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## *Letter from the Editor . . .*

ENGAGE, the journal of The Federalist Society for Law and Public Policy Studies, is a collaborative effort, involving the hard work and voluntary dedication of each of the organization's fifteen Practice Groups. These Groups hope to spark a higher level of debate and discussion than is all too often found in today's legal community. Through their programs, conferences and publications, they aim to contribute to the marketplace of ideas in a way that is collegial, measured, and insightful.

This online issue features transcripts from many of the panels and speeches at our November 2006 National Lawyers Convention. The transcripts have been edited for clarity, although in a few cases further revisions have been made as befits a written medium. Only the opening remarks follow; panel discussions and question-and-answer sessions have not been reproduced, for reasons of space management. Audio of these speeches and debates can be found on the multimedia archive on our website ([www.fed-soc.org](http://www.fed-soc.org)).

In the last print-bound version of ENGAGE (February 2007), we noted that several Convention panels and speeches had already been secured for publication with different law reviews. This is part of a concentrated effort to make the good work of our members and friends known to the widest possible audience. Transcripts from the 2006 Convention have thus far been placed with *Georgetown Journal of Law and Public Policy*, *Texas Review of Law and Policy*, *University of Illinois Journal of Law, Technology and Policy*, *Northwestern University Law Review*, *Chapman Law Review*, *Vital Speeches*, and *Transactions: The Tennessee Journal of Business Law*. Additionally, transcripts from the 2005 Convention, and events since then, have been placed with *William & Mary Environmental Law Journal*, *St. Thomas Journal of Law and Public Policy*, *Loyola of Los Angeles Law Review*, *Federal Communications Law Journal*, *Chapman Law Review*, *Virginia Tax Review* and *Albany Science and Technology Law Journal*.

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## WELCOME & OPENING ADDRESS

HON. PAUL D. CLEMENT: UNITED STATES SOLICITOR GENERAL

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**INTRODUCTION:** Ladies and gentlemen, my name is Leonard Leo, and I serve as Executive Vice President of the Federalist Society. On behalf of the directors, officers, and management of the Federalist Society, it is a privilege for me to welcome you this morning to our 2006 National Convention. For the next three days, we will explore a variety of fascinating and important issues dealing with constitutional law and legal policy. How these issues are ultimately resolved by courts and political institutions will have far-reaching impact on the lives of many, many Americans.

We have Steven G. Calabrese, the Federalist Society's national co-chairman, to thank for organizing this year's plenary sessions around the theme of limited government. And we are grateful to our practice group leaders for their creative spark and energies and developing 25 sessions with more than 125 speakers on cutting-edge legal topics.

Professor Calabresi was a bit of a prophet when he hatched the idea of focusing our attention on limited government this year. Here is an excerpt from the polling company's election night survey of actual voters: "By a margin of nearly 3 to 1, Americans vote for small government, even if it means fewer services. When given a choice between a larger federal government that provided more services and charged higher taxes and a small federal government that provided fewer services and charged lower taxes, Americans indicated a clear desire to downsize. In fact, 62 percent of voters preferred the smaller government. By comparison, just 22 percent opted for the more expansive government."

There are many important questions to address, however. What are the constitutional limits and how are they enforced? What role can courts, or perhaps political mechanisms such as the line-item veto or initiatives, play in policing limits on government power? Where do we trim the sails, and not trim them? Are there tensions between limited government and a foreign affairs policy that seeks to spread democracy abroad? And there is the perennial question of what role government ought to play in inculcating cultural norms through various forms of more regulation. These and other questions will be in the forefront of our debates this weekend.

Before launching into our arsenal of panels, we traditionally open the Convention with remarks from an accomplished lawyer. This one happens to be a bit younger than our normal stock, but no less distinguished. There are few, if any, who could make the claim that they have argued as many cases before the U.S. Supreme Court as they are years old. With 36 years under his belt, U.S. Solicitor General Paul Clement is just four shy of the mark—probably on his to-do list for the next term of the Court.

General Clement, we have very much appreciated your friendship over the years as a private practitioner, as legal counsel on Capitol Hill, as a Supreme Court law clerk to Justice Scalia (who we're honoring later today), as a Harvard law student, and now as the United States' leading advocate in the federal courts. Thank you very much, General Clement, for joining us this morning. And please, all of you, join me in welcoming the Solicitor General of the United States, Paul Clement.

