring six feet by seven feet by three feet, where he was kept for a year. He was brutally tortured. He was beaten with cables, threatened with electric shock, threatened to be put on what was known as “the tire,” and he was forced to listen to the detainees in other cells screaming and begging for mercy. After a year, the

Syrians released Arar, stating that they had no evidence that he was a terrorist of any sort. He is now a free man back in Canada, after having spent a year being tortured in Syria.

The first point about the Arar case is, why would the United States government send somebody who they think is a terrorist, not to our ally in the war against terrorism, namely Canada, of which he was a citizen and where he was trying to go, but instead to one of the so-called rogue states which we bitterly condemn? Why would the United States do this? There is only one reason that I can think of—that Syria would do what neither Canada nor the United States could lawfully do, detain him indefinitely without any due process protections and torture him. This decision to send Arar to Syria was not made by a low level official, it was made by the Attorney General's Office. And Arar's case is not an isolated incident. There have been over one hundred people who have been subject to this policy of extraordinary rendition, including a man by the name of Khalid al-Masri who was kidnapped by the CIA in Macedonia, brought to Afghanistan, held in Afghanistan for four months, and allegedly tortured by the CIA until it realized that he was the wrong person and released him. They were looking for another al-Masri. The only connection that Khalid al-Masri had with terrorism was that his name was the same as somebody else's who appeared on some list. This whole policy of extraordinary rendition has been aptly described as outsourcing torture. Instead of committing torture ourselves, we send the person to some other country where we know they will be tortured in a way that we could not do if it was being done in the United States. Extraordinary rendition is essentially a way of torturing somebody and avoiding accountability.

The second broad point I want to make about this case is that it's part of a much more general policy in fighting the war on terrorism known as the "preventive paradigm." In the past, before 9/11, rendition was used to transfer somebody to a place where they could be tried for a crime they had allegedly committed and for which they had been indicted. If somebody

was wanted in the United States for trial, and we couldn't get them legally, we would kidnap them. In my opinion it was an illegal policy, but at least its purpose was to bring somebody to trial. Since 9/11, the Bush administration has transformed the policy of rendition into a preventive paradigm mold. Instead of using renditions to bring individuals within the reach of the law for trial for past wrongs, extraordinary rendition's new purpose is to send suspected terrorists to countries where they will be held outside of the law in order to gather intelligence about potential future terrorist acts through coercive interrogations. It's a whole shift from prosecuting criminals to preventing future criminal acts.

The Arar case demonstrates a clear need to hold officials who engage in this type of rendition accountable. Yet, in both Mr. Arar's and Mr. al-Masri's cases, the judiciary has thus far denied these innocent victims of extraordinary rendition a judicial forum to hear their claims. This means that the executive branch would have no accountability in any of these types of issues. Moreover, the government argues that even were a court to exercise jurisdiction in the Arar case and reach the merits, Arar would have no claim because the Constitution and our laws don't apply abroad. Syria tortured him, we did not. They tortured him in Syria, not in the United States.

Arar was detained as an unadmitted alien and, therefore, the government claims, he is not entitled to any constitutional rights even when he was on American soil. The government makes that same argument with respect to the Guantánamo prisoners, that they have no constitutional rights.

I want to spend the rest of my time briefly discussing whether or not aliens held abroad have any constitutional rights. One can distinguish three kinds of cases. First, in Arar's case, he was here and was sent to Syria. So it's not like he was just purely abroad. He was actually sent from here to someplace else to be tortured. Second, in the case of those individuals detained at Guantánamo, Guantánamo is under the exclusive jurisdiction of the United States. Third, the people being held in Bagram Air Force Base

in Afghanistan or in Iraq were never in the United States. But all three of these cases raise the same issue, and in each situation the aliens have certain fundamental constitutional and human rights.

The United States Supreme Court, in a case decided in the late 1980s, *United States v. Verdugo-Urquidez*, held that the Fourth Amendment doesn't apply abroad.<sup>7</sup> The government uses that case and the *Eisentrager*<sup>8</sup> case to say that constitutional rights generally don't apply abroad. Yet neither of these cases support that blanket proposition.

There are two broad and conflicting theories that address this issue. One is that the Constitution is a compact between the government and the people and, therefore, only applies to those people in the United States—those people who are subject to U.S. law. The other theory is that the Constitution should apply wherever the government is acting because the Constitution sets forth the basic rules governing U.S. official conduct. We don't want the government to torture people anywhere. Thus, the Constitution is a limitation on how the government should conduct itself in general and not just a limitation on how it should conduct itself vis-à-vis our citizens or vis-à-vis residents of the United States. The Supreme Court, however, in its footnote in *Rasul*,<sup>9</sup> which noted that the complaint in *Rasul* unquestionably alleged violations of the Constitution, cited Justice Kennedy's concurrence in the *Verdugo-Urquidez* case. Justice Kennedy provided the critical fifth vote in the *Verdugo-Urquidez* case, as he seems to be providing the critical fifth vote in many of these cases now. Kennedy's opinion is that you have to look at each situation as a unique situation, each in its own context. You can't take a broad position that the Constitution simply doesn't apply. You have to look at each particular context. And I think in the context of Guantánamo, or of Mr. Arar, the Constitution clearly should apply abroad. Moreover, when a fundamental norm such as the ban on torture is involved, the Constitution should be read to apply wherever and against whomever the government acts.

In that context, I just want to address what the government has done with respect to Guantánamo subsequent to the *Rasul* case and how constitutional rights might be implicated. They created a hearing process which doesn't comport with any notion of due process that I'm familiar with. The first thing is that they don't tell the person what the facts are that they are being accused of. There are quite a few people in Guantánamo, as Commander Swift pointed out, who weren't captured on the battlefield. In fact, under the U.S. government's own investigation, only 8 percent of them were actually fighters. And only 45 percent of them actually committed a hostile act against the United States. Many of them are people like the prisoners who were taken from Bosnia after the Supreme Court of Bosnia held that there was no evidence to hold them in Bosnia. They were then transferred to CIA custody and sent to Guantánamo, where they come up for a hearing that looks like this: the tribunal president says that the prisoner is being accused of associating with a known al Qaeda member, which is apparently enough to be considered an enemy combatant. The Guantánamo prisoner then says, well, can you tell me who it is that I'm being accused of associating with so I can tell you either that I know he's not a terrorist or that I had no idea he was a terrorist and all I did was meet him in the street. And the tribunal president says, we can't tell you who it is because that's classified. So the prisoner says, well, how am I going to prove that I'm not associating with a known al Qaeda member if I don't know who I'm supposed to have been associating with. And they say, that's your problem. The prisoner then says, well, why don't you capture Osama bin Laden, bring him here, and he'll tell you that I had nothing to do with al Qaeda. How can I possibly prove it? I'm sitting here in Guantánamo. I have no way of getting any evidence and I don't know who you're talking about.

I litigated a case, *Wilkinson v. Austin*,<sup>10</sup> in the U.S. Supreme Court about solitary confinement just two years ago, which reminds me of this whole situation. It was a case that involved solitary confinement in a U.S. supermax prison where people are sent for many years. The Supreme Court

held that the due process clause of the Constitution required that prisoners be given a hearing before being sent to a harsh form of solitary confinement for many years. At the oral argument, the State of Ohio said that it did give him a hearing. But at the hearing, the prosecutors told the prisoner: you're a gang member, now prove that you're not. I argued that this type of process is insufficient because the prisoner is not able to prove that he is not a gang member if the state doesn't tell him any of the facts on which it bases his gang membership. And after ten minutes of oral argument, the justices agreed, holding that you have to give him the basic facts, that due process notice requires the basic facts. These hearings in Guantánamo will be struck down on the same principle if the Constitution applies to them.

In this country, aliens held abroad are considered by the government to have no rights. And it always struck me that these aliens, like Arar, are now in the same situation that free blacks were in after the Supreme Court's decision in the infamous *Dred Scott* case; they have no rights that U.S. officials have to respect. That is exactly what the Bush administration claims is the situation of aliens captured abroad or aliens acted upon abroad—they have no constitutional rights. And the real question is whether the American people will support that. I hope that they will not.