**GENERAL CLEMENT:** Well, thank you very much, Leonard, for that kind introduction, and good morning. Welcome to all of you, to the Convention this year. It's great to see so many people up at this hour willing to discuss limited government, when most people haven't even had their morning cup of coffee. As a veteran of many national conventions, I can also say that one of the great things about the opening day of the National Convention is to watch the group grow over the course of the day as more flights come in from out of town, as some of the day-students from the Washington, D.C. law firms finish up the last project before they can come over to the Mayflower. It's great to watch the group grow. And today, it will grow to the point where, by this evening, the group is going to fill one of the largest ballrooms in Washington, D.C. That's an amazing thing to watch and behold.

I'm very happy to be here this morning. Leonard asked me a while ago to give some remarks this morning and to try to tie them into the Convention's theme this year of limited government. Now I realize that for some of you, having the guy who argued *McConnell v. FEC* and the *Raich* case (involving federal regulation of medical marijuana) talk to

you about limited government might be a bit rich. I'm willing to admit that there's little question that because of my day job—that job being to defend the constitutionality of federal statutes and the legalities of exercises of federal authority by federal agencies—I and many of the other lawyers in the Department of Justice, by necessity, are many times not exactly advocating the position of limited government.

Nonetheless, I think it's important that even lawyers who are duty-bound to defend the federal government attempt to do so in a way that is sensitive to the limits on federal power and in a way that's respectful of the responsibilities of state and local government and the rights of the citizenry. Let me try to point to three examples of situations in which I think DOJ lawyers in general, and lawyers from the Office of the Solicitor General in particular, are in a position to promote principles of limited government.

First, there is a possibility of urging interpretations of federal law that are respectful of the independent prerogatives and responsibilities of the states. A clear example of this is a case from a few years ago that may have flown under many of your radar screens but is one of my personal favorites. It's a case called *Raygor v. the University of Minnesota Board of Regents*. Now, at the risk of talking about civil procedure before 10 a.m., let me set the stage for this case and remind you about the federal supplemental jurisdiction statute. When one incident gives rise to both federal and state claims coming out of the same incident or occurrence, the statute provides that both claims, the federal claims and the state claims, can be brought to federal court together. But it also provides that if the federal claims are quickly dismissed as being frivolous or for some other reason, the case can be dismissed so that the state claims can go forward in the courts they belong in, in the state court system.

There's one potential fly in the ointment in this arrangement of dismissing the case and letting it proceed in state court at that point in the preceding. The state claims that were timely when filed as part of a pending action in federal court, at the time they're dismissed if they were to be re-filed in state court, might be untimely. It might be too late for them to file. The federal statute provides for this by giving the plaintiff in that case an extra 30 days to file in state court, and as long as the claims were originally timely when filed in federal court, they are deemed timely in state court.

So far, so good. But what happens when the defendant is not an ordinary corporation but the state itself; an entity of the state; an arm of the state? The statute of limitations for suing a state government isn't just like any ordinary statute of limitations; it's a limitation or a limit on the state's own waiver of its sovereign immunity. So, obviously, the issue becomes much more sensitive. And a federal law that purports to modify the terms of the state's own waiver of sovereign immunity in its own state court system is quite another matter than a simple 30-day extension in a case involving a private corporation. Nonetheless, the federal statute by terms applied to any action, and the Minnesota Supreme Court, not surprisingly, found that the statute was unconstitutional as applied to a case where the defendant in federal court was an arm of the state, the Board of Regents of the University of Minnesota.

So, what to do for the federal lawyers when the case comes into our office? An act of Congress, after all, has been struck down as unconstitutional, and the general obligation of in lawyers in the Department is to make arguments in defense of the constitutionalities of an act of Congress. Well, what we did is we urged the Court to adopt a clear statement rule and argued that the reference to any action should not be held to mean every and any action, but rather should be applied in a sensitive way along the lines of the *Gregory v. Ashcroft* clear statement rule, not to cover a suit against a state entity like the University of Minnesota. Under such a rule, we could defend the constitutionality of an act of Congress by arguing that it didn't even apply in this particular constitutionally sensitive area where the rights of states were involved. I'm happy to say that the Court accepted the argument six to three and held the statute constitutional but inapplicable in the context of the State defendant.

Two years later, the Office confronted a very similar situation with a federal statute that purported to preempt state laws preventing "any entity" from providing telecommunications services. And then, what do you do when that law is applied to a state law that basically bans any entities within the state government from being in the business of providing telecommunications service? Again, what would normally be a fairly unproblematic federal law becomes, in the context of trying to preempt state laws about how the state is going to organize its own internal government, become quite another matter

and raise sensitive 10th Amendment and other issues in its application in that context. And so, a federal court had struck down a statute as applied to a state law of that nature, regulating the state's own operations.

Again, we faced the same basic dilemma. This time around, though, we did have one major advantage. We could cite the *Raygor* case is favorable precedent for the notion that a statute that purports to apply to any entity would not necessarily apply to a state entity in a situation that raises difficult 10th Amendment issues. Again we make the same argument, and this time, I'm happy to report, the federal government's position, which was sensitive to the role of state governments, prevailed in the Supreme Court by a vote of eight to one.

In a related vein, in a series of cases, the Administration has consistently taken the position that federal statutes that impose conditions on state and local governments as part of federal government spending programs, so-called Spending Clause legislation, should be interpreted narrowly in light of contract principles. The Court has picked up on this suggestion in the context of interpreting statutes like the Americans with Disabilities Act and Individuals with Disabilities Education Act, and so the Court has limited the availability of attorney's fees and punitive damages against state and local fund recipients—again, at the urging of the federal government as *amicus* or as an intervener in these cases.

As a second example, I'd like to make the pretty obvious point that there are times when the federal government can best serve the interests of limited government not by what it says in court but by what it chooses not to say. A case in point was the federal government's decision not to file an *amicus* brief on behalf of the City in the *Kelo v. City of New London* case. As most of you know, *Kelo* involved the question of whether the Takings Clause, which states, “[n]or shall private property be taken for public use without just compensation,” precludes states from using their eminent domain authority, or localities to use their eminent domain authority, to take private property from one person, to allow it to be used by another person in order to promote economic development.

Now I know some would have liked the federal government to file on behalf of the property owners in this case. But generally, the federal government does

not file an *amicus* brief just to urge a position that we think is legally correct. Rather, we usually seek to vindicate an interest of the United States in an *amicus* brief, which is generally a governmental interest of the federal government. And, for better or worse, I have to admit, the federal government is a taker of property, not a takee. More to the point, although the federal government did not engage in any comparable use of the federal eminent domain authority, there were some federal economic development grants that funded state and local efforts to engage in this kind of taking; so, there was a certain awkwardness and a certain natural interest of the federal government to support the city. And so, the pressing question was whether the federal government should file a brief in support of the city or sit this case out. Ultimately, we decided to sit this one out, and that decision, too, I think served principles of limited government.

Before I leave the subject of the *Kelo* case, which is a fascinating decision, let me make one brief comment on the aftermath. In a group like this, I'm sure we could have a healthy debate over whether *Kelo* was correctly decided as a matter of constitutional law. Although I suspect that a majority of this group, and indeed a majority of almost any group given the public reaction to the decision, might favor the view of the dissenters in the case, Justice O'Connor's dissent. I also suspect that there might be a few people here who would wonder whether the courts are institutionally well situated to make judgments about what is and is not a “public use” and would have their doubts about whether judicially manageable standards could be provided in this particular area. But whether you think *Kelo* was rightly decided or an abomination, the reaction to that decision has been truly remarkable. It has fostered not so much economic development as democracy. The reaction is a great reminder that when courts decide not to constitutionalize an issue, the democratic process remains available to fill the gap. No less a source than yesterday's edition of the *New York Times* puts at 34 the number of states that have passed laws limiting the eminent domain authority of state and what will governments in the wake of *Kelo*. The approaches adopted range from a flat prohibition on economic development as a valid public use for purposes of state law or state constitutional law to prohibitions subject to a number of exceptions to simply procedural matters that require certain heightened

vote requirements before this kind of use could be made of the eminent domain authority.