**Bruce Fein:** I'd like to elaborate on Charles Swift's focus on whether we are presently involved in a war and what the implications of that answer are. The president has taken the position that all of the world is a battlefield because al Qaeda has threatened to kill us wherever they can find us. And what that means is that battlefield tactics appropriate for a Kabul or Kandahar are appropriate in the United States. In other words, if the United States wanted to shoot and kill Jose Padilla when he landed at Chicago O'Hare International Airport that would have been lawful because he was a suspected enemy combatant; all of the world is a battlefield, therefore, he was on a battlefield. He is a U.S. citizen. We can shoot and kill him. There was not, and never has been, any denial by the president or the attorney general that this theory of the battlefield means we can shoot to kill

anybody we think is al Qaeda at any time anywhere, whether the person is a U.S. citizen or not. That is a stunning assertion of power that would even have embarrassed King George the Third.

The second thing I want to emphasize here with regard to military commissions, especially where the constitutional envelope is being pushed, is that the administration has never advanced any legitimate reason for why you need to try someone for a war crime with these “kangaroo” courts where you can use secret evidence—evidence that’s been obtained by coercion. We don’t have an independent judiciary, but that’s needed to defend and protect the national security of the United States. Remember these commissions had been authorized for five years, but no one even knew they existed until *Hamdan* got to the Supreme Court. And no one was sitting and worrying, saying, oh my gosh, we’re in danger. Under the theories that have generally been accepted by the Supreme Court in *Hamdan*, if, in fact, you have an enemy combatant, you can detain him without having to prove a crime because it’s not a crime to be involved in hostilities. These enemy combatants can then be detained indefinitely in Guantánamo Bay because there isn’t any likelihood that terrorism will ever end. The detainee could be held for life.

Why would you even need to create a military commission? Remember these commissions just happened to be pushed forward on the eve of November elections when the so-called al Qaeda Fourteen were returned from abroad, where the CIA had imprisoned and interrogated them. And then suddenly they are brought home and now we have to have these military commissions. I would suggest it’s because of political tactics, which is really quite sad to think that something so critical to the nation as due process, and the example we set for other countries which capture our citizens, is being sacrificed for political purposes. No one believes that al Qaeda would hold trials for captured U.S. citizens, but not all wars are going to be against al Qaeda. Why would they manipulate this issue for political purposes? I’ll elaborate further later, but it’s the motivations

behind the administration's tactics here, motivations that are irrelevant to the safety of the American people, that are exceptionally troublesome.

*At this point in the forum, the discussion turned back to the issue of habeas corpus and Judge Lasnik picked up the conversation.*

**Judge Lasnik:** We get to habeas cases in a number of different ways. Basically, the Constitution says that Congress shall not suspend the writ of habeas corpus except in times of invasion or rebellion where public safety requires. So it has always been a conditional right. By the same token, during times of war, military generals and leaders have occasionally taken it upon themselves to suspend the writ of habeas corpus by declaring martial law. President Lincoln and some of his commanders did it in places that were really not subject to invasion or rebellion. Yes, there was a civil war going on in the South, but was there really a need to throw Indiana residents who spoke out against the war in jail and not accord them trials? Eventually the U.S. Supreme Court said no, but not before a lot of people were arrested. Over thirteen thousand Americans were arrested during the Civil War. They were never given a jury trial, never given access to counsel, and their property was taken away, all in the name of the Civil War. However, there were definitely parts of the country where there was chaos and rebellion and it was difficult for the administration to know who was a spy and who wasn't. For example, Washington, D.C., the seat of government, was surrounded by the South and there was a lot of danger there.

We want a strong executive to take decisive steps in certain circumstances. President Lincoln could be said to have violated many provisions of the Constitution, but I think we rightfully consider him one of the greatest presidents of all time. In those days, getting Congress together was not that easy to do and somebody who is faced with exigencies occasionally has the right to do away with some of the constitutional

niceties in the heat of battle; we have this concept of exigent circumstances as a reason to not comply with the Fourth Amendment and some other amendments out there. When Andrew Jackson was running the Battle of New Orleans, it took several months for word to get to New Orleans that the War of 1812 was over, and when that rumor got to a newspaper editor he published it in the newspaper. General Jackson called him up and said, I don't think you're accurate there, that's just a rumor, print a retraction. The editor said, no thank you, General, I'll run my newspaper. General Jackson then arrested him under his martial law decree. When a district judge in that area issued a writ of habeas corpus releasing the newspaper editor, General Jackson put that judge in jail. And when another judge and a United States attorney tried to get that judge out, they were jailed too. This was a decisive man who later became the president of the United States. When order was restored and the jailed federal judge fined him \$1,000, which was a lot of money in 1814, he paid it. And then later on, Congress passed a law giving him back his \$1,000.

What we have to look at with a suspension of the writ of habeas corpus is, was it done at a time of invasion or rebellion where public safety required it? That's the standard. Senator Spector is on record as saying the Military Commissions Act (MCA) didn't meet that standard, but he'll vote for it anyhow. Going back to the issue of jurisdiction stripping, if Congress is willing to pass unconstitutional laws that it knows are unconstitutional and then try to strip the court of hearing challenges to it, who is going to point out that an unconstitutional law is unconstitutional?

Of course, that case may come in front of me, so I express no opinion on its viability. But I think if you look at what some people who have already pointed out problems with it, such as Kenneth Starr, have to say, there is definitely a lot going on here. But, I want to make the point that we do want the executive to have the ability to be flexible. I am not here to defend the unitary executive, which is the idea that the other branches of government cannot exercise their powers in ways that divest the president

of complete control over the executive branch of government. Congress acts the way it acts. The courts react the way they react. But someone needs to be able to act decisively. When we talk about limits on presidential power, we don't want to limit all presidents forever just because we don't like the person who occupies the White House at the present time, so we need to be careful about that.

**Professor Lobel:** I wanted to get back to the topic of why habeas is important. It's important to ensure that officials are held accountable for their actions. Even in wartime, government officials should not be unaccountable. As the plurality said in *Hamdi*, "a state of war is not a blank check." Even where the government alleges that it is taking certain actions based on alleged military necessity, we don't know whether what the government is doing is really necessary.

The war against al Qaeda is, as the government itself argues, a very different kind of war than the traditional war between nation states, if it can even be termed a war. The president has argued that in fighting the War on Terror we're not obligated by the normal rules of war. The Supreme Court said in *Hamdi* that even in the conflict with al Qaeda, at minimum common Article 3 of the Geneva Convention applies. But, because this is not a traditional state versus state war, captured prisoners should have more, rather than fewer rights than traditionally granted by the laws of war. That most of these prisoners are not captured on the battlefield wearing an enemy uniform requires that more process be afforded them to ensure errors are not made, and that innocent civilians are not detained. Moreover, as Justice Kennedy pointed out in *Rasul*, these people are being indefinitely detained, possibly for the rest of their life, as opposed to the typical prisoner of war situation where the prisoners will be released when the enemy surrenders and the war is over. Here, the enemy is unlikely to ever surrender and the war is unlikely to be "over" in the prisoner's lifetime. That difference requires that habeas be *more* important in this situation than the typical wartime situation.

The MCA totally strips the courts of federal habeas jurisdiction. There are several main arguments that the Center for Constitutional Rights is making in opposing this jurisdiction-stripping statute.

First, as Judge Lasnik pointed out, habeas can only be suspended by Congress during rebellion or invasion. We face no rebellion today, nor has Congress claimed that we are being invaded. We were attacked, but there's been no invasion of the United States, so Congress can not suspend habeas in this situation.

Second, where Congress does not provide for habeas jurisdiction, it has to provide for a reasonable, adequate, or equivalent substitute to habeas jurisdiction. It can't just say the courts have no jurisdiction. The MCA does provide that prisoners who have been determined to be enemy combatants such as those detained at Guantánamo will be accorded some kind of appeal. However, the administration can avoid complying with that act simply by never determining the prisoner to be an enemy combatant. There's no requirement for a hearing to determine that the prisoner is not an enemy combatant. There are many people now in jail in Afghanistan or Iraq who have probably never had any determination about their status made at all. And in that context, there will be no potential for those people to have a court hearing. The CCR filed cases on behalf of prisoners in Afghanistan and Iraq who would have no legal remedy under the MCA.

For the prisoners being held at Guantánamo, there is a remedy under the Detention Treatment Act which allows an appeal to the D.C. Circuit, but that remedy is clearly inadequate. The historic role of a habeas court, particularly for detention that has never been reviewed by any court—as opposed to one for a domestic criminal case where the prisoner has already been tried and convicted by a regular court—has been to review the evidence to see if the evidence is *really* sufficient and not just to determine whether the government's evidence is *facially* sufficient.