All of the approaches that were adopted by the people in these democratic processes fostered limited government to one degree or another. And in contrast to a single federal constitutional standard, the differing approaches allow states to adapt the limitations to the local conditions in the area. Legislative approach has also had the advantage of being able to distinguish between, say, the use of the eminent domain authority to build a new Wal-Mart and the use of the eminent domain authority to build a new stadium. That's not the kind of distinction that a federal constitutional standard could easily accommodate. And, as someone who's spent a lot more time in baseball stadiums over the years than at Wal-Marts, I have to say I sort of welcome the flexibility.

Third, the federal government is sometimes in a position to serve principles of limited government by defending its discretion not to regulate in a particular area. A particularly prominent example of this is the so-called *Greenhouse Gases* case that will be argued just the week after next in the Supreme Court. I say the so-called *Greenhouse Gases* case because the case actually presents a very serious standing question which may prevent the Court from even getting to the merits of the case. But if the Court gets past the standing issue, it will then have to address the question of whether the EPA has the authority to regulate greenhouse gases under the Clean Air Act and, assuming authority exists, whether or not the EPA could refrain from regulating in order to continue to study the issue rather than regulate it.

This suit involves a rather remarkable attempt by Massachusetts and 11 other states and the District of Columbia to effectively force the EPA to regulate more in this area. As a result, although the Office of the Solicitor General is often in a position of defending exercises of regulatory authority, in this case it is the decision not to regulate by the federal government that is under attack. And this is not the first occasion in which our office has been called upon to defend a decision of the federal government to stay out of a regulatory area and refrain from regulation. Just two terms ago, the Office successfully defended the authority of the FCC not to regulate high speed cable Internet access in the *Brand X* case.

There is one final area I should mention where the Office plays an important role in seeking to enforce the principles of limited government, and that is in pressing arguments in the courts that certain issues are not proper subject for intervention by the courts. The courts themselves, after all, are part of the government that the Constitution limits. This can take the form of arguments about standing, as in the *Greenhouse Gases* case, or arguments about the courts' limited role in, for example, superintending secret agreements, such as in the *Tenant v. Doe* case a couple of terms ago, which was the last separation of powers opinion written by Chief Justice Rehnquist, in which a unanimous Court reaffirmed the rule of *Totten* case. And of course, this issue of the proper roles of the courts is front-and-center in many of the cases involving the war on terror.

Let me close my remarks just by stating the obvious. The theme of this Convention is incredibly timely. With two justices on the Court and a number of important cases on the horizon that involve both the limits on the role of the federal government, *vis à vis* the state, and also the proper role among the three branches of the federal government, the Court in the next couple of years is going to have numerous opportunities to address and refine the notion of what a limited government means under our Constitution.



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## SHOWCASE PANEL I

### LIMITED GOVERNMENT AND SPREADING DEMOCRACY: UNEASY COUSINS?

*Francois-Henri Briard, William Kristol, Tom G. Palmer, Kenneth Wollack; Moderator: A. Raymond Randolph*

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JUDGE RANDOLPH: Good morning. We all know the topic that we're going to hear our distinguished panelists talk about. I just want to say a few words by way of introduction. Spreading democracy has become—I'm not sure whether it still is—a centerpiece of the current administration's foreign policy. But what makes a democracy? For the past several weeks I've been taking a poll, and I want to give you the official results; they're now in. What makes a democracy? Ninety-nine percent say the ability of the people to elect their representatives. Well, if that is the definition, Cuba must be a democracy, and so is Iran and North Korea. North Korea calls itself the Democratic Republic of Korea.

According to one commentator that I've read, there are only five countries in the world that consider themselves not democracies. But, you say, many of those elections in those countries are shams. Well, last year the Palestinian territories had an election. Everyone thought it was fair and free, and who won? Hamas, which is listed by the State Department as a terrorist organization. If you want to support democracy by making a contribution to Hamas, you will be committing a federal criminal offense. Hugo Chavez was elected; I need say no more about that. And just the other day, Daniel Ortega was elected President in Nicaragua on the Sandinista National Liberation Front ticket. So maybe elections are not the only key to a democracy.

Perhaps a true democratic country is one that has free speech, freedom of religion, private property, rule of law, independent and honest judges. I add "honest" because according to a program on National Public Radio this morning one of the big problems with the court system in Afghanistan, to the extent there is one, is not independence but corruption. Judges are on the take. If that list makes up the attributes of democracy, then we can be sure that we've narrowed the number of truly democratic countries, and we can be sure that to get on that list many countries would have to go through monumental cultural change.

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\* *The Hon. A. Raymond Randolph sits on the U.S. Court of Appeals in the D.C. Circuit.*

Francis Fukuyama writes in his most recent book that, "Our record in nation-building is mixed. There are few successes and a large number of failures. And where success has occurred, they required an extraordinary level of effort and attention. In virtually every case, the basic impetus came from within the target society and not from external pressure." I used to tell my children, that before they try to change the behavior of someone else, they ought to consider how difficult it is to change their own behavior. Many marriages have foundered on that simple truth, I think. But that may be so not only with respect to individuals but also with respect to nation states.

Our distinguished panel will address some of these questions and more. Our first speaker will be Kenneth Wollack. Since 1993, Mr. Wollack has been President of the National Democratic Institute for International Affairs. He's traveled extensively throughout the world on behalf of the Institute's political development programs. Before joining the Institute, he co-edited the *Middle East Policy Survey* and wrote regularly on foreign affairs for the *Los Angeles Times*.

**KENNETH WOLLACK:** Thank you very much. Some of your provocative remarks I think we will come back to, regarding elections and other institutional elements of democracy. I'd like to step back, however, and talk a little bit about the context within which we are operating.

Following the end of the Cold War, we entered into a rare period in American history when fundamental assumptions were challenged. It was an exciting time for those who would presume to define a new American foreign policy. We found ourselves entangled in numerous international commitments with many responsibilities we could ignore only at our peril. Many of these commitments we wished to reaffirm and even strengthen. The challenge was to make sensible choices about those prior commitments and to be sure that new directions were not only relevant but capable of receiving broad popular support; for without such support, as we found out in Iraq, we have neither the coherence nor the resources to succeed.



Needless to say, the threats to American interests still exist. They include international terrorism; economic competition that could produce dangerous regional trade blocs and trade wars; environmental degradation reaching crisis proportions; the proliferation of weapons, both conventional and nuclear; and ethnic and national conflicts that could lead to war. These threats and others may not be easy to encapsulate in the public's mind, but any one of them could affect, fundamentally, our way of life—what Tom Friedman would call “our flat world.” And together they constitute ample reason for an engaged America in the international arena.

The answer to today's threats is not to win a metaphorical war against a single adversary. The answer lies in creating an overall environment in which international cooperation is emphasized, in which conflict can be managed, and terrorism effectively confronted militarily, economically, and politically. In this context, foreign assistance is not only a charitable endeavor but an exercise in enlightened self-interest, and the promotion of democracy, I would argue, not some idealistic crusade but rather quintessentially an exercise in *Realpolitik*. Nothing better serves the interests of this country—economic, political, or ideological—than the promotion of democratic practices and institutions. A more democratic world is not simply a more orderly and humane place. It is a more peaceful and prosperous place.

The notion that there should be a dichotomy between our moral preferences and our strategic goals is a false one. Our ultimate foreign policy goal is a world that is secure, stable, humane, and safe; where the risk of war is minimal. Yet, the undeniable reality is that the geostrategic hotspots most likely to erupt into violence are found for the most part in areas of the world that are non-democratic, or where governments are anti-democratic. Even from the traditional foreign assistance perspective, the establishment of democratic institutions has been found to assure sustainable development. Deforestation, rural dislocation, environmental degradation, and agricultural policies that lead to famine, all trace to political systems in which the victims have no political voice; in which government institutions feel no obligation to answer to the people; and in which special interests feel free to exploit the resources, land, and people without fear of oversight or the need to account.

Terrorism and political extremism pose an immediate security threat that must be confronted directly and forcefully. Concurrently, there must be a new urgency in the promotion of the rule of law, pluralism, and the respect for human rights. Democracy and human rights are not only ideals to be pursued by all nations; they are also pragmatic tools that are powerful weapons against extremism.

During the 1980s, an important lesson was learned about political transformations in countries like the Philippines and Chile: that political forces on the far left and the far right enjoy a mutually reinforcing relationship, drawing strength from each other, and in the process marginalizing the Democrats in the middle. Prospects for peace and stability only emerged once democratic political parties and civic groups were able to offer a viable alternative to the two extremes. These democratic forces benefited from the solidarity and support they received from the international community, and in the U.S., Republicans and Democrats joined together to champion their cause. Today, these conditions find their parallel in the Middle East and in Asia.