For example, as an amicus brief filed by retired federal judges explains, in a significant percentage of these enemy combatant cases in Guantánamo

the evidence that's been used is evidence obtained by coercion or torture. The problem that the administration would have, in terms of trying these people in a criminal court, would be that no court would allow them to use this evidence.

The review commissions, which are different than the military commissions, determine whether these people are properly labeled as enemy combatants. In a number of these cases, the commissions have determined that the detainee was tortured, or at least there is evidence that he was tortured, and referred it for military investigation. But they still based their determination of whether the detainee was an unlawful combatant on evidence obtained by coercion. This is a fundamental flaw in the procedures and any habeas court would review the evidence to see if it were obtained by torture.

The Supreme Court could hold that the Constitution does apply and invoke the power under the MCA to review the constitutionality of the procedures and standards the government is using. The government argues that the Constitution doesn't apply, so that provision of the statute is meaningless. But, if the Court rejects that and finds the Combatant Status Review Tribunal's procedures and standards to be unconstitutional, then there will be no reasonable alternative review and the MCA will fail, not because it's unconstitutional on its face, but because the procedures that are being used by these commissions are unconstitutional.

*The panel discussion then turned to Combatant Status Review Tribunals.*

**Lt. Cmdr. Swift:** A panel of three military officers sits on each Combatant Status Review Tribunal (CSRT) and at least one must have the rank of O4. The detainee has an advisor, whose job it is to explain to the detainee prior to the hearing what the rules will be. He informs the detainee that if the detainee tells him anything, he will use it against him in the tribunal. The advisor then ascertains if the detainee has any evidence to

present or witnesses that he would like to have called on his behalf, and then they have the hearing. At the hearing, he is told that he is suspected of being either an al Qaeda member or having associated with an al Qaeda member, and that the panelists have reviewed the evidence and find there is reason to believe that this is true. He is then asked if he has anything to say. That's the normal procedure. In Mr. Hamdan's case, he said he'd like to call me as a witness, and even though I was going to be at Guantánamo the next day, the tribunal said it could not wait for me; so, they found him to be an enemy combatant.

No one in that hearing has any legal training. Under the MCA, the military commission is a judicial proceeding. It differs significantly in that you have a military judge appointed to it who does not sit on the panel and a fact-finding panel of a minimum of five and a maximum of twelve, or a minimum of twelve for death penalty cases. All charges heard by the military commissions may be punishable by death. You know you're in a death penalty case if you can count twelve jurors at the hearing. So, the military commissions appear more like a trial than the CSRTs; though, one of the biggest things debated in the MCA was whether the individual would have the right to see the evidence against him. And, ultimately, that was a step forward by the MCA, that the detainee does have the right to see the evidence against him; before, it was the same as in the military commissions that the detainee could not see the evidence against him, but his attorney could. As a defense attorney, the first thing I did was to turn to the client with the statement of any one of the persons who said he did this, and ask him if he knows that guy and, if so, why would he say this? The detainee can now see a summary of the charges against him.

There is another problem with the rules for these military commission hearings and, unfortunately, we're going to have to wait for the rules to come out. This is big in understanding the MCA. The executive will promulgate the rules and the MCA pretty much states that the president could enact the Uniform Code of Military Justice and the current Manual of

Courts-Martial if he wanted to, but he doesn't have to. So, for instance, it's certainly possible that under the rules, as they are written, that the right to be present when the evidence against you is read would work like this: the jury will be given statements of the people who have made accusations against you, the jury will read them in your presence—not aloud—and then you would have the right to confront the evidence. That's being debated right now and there continues to be a tension about national security and individual rights.

An important historical perspective of the commissions comes from William Winthrop, who wrote the authoritative *Treatise on Military Law* in 1886. When he talked about commissions, he said that the idea of a commission was to expand jurisdiction. The court-martial is a statutory creature created by Congress. Military commissions are common law creatures created by necessity and the law of war. Winthrop thought the two looked exactly the same. He realized that battlefield necessities might change either, but essential rights would be required for both. Military commissions have been abused in the past, but historically they have worked best to bring the law to a lawless place.

For example, an ideal place to use a military commission would have been on the streets of Baghdad in the summer of 2003. There was no effective civil government there—the military was the government. The courts were gone, the Baath party was gone, and everybody was taking everybody else's television set. People were being shot. We had a lawless situation and that society would have benefited tremendously from having law and order brought to it.

How do you do that legally? Well, General Winfield Scott, in the Mexican-American War, had said, we're going to have military commissions and we're going to use these occupation courts to try people until such time as Congress sets something up for us. We're going to restore law and order. That's the best use of military commissions. Another principle involved in these military commissions is that soldiers try

soldiers. You shouldn't expect the civilian population to give the soldiers from the other side a fair hearing because they are the enemy. As soldiers, we are supposed to have a certain level of respect for each other and a set of principles on the battlefield, so it makes sense that we would try each other. But the administration sees commissions completely differently. It sees them as a means of avoiding the law, so rules were created to allow avoidance of certain principles of an impartial hearing.

The last part that needs to be understood is that this is a pure numbers game for the administration. There are currently 450 people detained at Guantánamo Bay and the administration has only built 300 hard jail cells. According to the prosecutor, the most military commissions that will ever be held is eighty. The review panels have indicated that they are probably looking at releasing about 150 detainees. The law of numbers now tells us that there are 220 people who are never going to be tried at all, but held forever. In fact, the medium security jail is for those who don't get "trials"; the maximum security is for those who did.

But, none of these "trial" processes have complied with normal presumptions under the laws of war. Under the laws of war, you are presumed to be a POW if you are captured as a combatant. If you're captured in a battlefield in a regular war, you are presumed to be a POW. If we believe you to be a combatant, we're going to have a hearing to determine whether or not you are entitled to that status. If you're not a combatant, then you're a civilian who has been fighting and you're going to be tried in either a law-of-war tribunal that complies with the law of war or in a regular civil court. In Iraq, they now have civil courts; we could turn captured civilians over to those courts.

But, instead, we use the MCA and CSRT processes to move out of the normal system of presumptions and we presume that you are guilty of a crime. You are an illegal combatant with no protections unless you can prove otherwise. The law of war has never worked that way before, at least the modern law hasn't. So I disagree with the judge advocate general. The

military commissions and the CSRT system is adequate. If you started with the presumption that one is either a civilian or a lawful combatant, and worked from there, where they came in and said, well, you're a lawful combatant, the individual could say, "No, I'm not. I'm a civilian. And here's why I'm a civilian. I never joined the army. I didn't do these sorts of things." "Oh well, okay, we presumed you were a lawful combatant. Here's the other evidence that you were not part of them. And we'll consider that." Or you're presumed to be a civilian: "And we're going to put you in civilian detention." It's the presumptions that kill on this.

Once the presumptions are changed and the government has to put the evidence forward, I think most people would be happy, at least in context of people who are captured on the Afghan battlefield, because they should be able to be held, if they are, in fact, combatants. That war is still going on. It's not an indefinite war and it will end at some point and we will go home. The Vietnamese prisoners of war on our side were held far longer than five years and I'm not arguing for anything different, but that's in the context of a regular conflict, not the War on Terror.

**Moderator:** Professor Turner, I wonder if you have any comments here with regard to the president's authority as commander in chief or the theory of the unitary executive in this context.

**Professor Turner:** War is different. The president delegates, through generals and colonels and captains down to sergeants, decisions that cause an awful lot of unpleasantness. I'll give you one example. We get a tip that a certain structure in Afghanistan is an al Qaeda safehouse. That is analyzed. Someone says that the best evidence is that there are nine top al Qaeda leaders in there who are responsible for killing a thousand people and, if allowed to go their own ways, may kill ten thousand more in the next few years. What do we do? Call in a Predator drone with its Hellfire missile, launch a cruise missile from offshore, or send in a squad of infantry with some machine guns to hose the place down? Whatever tactic we select, the end result may turn out to be that the structure is an orphanage,

or a school, or that it's the home of a perfectly innocent human rights NGO employee. What do we do about it? If we say we want due process and the rule of law to govern this kind of decision then presumably we're going to say: Hold it Colonel, don't fire a shot until we have a neutral magistrate establish the facts. And somebody brings the evidence back and a judge sits down and we put it on the docket and a few months later we have a hearing and somebody needs to bring in the other party. And then the judge says, yeah, that's a good call, go ahead and destroy it. Well, the bad guys left four months ago, and since then five thousand Americans have died from their combined efforts.