The U.S. agenda in these countries can help support those working for the so-called third way between autocratic regimes and religious extremists: for freedom of speech and expression, fair elections that reflect the will of the voters, representative political institutions that are not corrupt and are accountable to the public, and judiciaries that uphold the rule of law.

Future programs can identify key areas where democracy assistance can be effective, particularly concentrating on encouraging women's participation, strengthening democratic institutions and practices at the local and municipal level, and supporting journalists and activists in opening up debate throughout the region. Such initiatives should explore subregional and regional approaches that facilitate experience-sharing and help build linkages between democratic activists in the region. This strategy focuses on building institutions that pull together disparate voices that constitute civil and political society and helping them to identify common interests, channeling them for common ends.

I would like to conclude by answering four questions. First, is this costly? The entire democracy promotion budget of the United States government reflects about three percent of our total foreign

assistance budget. Are the programs effective? In some places, yes; other places, no. We're still learning how to deliver this assistance even more effectively. But it's important to talk to the beneficiaries of this outside engagement to see how they feel in places like the Philippines, Chile, Eastern Europe, Africa, Asia, and today in the Middle East--to determine whether they believe that the international community has a role in the responsibility to engage in this endeavor.

Is it an imposition? No. If we can put Iraq to the side, there are close to a hundred countries over the last 30 years that have moved in one form or another toward a democratic transition. The United States has probably invaded only five of those. Something else is going on here. Democratic aspirations, we have found, are universal. If you study public opinion polls in every region of the world, there is no clash of civilizations. People all over the world want the same thing. They want to put food on the table; but they also want to have a say in the political issues the governor lives. They want to have the right to elect their leaders, guaranteed by the Universal Declaration of Human Rights. They want an independent judiciary. They want a parliament that can debate and enact laws. They want freedom of expression and freedom of assembly. These are issues that you will find across boundaries, across regions.

Finally, are we alone in this effort? The answer is a resounding no. My organization is now part of an international network made up of other American organizations, organizations in other countries, non-governmental groups, other governments now engaged in this effort, inter-governmental organizations, and even some unlikely international financial institutions that have come to recognize the interdependence between economic development, human development, and more open political systems. So, with this growing consensus among the economic development field, the political development field, politicians across the political spectrum, an international solidarity network has developed. This is not about ceding something to the United States. It's about joining something larger than yourselves in the pursuit of what I believe will be a more stable, democratic and prosperous world.

RANDOLPH: Our next speaker is Francois Briard. He is President of the Paris Chapter of the Federalist Society. I heard a snicker or two, but I'm told that

he's having an increasingly difficult time finding a large enough meeting room. Isn't that right? He's an attorney with one of the French Supreme Courts and represents major U.S. companies in France. He has worked on issues of Franco-American trade, foreign investments in France, and economic intelligence. Mr. Briard is President of the Vergennes Society, which he co-founded with Justice Scalia. The Institute seeks to foster cooperation between the French and American Supreme Courts. He is a member of the Board of Trustees of Sarah Lawrence, and has published widely. He's lectured in this country and abroad, including last spring at the Yale Law School.

**FRANCOIS BRIARD:** It is a great honor to be on this morning panel for the opening of the Federalist Society's Annual Meeting. I may be the very first Frenchman since the Louisiana Purchase to have been invited to discuss issues with Federalist lawyers... Don't worry, I'm not here to buy back America. Or to advertise for *Ségolène Royal*, the champion of the French Socialists in our next presidential election... Actually, I am very proud that I am not, and happy to be here with you.

My thanks to President Eugene Meyer and to my friend, Vice President Leonard Leo. Leonard is an "FF," a Federalist and a Francophile! Thanks to you all for welcoming a "*non-American*," who can perhaps bring you (I hope...) some new views on familiar American issues...

When I heard the topic we will talk about this morning, I thought it was perhaps quite risky to ask a French attorney to talk about *limited government and spreading democracy*. I looked at our history (monarchy, revolution, empires, modern authoritarian leaders...) and I found people who are not exactly true models of democracy and limited government.