The point I'm making is that these are difficult decisions. The obligation to treat all detainees during armed conflicts humanely is clearly established. In my opinion, there is no question about this. It frightens me that we are not doing so, not only because we are compromising the high moral ground we need to maintain if we hope to win this conflict, but also because every interrogator involved in this is going to have to live with the consequences of his or her actions for the rest of his or her life. Under the Geneva Conventions, there are 193 other countries that have a legal duty to investigate allegations of war crimes, and then an obligation, if they find probable cause to believe a war crime occurred, to either prosecute the accused or extradite him to another state where he will be prosecuted. And each of these 193 countries (not counting future administrations in our own country) will have jurisdiction under the theory of universal jurisdiction without any statute of limitations.

Henry Kissinger never leaves this country because there are enough people in the world who think he was a war criminal because of his actions in relation to Vietnam. He doesn't travel because he doesn't want to risk being snatched up in France or anywhere else and tried as a war criminal. (I profoundly disagree with the assertion he was a war criminal, I would add.) All of these American soldiers and CIA operatives, whether they acted in good faith or they were just mean people, are going to face this

possibility. And the Detainee Treatment Act doesn't change that. I don't know how many of you remember Mark Felt and Edward Miller, the two senior FBI officials involved in violating the rights of relatives of members of the Weather Underground during the Vietnam War. The Weathermen were blowing things up and were plotting to bomb an NCO (noncommissioned officer) club at a military base in New Jersey. The FBI wanted to catch them, so Felt and Miller approved breaking into the homes of their parents to search for evidence of where they might be hiding. When President Carter came into office, Felt and Miller were prosecuted. Between them, they spent more than a million dollars on lawyers and were ultimately convicted as felons and sent to prison, before Ronald Reagan pardoned them. My point is that there is no assurance that the next Congress won't repeal this law. And if it does, every act of torture or of inhumane treatment that occurred before this will be subject to criminal prosecution. There is no *ex post facto* problem here. Why? Because the act was illegal when they did it, and then Congress passed a law seeking to immunize this type of behavior prior to a certain date. But, that law can easily be changed and they will then be vulnerable to trial even in U.S. courts. This is something I've talked to a lot of military people about.

Some of the heroes of this struggle have been the two-star generals and admirals in our military JAG corps who have stood up and said these interrogation techniques are illegal and fought hard to convince the administration that this is wrong. Former Navy Department General Counsel Alberto Mora was particularly courageous in taking such a stand and, as a result, he received the Kennedy Library's Profile in Courage Award. I think some good people made some very bad decisions for some very good reasons. They looked at this and said these people are trying to kill Americans, we need to find out what they know and who else is involved. And let's not worry too much about treating them well. So they authorized the commission of war crimes. This is simply wrong.

But, at the same time, I am not in favor of saying all of our constitutional provisions apply universally to foreigners, and that you have to get judicial approval before you can put a missile into a target that you honestly believe is a legitimate military target. The reason that I'm opposed to that is because, in most wars, you have to have speed and dispatch. You have to have secrecy. Or you may lose the war.

I apologize if I seem passionate about these issues, but I did two tours in Vietnam. I've seen innocent people killed by mistake. I had nightmares about it for years. I'm not talking about errors that I made personally, but where I was a witness. I'm not talking about William Calley and intentional war crimes like My Lai; I'm talking about honest mistakes. Somebody said this is a legitimate target, but it was an orphanage or a school. No one wants that to happen, but it is probably inevitable in war. And the alternative of trying to stop those kinds of incidents by saying that our soldiers are not going to be allowed to fire their weapons without months of delay, while we bring evidence back and have judges make targeting decisions, is an excellent way to lose a war. I don't want to see us lose our wars. But this is a very complex issue, and I often find that people who have real simple answers to it don't fully understand the situation.

There is also a tremendous distinction under international law between detaining people and trying them. Congress has acted under the War Powers Resolution to authorize this as a war. I don't think there is any question about that. NATO, for the first time in its history, acted under Article V of its treaty as if this was an armed attack against the United States. Under international law, POW status carries no suggestion that the individual is a bad person or has done anything wrong. The Third Geneva Convention provides that captured enemy soldiers may be detained for the duration of the conflict, whether that's four days, ten years, or twenty years. They may be tried for war crimes prior to being detained or for common crimes committed while detained and, if they are tried, they are supposed to be tried by military courts. Those courts can conduct their proceedings in

secret if that's a necessity for national security reasons—to protect intelligence sources and methods, for example—but, as long as they are just being detained, they are essentially being warehoused and have no right to legal counsel or a day in court.

Early military practice was just to kill all captured enemy soldiers. Then people said: Hey that's not good—they're valuable—let's sell them as slaves. The world became more civilized and countries played around with “paroling” captured enemies: Sgt. Jones, go home, but promise me you won't come back to the battlefield. Go home and tend to your crops and your flock. Jones went home, but his king said: Get your butt back on the battlefield if you know what's good for you, and countries found their troops were getting shot at by the same guys they had just paroled. So, the world settled on the practice of basically warehousing enemy combatants for the duration of hostilities.

Somebody earlier made reference to the thousands of German POWs in this country during World War II. We actually held more than four hundred thousand German and Italian POWs in more than forty states, and I think only three or four of them got before a judge, and in each case, they were sent back to the POW camp. But if you're going to try a detainee as a war criminal or for a common crime, say if a prisoner murders another prisoner or kills a guard or something like that, then he is entitled to international law standards of due process: a presumption of innocence, legal counsel, and a variety of other rights that are very similar to our own justice system. They wouldn't be entitled to Miranda warnings and international law does not impose restrictions on hearsay evidence and the like, but it's a fair system. That is established law as it relates to POWs. A lot of the criticism I hear is along the lines of, “how dare Bush hold these people for four or five years without trying them, or taking them before a judge, or giving them a lawyer.” Such comments are founded on an ignorance of international law. That's what you do to enemy combatants during war time.

**Lt. Cmdr. Swift:** I wish the professor had heard me say that this is why it's important to know where the battlefield is. And the assertion that there's a worldwide battlefield changes everything. I agree that you can't call a federal judge before you run a missile strike on an enemy target in Iraq or in Afghanistan. In ongoing hostilities, I'd never suggest it; we do the best we can on the information we've got. But when you say that the war exists everywhere all the time, and has always existed and will always exist, what the professor just argued for is that same strike on a house in Chicago because there may be an al Qaeda cell there. There's a worldwide cell. They might be there and they might get away, so let's set up the predator now. And we'll hit it. And that's the danger of blurring the two.

The other part is the professor argued for the Third Geneva Convention. We'd love it. We've argued for it from the very beginning. Of course we'll take it. Of course you can hold and detain and follow the procedures of the rule of law. He has argued that it is dangerous for our soldiers not to follow the rule of law. He's absolutely right. Think about it here. You're following orders and you're damned if you do, damned if you don't if there's not a federal judge who can come in on habeas on prisoner treatment. If you don't follow orders, you will be court-martialed. If you do follow orders, you may find out later that you committed a war crime. So we need federal supervision, if for no other reason than to protect our own troops from future legal actions. We're all down there working on the commission because the president ordered us to. Let's see, should we all have to do that and then we can't travel the world because we violated the Geneva Conventions by holding a war crimes tribunal that violated international law? That's a war crime too. So all of this argues for why you want a federal judge to be able to intercede in areas of detention where our treatment could reach the level of a war crime. We want a federal judge to look at the trials we hold to make sure that the process is fair and adheres to international law and is not simply dictated by a military commander. We need a very good definition of what war is and what war isn't because

we want our military commanders to be free on battlefields to use those prerogatives. I don't think anybody up here on the panel would argue differently, but it's when you blur all of those distinctions and say that the battlefield is everywhere and the unitary executive can establish the rules and procedures that things go wrong.

**Bruce Fein:** I just have one question for Commander Swift. Would you say that these CSRTs comply with the obligation under the Geneva Conventions for Article 5 hearings?

**Lt. Cmdr. Swift:** No, they don't, and the reason they don't is the presumptions they start with. The form is great. The form complies with Article 5 if you look at how many officers are on the panel and their evidentiary standards, though not from the standpoint of coercion, of course. But the CSRTs start with the presumption that you are guilty and you have to prove that you're not.

That's not how Article 5 panels are supposed to work. During the Iraq war we used them to release people because we didn't want POWs. The Israelis had advised us that we had way too many body bags and way too few POW camps when we were going in. We were met with trains of people surrendering. So we held the Article 5 tribunals to see if these people were really combatants and if we really had to hang onto them. If they were not, we told them, "Here's your food and water and get on down the road because we're not holding you right now and we're not going to detain you in a POW camp." So as people were surrendering, the tribunals were designed to sort this out, but we didn't start with that presumption, that the detainee was an enemy combatant. We started with the presumption that everyone was a POW and would be accorded those basic protections, rather than starting with a presumption that the person had no protections and that we could hold him or her indefinitely.

The final complication on the CSRTs was that we waited too long. They work really well on the battlefield. For example, a sergeant brings in fifty detainees. How did he get those guys? Well, they were in this unit and

some were wearing uniforms and some were not, but they were all sitting around a campfire and we came up and they had white flags and surrendered. We asked if any of the guys were not in the unit. One might say, "I was just there bringing in water." "Well, let's see your ID card." Let's talk to a couple of the guys who were also there. "Was he bringing in water? Who is this guy?" Ask fifteen guys down the line. They all say, "Yeah, he was just bringing water." "Well, we'll release him then." That's how it's done. It's pretty fair. It's fast. It's done on the battlefield and it works. When you wait for three years and then you don't tell him the evidence says you were in Bosnia, but you were actually fighting in Afghanistan two years ago, and that evidence is from an interrogation conducted who knows where, you have a problem. It's not the same hearing at all.

So while the CSRT looks good on some levels of compliance, the problem remains that military officers in Afghanistan desperately wanted to do Article 5 tribunals immediately. We set up to do it, but we weren't allowed to do it. The CSRTs or Article 5 tribunals would have worked far better on the actual battlefield. But when you start out trying to avoid the rules rather than following them, that sets you up for all kinds of problems. It would have worked so well. A lot of the controversy over Guantánamo Bay would not exist because detention power is part of the power of war. And if you do it right, there are not a lot of arguments to be made to the contrary.

Let's go back to the war setting and let's say you've got a private or a sergeant who honestly thinks this is an al Qaeda safehouse, or that there are bad guys in there and he has it destroyed. Would you allow the relatives of totally innocent people to sue that sergeant or that captain? And, if so, wouldn't there be a chilling effect and nobody would ever fire a gun again?

**Bruce Fein:** I think that your question raises the problem with President Bush's idea that all of the world is a battlefield. The fact is that this wasn't a battlefield. And that just like the distinction between day and night, it will

always be somewhat blurry. It is preposterous to suggest, as the administration does, that everywhere in the world is a battlefield, so that any time you detect a terror suspect hideout, you can blast it—whether that it is in San Francisco or New York. And I think that you would be frightened and alarmed, Jim, that the president could kill somebody with rockets in the United States based upon a suspicion that might be pertinent on a battlefield where there was an actual battle going on.

All law is a matter of degree. I think this administration is guilty of believing that the threat from al Qaeda is on the same level as that created by Hitler and Hirohito, which are analogies that Rumsfeld, the president, and Condoleezza Rice have made. In fact, they have incorporated Lenin, Stalin, and every other monster in the world into al Qaeda and Osama bin Laden. If you believe this, then you don't know how to draw lines. We aren't confronting that level of danger here. It reminds me of the lawyer claiming that an elephant is a mouse with a glandular condition.

When you lose the ability to make sensible distinctions about the nature of the danger, you run the risk of losing your civil liberties. And that is perhaps the most frightening thing that has come out of this. The whole debate about the military commissions, the suspension of habeas corpus, and domestic wire tapping is all premised on the idea that 9/11 has changed the world. We are no longer a government whereby the goal of the state is to make people free and where we place the burden on the government to show compelling interests for encroaching on civil liberties. It's all distorted. Everybody we claim is an enemy combatant is automatically presumed guilty. We must assume the president is infallible. The measure of our civil liberties is no longer checks and balances, ambition counteracting ambition, or due process. This will be the demise of our democracy if this chipping away, bit by bit, continues.

One of the reasons why the detentions of enemy combatants in this circumstance is different than detentions during World War II is that there isn't any end to the war in sight. It's one thing to fight a war as we

customarily have done where we know there's going to be a surrender at some point. Then there is at least some restriction on the scope of the punishment or the harm to the individual detained. It's another thing to detain people for what may amount to life imprisonment. There is never going to be a time when the president of the United States is going to stand up and say that we don't need these war powers anymore because there's no chance that there will ever be another terrorist attack against a U.S. citizen anywhere in the world. That's not going to happen. So the reason we have to be more scrupulous about due process today than in World War II is because the nature of the harm is fifty thousand times greater.

**Deborah Pearlstein:** I do think we would be wise to talk about this question of accountability and the role of the courts in constraining the power of the executive. There's a substantial difference between judicial intervention in military decisions and decision making in real time, and the role that the courts can play in policing the rule of law as a matter of regular enforcement of the laws. This latter category includes things like war crimes trials where you're talking about something after it has happened, which is exactly what the courts are designed to do. I would say that the courts are designed to do exactly that when it comes to enforcing the laws against torture and abuse of detainees. Yet, in addition to the question of trials, there really has been a dramatic, and in some respects revolutionary, challenge of the role of the courts in just conducting basic law enforcement operations.

*The panel discussion then turned to issues surrounding National Security Agency (NSA) surveillance programs.*

**Professor Turner:** I did my doctoral dissertation on national security and the Constitution, in particular, looking at intelligence issues, and I have spent an awful lot of time over the last forty years thinking about these

issues. My goal here is to pursue the truth, and I think there are three key constitutional issues we need to address.

First, does the Constitution empower the president to collect foreign intelligence? Second, if that's true, could Congress limit that power by a simple statute like the Foreign Intelligence Surveillance Act (FISA) passed in 1978? And, finally, does the Fourth Amendment require a judicial warrant for these kinds of searches?

Now I think there's a myth—we hear it all the time and it makes sense to most of us when we hear it. How many of you have heard that in a democracy, every governmental power must be checked? But, that was not the understanding of the founding fathers. Having independent power that is not checked by the courts or by the Congress in the hands of the president does not make him a monarch. And I would go back to perhaps the first case that we all studied in law school, *Marbury v. Madison*, where Chief Justice John Marshall wrote:

By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.<sup>11</sup>

To illustrate this, Marshall mentioned the statute that created the Department of Foreign Affairs, which later became the Department of State. He explained that the acts of the secretary of foreign affairs “can never be examinable by the courts.”

The Senate has a “negative” or veto over treaties and diplomatic nominations pursuant to Article II, Section 2, Clause 2 of the Constitution. But, where has the Constitution placed the power to decide where we send diplomats, what title we give them, and all of those other decisions

regarding diplomacy that are not specified in the Constitution? In an April 1790 memorandum to George Washington, Thomas Jefferson discussed the Constitution as it relates to the powers of diplomacy in foreign affairs. Jefferson wrote that the Constitution declares that the *executive power* shall be vested in the president, and that “the transaction of business with foreign nation is executive altogether” and, thus, “belongs to the head of that department, except as to such portions as are especially submitted to the Senate,” adding that “exceptions are to be construed strictly.”<sup>12</sup>

Three days later, George Washington wrote in his diary that he had spoken to Representative James Madison about the propriety of consulting the Senate on where we might send ambassadors, and so forth. Madison’s opinion, he wrote, coincided with that of Chief Justice John Jay, our most experienced foreign affairs expert, and Mr. Jefferson’s. To wit, the Senate had “no constitutional right to interfere” with such “executive” decisions.<sup>13</sup> The Senate’s only involvement was in the approval of treaties and the confirmation of ambassadors and other presidential nominees, all the rest belonging to the executive and vested in the president by the Constitution.

Three years later, Alexander Hamilton, in his first *Pacificus* Letter, noted that the executive power of the nation is vested in the president, adding:

[A]s the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general “executive power” vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.<sup>14</sup>

Before becoming perhaps our most famous chief justice, John Marshall served one term as a Federalist member of Congress. During the debate over the Jonathan Robbins affair, he was the clean-up speaker and defended John Adams’s decision to hand over a British deserter to the British pursuant to the terms of the Jay Treaty without involving the judiciary, noting: “[T]he President is the sole organ of the nation in its external relations, its sole representative of foreign nations. He possesses the whole

executive power.”<sup>15</sup> So we have support for this idea that foreign affairs were a component of the “executive power” from the first president (who was also president of the Constitutional Convention); a majority of both chambers of the First Congress (who accepted Madison’s explanation of the Senate’s role in removing the Secretary of Foreign Affairs in 1789); the leaders of both the Republican Party and the Federalist Party; and from all three authors of the *Federalist Papers*, the single most important documents in explaining the Constitution to the American people before it was ratified. And yet, virtually no modern casebook even discusses this clause as a source of constitutional power.

In my dissertation, I give dozens of examples of statements made by senior congressional leaders during major debates. Here’s one from Senator John Coit Spooner, a Harvard Law graduate and very senior member of Congress who chaired the Foreign Relations Committee:

From the foundation of the government, it has been conceded in practice and theory that the Constitution vests the conduct of our foreign relations exclusively in the President. . . . [H]e does not exercise that power, nor can he be made to do so, under the tutelage or guardianship of the Senate, or of the House, or of the Senate and the House combined. So far as the conduct of our foreign relations is concerned, excluding only the Senate’s participation in the making of treaties, the president has absolute and uncontrollable authority.

The Supreme Court in the 1936 *Curtiss-Wright*<sup>16</sup> case noted that Congress differed in how it requested information from the executive branch, and this goes back to the Washington presidency when Thomas Jefferson was secretary of state. The Court explained:

The marked difference between foreign and domestic affairs is recognized by both houses of Congress in the form of their requisitions for information. In the case of every department, except for the Department of State [and the Department of War], the resolution directs the official to furnish the information. However, in cases dealing with foreign affairs, the president is

requested to furnish the information if not incompatible with the public interest.

The Court went on to say that “not only is the federal power over external affairs different from that over internal affairs in origin and character, but participation and the exercise of the power is significantly limited . . . .” With respect to diplomatic negotiations, the Court explained, “the Senate cannot intrude, and Congress itself is powerless to invade it.” The Supreme Court, in this most frequently cited foreign affairs case, has thus said that Congress has no power to tell the president what treaties to negotiate or otherwise to micromanage the business of foreign affairs. The Senate has vetoes or negatives, but they do not have the power to make foreign policy.

What about intelligence? Did the founding fathers even *know* about intelligence or think about intelligence? In reality, America had problems with leaked secrets in the old days too. Benjamin Franklin and the four other members of the Committee of Secret Correspondents wrote in 1776 that “We find by fatal experience Congress consists of too many members to keep secrets.”<sup>17</sup>

This was the Continental Congress, of course, and Franklin’s committee had made a decision not to tell Congress that the French government was supporting our revolution with the funding of weapons and all sorts of other covert assistance. The fear was that if they told Congress, it would get in the papers and the British would learn about it and they might even go to war with France over its interference in the internal affairs of Great Britain and its colonies.

John Jay, writing in *Federalist 64*—by far the most important of the *Federalist Papers* on foreign affairs—noted that the most useful intelligence may be obtained if the persons possessing it can be relieved from apprehensions of discovery. And he notes that there are people, whether motivated by mercenary or patriotic reasons, who would rely on the secrecy of the President, but would not confide in that of the Senate,

which in those days consisted of twenty-two members elected by the states. Just imagine today's Senate.

Can Congress take this constitutional power away from the president? Again, we go back to *Marbury v. Madison*: “An act of the legislature repugnant to the Constitution is void.” In 1959, the Supreme Court noted that “Congress . . . cannot inquire into matters which are within the exclusive province of one of the other branches. . . . It cannot supplant the executive of what exclusively belongs to the executive.”<sup>18</sup> In the 1967 *Katz* case, holding for the first time that wiretaps were a “seizure” under the Fourth Amendment, the Supreme Court, in footnote 23, stated that national security wiretaps authorized by the president were not included in the holding.<sup>19</sup> The following year, when Congress passed the first wiretap law, it provided that nothing in the chapter would limit the constitutional power of the President to obtain foreign intelligence information deemed essential to the security of the United States.

In 1972, in the *Keith* case, the Supreme Court held that a national security wiretap of a purely *domestic* target, in this case an affiliate of the Black Panthers, was an unconstitutional seizure and required a warrant.<sup>20</sup> But Justice Powell, who wrote the unanimous opinion, had earlier said the president doesn't need authority for foreign intelligence security wiretaps and had the constitutional authority to authorize them. In the *Keith* case, Powell said the case required no judgment on whether the president can do this with respect to the activities of *foreign* powers within or without this country. We express no opinion with respect to activities of foreign powers or their agents in this country. The Supreme Court has never expressly resolved this issue, although it may be significant that—in addition to *Katz* and *Keith*—the Court has had at least four opportunities to constrain presidential power in this area by granting certiorari when four different courts of appeals held the president has constitutional power to authorize warrantless foreign intelligence surveillance.

The *Keith* case held that a warrant is required for a national security wiretap of a purely *domestic* target. Powell added that Congress might want to consider passing a new law that established different requirements for *domestic* national security wiretaps than the existing requirements for criminal warrants. Congress at the time was engaged in a large-scale usurpation of executive power, certainly unmatched since the post-Civil War era. So it decided to seize control of *foreign* intelligence instead, and passed FISA.

At that time, I worked in the Senate, and I believed the FISA bill was unconstitutional. Carter administration Attorney General Griffin Bell came before the Senate and observed that the FISA bill did not recognize the president's inherent power in this area, emphasizing that FISA could not take away the power of the president under the Constitution. The Foreign Intelligence Surveillance Court of Review, which was set up by FISA and is composed of federal court of appeals judges empowered to review appealed cases from the FISA Court, noted in 2002 that every court to have decided the issue has held that the president does have inherent constitutional authority to conduct warrantless searches to obtain foreign intelligence information. The court assumed that the four federal courts of appeals to decide the issue were right and unanimously added that "FISA could not encroach on the president's constitutional power."

When the people, through the Constitution, have given the president certain powers, Congress cannot take those powers away by simple statutes. That should be obvious. Both Congress and the president must obey the Constitution, and that includes the Fourth Amendment. However, the Supreme Court has established that neither probable cause nor a warrant is required for every legal search or seizure. For example, in *National Treasury Employees Union v. Von Raab*, the Court noted the "longstanding principle" that:

Neither a warrant nor probable cause nor any measure of individualized suspicion is an indispensable component of

reasonableness in every circumstance. Our cases establish that when a Fourth Amendment intrusion serves special needs beyond the normal needs for law enforcement, it is necessary to balance the individual's privacy interest against the government's interest.<sup>21</sup>

*Haig v. Agee*, of course, is one of several cases to note that “no governmental interest is more compelling than the security of the nation.”<sup>22</sup> Again, in *Von Raab*, the Court noted that this point is well illustrated by the federal government's practice of requiring the search of all passengers seeking to board commercial airlines.<sup>23</sup> Lower courts that have considered the question have consistently concluded such searches are reasonable under the Fourth Amendment.<sup>24</sup> These are, in fact, Fourth Amendment government searches, but they are *reasonable* searches. The *Von Raab* court quoted Judge Friendly in noting that when the risk is to hundreds of human lives and millions of dollars of property that might be lost by blowing up a large airplane, “that danger alone meets the test of reasonableness . . . .”<sup>25</sup>

Obviously the 9/11 attacks did far more damage than blowing up one airline. In *Board of Education v. Earles*, the Supreme Court noted the probable cause standard is “peculiarly related to criminal investigations” and “may be unsuited in cases involving preventing the development of hazardous conditions.”<sup>26</sup> Therefore, “in the context of safety, a search unsupported by probable cause may be reasonable when special needs beyond the normal needs for law enforcement make the warrant probable cause requirement impractical.”

If the FBI has a warrant to listen to John Gotti's or some drug lord's phone—or the phone of someone engaging in insider trading of stocks—and I call him up, they can legally record every word I say and use it in court against me if I commit or confess to a crime. It is fully admissible, despite the fact that they had no warrant to monitor my calls. My civil liberties are basically “collateral damage” once they have legal authority to

listen to the target of the wiretap's conversation. According to the *New York Times*, and what the attorney general and what Hayden (the head of NSA at the time) have said, every one of these intercepts involves a communication between a foreign national outside this country known or believed to be tied to al Qaeda or other terrorist groups and someone in this country—and that someone may well be a Saudi national who is over here waiting to get instructions on where to put the next bomb. Why require a higher standard when the government has a lawful right to conduct electronic surveillance of a foreign terrorist than we do in a domestic case involving a white-collar criminal? It makes absolutely no sense.

As for reports of using phone company records for data mining, there is no constitutional issue here. In *Smith v. Maryland*, the Supreme Court upheld the warrantless use of pen registers.<sup>27</sup> A pen register is a device that simply records the phone numbers dialed by a certain phone as well as the numbers of incoming calls to that line. And the Supreme Court held that since they're not seizing the content of communications, but merely collecting telephone numbers, it is not an unreasonable seizure under the Fourth Amendment and no warrant is required. The government is reportedly getting large databases of records which it can then analyze by computers to identify interesting relationships. They notice this particular number has been in communication with phones used regularly by five different known al Qaeda operatives. This may be somebody they want to look at. Well, they go down and find out that's because it's a Pedro's Pizzas or a Wal-Mart. Maybe that explains it; maybe it doesn't. Maybe Pedro's has somebody working there who is also building bombs. It may be worth checking out. The key point is this is not seizing the content of anyone's telephone communications. This is like a cop sitting on the side of the road writing down license numbers as cars go by. According to the Supreme Court, there is no reasonable expectation of privacy in these situations.

**Bruce Fein:** I'll elaborate further on what in fact the National Security Agency (NSA)'s warrantless domestic program is about, but first I want to make some preliminary observations. At the outset of the program it was stated, I think accurately, that President Bush is engaged in unprecedented usurpations of powers properly entrusted to the other branches of government. But, in fact, in my judgment, he is not responsible for all of his success in doing so. Congress has been docile, but it's also public indifference that enables this kind of deforming and torturing of the Constitution to occur. I recall my first working days in Washington, D.C. It was over thirty years ago at the height of Watergate. There had been a decision by the U.S. Court of Appeals for the District of Columbia Circuit ordering President Nixon to turn over his secret taped conversations in the White House to the federal grand jury in Washington, D.C. And he had made a statement through his then subordinate, General Alexander Haig, that he would not obey the court of appeals decision.

I was in the Department of Justice at that time and there was a Chinese wall between the Justice Department and the White House. We were supporting the United States, which we thought was distinguishable from the president. And I thought, at that time, of a remark that Dr. Benjamin Franklin had made to a lady who had asked him on his exit from the Constitutional Convention whether or not we had a republic or a monarchy and he retorted, "a republic if we can keep it." One of the reasons why President Nixon ultimately decided to obey that court of appeals ruling was that there were a million telegrams that came in from American citizens like you and me saying, "Mr. President, if you don't comply with the law, if you try to defame the Constitution of the United States, you shall be impeached." And that convinced him that he ought to comply with the law. We are confronting a similar situation today. Members of Congress respond to what you all think and write to them. They need your voices. We have the ability to change these usurpations in our own hands.

Now let me get to the NSA domestic surveillance program because I think it's perhaps the high water mark of presidential audacity. It was born not because Congress decided it wanted to get nasty with the president. It was because we had experienced forty years of unchecked presidential power, not in matters of discretion and negotiating treaties, but in unchecked presidential power invading individual rights of citizens. And you'll notice that when Jim was quoting from Chief Justice John Marshall in *Madison*, he mentioned that individual rights were different than the rights he was speaking of that belonged to the president—like who to choose to be a foreign diplomat and how to decide to negotiate a treaty with a foreign country. The CIA and the FBI were opening up the mail of U.S. citizens and looking at it; even members of Congress were doing it.

This was blatantly illegal; it was the misuse of the NSA as a spy, not for intelligence purposes, but for political purposes. Remember, it's the political figures who decide what to use and how to use the intelligence that's gathered. So the Foreign Intelligence Surveillance Act (FISA) of 1978 was born out of forty years of flagrant abuses of power. FISA does not seek to dispute the president's ability to gather foreign intelligence, it seeks to regulate it.

What proportion of the president's foreign intelligence authority is actually regulated? Maybe a fraction of 1 percent, because most foreign intelligence is gathered by targeting an alien abroad. That's where the information is, and FISA and the Fourth Amendment don't apply abroad, only domestically. The FISA governs the targeting of an American citizen on American soil. There are a couple of exceptions, but they're minor. So it's when an American citizen on American soil is suspected of being a foreign agent, or an al Qaeda member, that FISA is triggered.

Does it require that there be probable cause that's presented to a judge to believe that there is this wretched activity out there? There have been over twenty thousand warrants granted in the history of FISA and maybe only four or five that have been denied. So, the threshold for having a warrant

granted is not great indeed. The Department of Justice on July 31, 2002, informed the Senate Intelligence Committee that FISA was impeccable. They didn't want to lower the threshold. They worried that lowering the threshold for a warrant would create constitutional problems. They said, leave it intact.

FISA has been amended six times since 9/11 to accommodate new changes in technology and other problems that the Bush administration properly pointed out reflected rather obsolete ways of thinking about people communicating. Six times. So Congress has been exceptionally receptive to all of this. Nonetheless, the president has said, "Oh, you're destroying my ability to gather foreign intelligence by regulating this less than 1 percent of all of my communications, which I can nevertheless get if I obtain a warrant by enacting FISA."

So he secretly began to order the NSA to target American citizens on American soil without any warrants shortly after 9/11. Now the peculiar thing, maybe it's not so peculiar, but alarming, is that we might not have been able to have this discussion today, if it wasn't for a leak to the *New York Times*. President Bush's ambition was to keep this secret forever. He hoped that no one would ever know about it and there would be no legal accountability and no political accountability.

Indeed, he still has outstanding NSA programs that haven't yet been leaked to the public. We don't know about them and he's not telling. Congress is not forcing that disclosure. But when he was asked why, if he thought that there were problems with FISA, didn't he just ask Congress to amend the law rather than just unilaterally violating it. He said, "Well, on the one hand, Congress might not do my bidding." So, if there is a king and the parliament doesn't do what the king wants to do, does he just decree what he would like anyway?

The second thing he said was that, in order to explain the deficiencies in the law, he would have to compromise intelligence sources and methods. That is, al Qaeda doesn't know that we actually are trying to spy on them

and capture their communications. And if we give them a clue that we're trying to do that by changing the statute, then all of our sources will dry up.

Now, simultaneously with his assertions of this sort, he has continued the NSA program that's now been published to all the world and maintains that its effectiveness remains undiminished, even though Osama has read it on the front pages of the *New York Times*. You know, it reminds me of F. Scott Fitzgerald's definition of a person of first rate intelligence in Washington, D.C.—that person has the ability to keep two opposite ideas in the mind simultaneously and, yet, retain the ability to function. Bush seems to satisfy that standard.

I want to touch on the other thing that's exceptionally worrisome about the NSA warrantless surveillance program. As I said, it applies only when the target is an American citizen on American soil. Professor Turner stated that we only have situations where we're targeting al Qaeda abroad, and when they talk to someone in the United States we can listen in on the innocent person's conversation. That's wrong. I agree with him. It's legal that the innocent party is going to have their conversation picked up when you target one person in a two-way conversation who is suspected of wrong doing. But the difference is that when that happens, under FISA, the government is required to minimize the use of that innocuous information, which basically means they've got to destroy it after a short period if it's not relevant to an ongoing foreign intelligence operation.

We don't have a ghost of an idea why the NSA is using this information. They may be taking this information and going to an individual's bank and saying this guy may be a terrorist, perhaps you ought to shut his bank account down, or to credit card companies or to employers. We know that this was a typical tactic that was used by the FBI and the CIA during the cold war communist hysteria. That's how they destroyed people's ability to operate. And you can see how it functions in that way in some cases that are more overt, like in the case of Steve Hatfield. He is the so-called "person of interest" involved in the alleged anthrax investigation and now

being a person of interest, he can't find a job anywhere. Everyone says, "No, you're radioactive, I can't touch you." He's had no trial, but yet his life has been destroyed.

When you ask what the military necessity of this information gathering is and why it has to be gathered outside of FISA, there really isn't any answer. The Department's own officials say FISA works perfectly. When Congress has amended the law six times to comply with what the president alleges were deficiencies in the law, why does he have to evade what Congress has done and violate the rule of law?

Professor Turner insinuated that if the president enjoys an inherent power, Congress lacks any authority to regulate or encroach on it. That is flatly false. See Article I, Section 8, Clause 18 of the Constitution; it's called the Necessary and Proper Clause. It empowers Congress to legislate with respect to any power entrusted to any branch of government, legislative, executive, or judicial.

Let's take an example of the way in which the president conducts war. On several occasions during the Vietnam War, Congress enacted laws that said there was no money to carry the war into Cambodia or into Laos. Yet, we invaded both Cambodia and Laos, repeatedly. Nixon and his associates never said this was illegal and that Congress was regulating his ability to fight the war. These restrictions on executive power are clearly authorized by the Necessary and Proper clause. Restrictions on executive power may be ill advised, but they are certainly not unconstitutional.

Lastly, let's take a look at the *Youngstown Sheet and Tube* case as opposed to the FISA case.<sup>28</sup> In *Youngstown Sheet and Tube*, the Court said that President Harry Truman could not seize a domestic private business in order to avoid a strike that was said to imperil our ability to develop weapons for the Korean War. All that was at stake on the individual liberty side was private property, which was being taken and for which the owners were not being properly compensated. The private property right is important, but in the warrantless surveillance program, the right being

invaded is the cherished right to be free from search or seizure or restricted in your communications without good reason. The Fourth Amendment and the First Amendment right of freedom of communications, stand at the highest level of our hierarchy of constitutional values. Without free speech and privacy, we become a docile and cowed people that will be too frightened to criticize the government because we fear retaliation. And we will develop the mind set that we don't want to get involved. Who knows what will happen then; the government has already tried to destroy my life.

Secondly, with regard to *Youngstown Sheet and Tube*, Congress had not, in fact, affirmatively forbidden the president from seizing private businesses. It simply hadn't authorized it. In FISA, Congress has explicitly said, "Mr. President, it's a crime to gather foreign intelligence outside of this statute," the strongest statement of congressional sentiment possible. And the *Youngstown Sheet and Tube* concurring opinion of Justice Jackson, which is still taken as at least semigospel, is that the president's authority is at its low water mark when Congress has affirmatively repudiated what he's done. It's at its high water mark when Congress has specifically authorized what he's done. But in FISA, the clear intent was to reduce the president's authority to its low water mark. And if the Necessary and Proper clause doesn't authorize Congress to pass FISA, then the Necessary and Proper clause is worthless.

**Deborah Pearlstein:** Let me make two points and then get back out of the line of fire. First of all, with tremendous respect to my other panelists, the argument about the Foreign Intelligence Surveillance Act (FISA) as a constraint on executive power is sort of taking place on a bit of a fictional playing field. From the time FISA was adopted with the express purpose of trying to constrain executive power to engage in domestic wire tapping surveillance until today, the secret Foreign Intelligence Surveillance Court that was established by the statute to issue so-called warrants, never once, in thousands of requests, denied a single executive wire tapping surveillance request. So one can argue that it is better to have the FISA

court than to have nothing—and I think given the internal review structure now set up in the Department of Justice, there is some merit to this view—but the idea that this imposes any sort of powerful constraint on the president’s domestic ability to engage in wire tapping is misleading.

We should also clarify that FISA doesn’t require a showing of probable cause like you would have in the criminal context. The president doesn’t have to show probable cause that someone has done something wrong, or is doing somewhat wrong, or is even about to do something wrong. All the president has to show is probable cause to believe that the target of the search is an agent of a foreign power. That’s a pretty low threshold. I think the proof of how low that threshold really is, is seen in the percentage of wiretaps granted.

Now having said that, I do think FISA is better than nothing. The FISA court does sometimes go back to the administration seeking procedural amendments, asking, for example, that the president not request a warrant of unlimited duration. But, I want to be clear about FISA as a very minimal constraint on executive power.

The second point I just want to try to make briefly is to address this whole vesting clause theory that I think Professor Turner really eloquently and powerfully presented. The vesting clause theory is the idea that there is a substantive grant of power in the clause of Article II of the Constitution that says the executive power shall be vested in a president. And there have been many law review articles and books written, not only about Mr. Turner’s view of why that’s right, but on why it’s wrong.

I would associate myself strongly with the latter camp, and let me just make a few of these arguments here. First, almost all of those who advocate for some sort of substantive grant of power in the vesting clause recognize, well, the clause can’t be so capacious a grant of power that it subsumes powers expressly allocated elsewhere. The president may have power under this clause, but not power that has been expressly granted to the courts or expressly granted to Congress. Indeed, some vesting clause

theorists would acknowledge that while there is some substantive grant of power here, it cannot be such that it would interfere with any of the other express individual rights or structural protections of the Constitution. If you concluded the executive power clause was otherwise—that is, that the president has all the power he could conceivably need—you would basically be saying the executive power clause swallows the Constitution as a whole. And you would be saying this even though our Constitution doesn't have an express emergency exception to the Bill of Rights, unlike many other countries in the world that do. Our Constitution just doesn't say executive power is this big, except during times of war or emergency. The framers could've said that. But they didn't.

Instead, we have a Constitution in which the only one of the first three articles of the Constitution, establishing Congress's powers, the executive's powers, and the judiciary's powers respectively, that doesn't contain the word "war" is the article creating the executive branch. Congress has mammoth sets of war powers, with the Necessary and Proper clause granting the least of them. Even the judiciary is given the power to hear cases that are criminal prosecutions of treason, defined as levying war against the United States. The only branch of government that isn't accorded a war power *per se* is the executive branch. That should tell us at least something about how to read the Constitution's separation of security powers.

*Due to space limitations, we end the publication of the transcript here. If you would like to read the entire transcript, including the last section on presidential signing papers, please visit [www.law.seattleu.edu/sjsj](http://www.law.seattleu.edu/sjsj).*

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<sup>1</sup> The opinions that I express here are solely mine and not those of the Department of Defense, the Department of the Navy, or any other branch of the government. My comments today are made in my capacity as an individual and in my capacity as Mr. Hamdan's counsel.

<sup>2</sup> Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

<sup>3</sup> Neil Katyal, a professor of law at Georgetown, argued the *Hamdan* case before the Supreme Court.

<sup>4</sup> Common Article 3 is so named because it is contained in each of the Four Geneva Conventions dealing with the Wounded and Sick, Maritime, Prisoner of War and Occupation of Foreign Territory. It has been called the “mini-convention” because it contains the core principals of humane treatment for all persons either not engaged or no longer engaged in combat, and who care for the sick and wounded on which the Geneva Conventions are based.

<sup>5</sup> The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>6</sup> The McCain Amendment was included as Title X in Division A of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, H.R. 2863, 109th Cong. (2006).

<sup>7</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

<sup>8</sup> *Johnson v. Eisentrager*, 338 U.S. 877 (1949).

<sup>9</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>10</sup> *Wilkinson v. Austin*, 544 U.S. 209 (2005).

<sup>11</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>12</sup> Jefferson’s Opinion on the Powers of the Senate Respecting Diplomatic Appointments, April 24, 1790, *in* 3 THE WRITINGS OF THOMAS JEFFERSON 16 (Mem. ed. 1903).

<sup>13</sup> 4 DIARIES OF GEORGE WASHINGTON 122 (Regents Ed. 1925).

<sup>14</sup> THE PAPERS OF ALEXANDER HAMILTON 39 (Harold C. Syrett ed., 1969).

<sup>15</sup> 10 ANNALS OF CONG. 613–15 (1800).

<sup>16</sup> *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

<sup>17</sup> Verbal Statement of Thomas Story to the Committee, 2 PAUL FORCE, AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE NORTH AMERICAN COLONIES, 5th Ser., 819 (1837-53).

<sup>18</sup> *Barenblatt v. United States*, 360 U.S. 109 (1959).

<sup>19</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>20</sup> *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297 (1972).

<sup>21</sup> *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

<sup>22</sup> *Haig v. Agee*, 453 U.S. 280 (1981).

<sup>23</sup> *Von Raab*, 489 U.S. at 675 n.3.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

<sup>27</sup> *Smith v. Maryland*, 442 U.S. 735 (1979).

<sup>28</sup> *Youngstown Sheet & Tube Co. v. United States*, 295 U.S. 476 (1935).