Nevertheless, I could have given a very academic talk (at least 40 minutes in our country) about the French Enlightenment, human rights, the sun rising on French Republics and the world.... Too long, too boring. Let me take you, gently, instead, for ten minutes to the south of our beautiful country. Try to close your eyes and feel as if you were on the terrace of a lovely *café* listening to one Frenchman and one American talking these interesting issues, *limited government and spreading democracy*....

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THE US AND THE EU SEEM SO REMOTE  
FROM EACH OTHER

*The American:* You French are great humanists and believe the State can do everything but change a man into a woman. Have you heard of the U.S. doctrine of spreading democracy? And, first, have you heard of limited government?

*The Frenchman:* I've no clue at all about limited government. It must be an American idea dealing with...federalism? The Tenth Amendment? Yes, we know about that, states rights, limits on the federal government. We have none of that here, and Europe is very far from being a federation. But why do you want to *limit* government? The will of the majority is everything to us; then all decisions become political. Remember Mr. Prodi's recent declaration that *Europe is on the left*. Governments have to be strong, respected, acting almost everywhere, including in matters related to social questions (culture, welfare state, solidarity, etc. etc.). Plus we have that fantastic and superb Brussels technocracy. It is nice to have 15,000 civil servants only in Brussels taking care of our community!

*The American:* Hey, you sound optimistic! Don't you think there is a deficit of democracy in the EU mess? Don't you think it's time to get more legitimacy into EU laws? Do you actually see any logic in the search for "*international consensus*"?

*The Frenchman:* Don't be so critical my friend. You said democracy? Well, it may work. "*Government is in the free consent of the people*." But I understand from James Madison and de Tocqueville that "democracy" and "republic" may have different meanings. We do have that accessory in our baggage. Good effects from democracy are not guaranteed! Free elections guarantee a happy future? Think of the French Terror and "*democratic*" ideas forwarded then to support violence and crime. Consider the Weimar Republic. Very modern and sophisticated institutions. A wonderful springboard for Nazi power!

*The American:* You French are so cynical!

*The Frenchman:* And why do you want to *spread* democracy? Did you hear our President on September

4,<sup>th</sup> 2006 at the UN: *international law and sovereignty*, not intervention! Democracy has to rise on its own. How can you Americans can talk about the rule of law and violate international law? How can you promote limitation of power inside the nation—private enterprise and citizenship—and expand power outside through public policies? And what about sovereignty, the very first freedom you got in this country, before any other liberties, when you left Mother England?!

*The American:* So you prefer to let Albanians be killed in Kosovo, to have Iraqis murdered by Saddam, genocides, atrocities, failing states...and you do nothing? I thought you Europeans, especially the French, had a universal idea of human rights! And by the way, I thought that the right to intervention was a European idea, developed by Mario Bettati in 1974 (student of a Frenchman, Chief Justice René Cassin) and taken over by French doctor Bernard Kouchner. What did you do with the eight post-Communist states that joined the EU in 2004? You didn't promote democracy for them? And, my friend, don't you think that defense of human rights sometimes becomes political and a super-legality overruling international law?

*The Frenchman:* Alright, well said, but intervention often denies geopolitics and never goes against the one who is strong! Are you going to try to liberate the Tibetan people from Chinese yoke? You just *cannot* standardize democracy in its Western form. Pretending to order the world, you just make it messier. Think of the destabilization of Iraq and the new tyranny of the Shia majority government. Political institutions are not spreading worldwide like iPods, gas stations or computer geeks!

*The American:* So we do agree on some things! We are both attached to individualism, freedom, free enterprise, separation of powers, democracy, and limitation of power by the rule of law. And we disagree on other things. So what is our common message about limited government and democracy?

THE US AND THE EU MAY BE SO CLOSE  
TO EACH OTHER

*The Frenchman:* I've got an idea!



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Tocqueville, Bastiat... What do they say?

*The Frenchman:* Descartes was the champion of personalism and self-thinking, a wonderful approach to personal and social responsibility; Montaigne: a true individualist too and a unique thinker about human nature; Tocqueville: *Democracy in America*, the best book ever written not only on democracy and on America but also on the influence of democracy. Like James Madison, Tocqueville feared majority tyranny. Bastiat: a champion of the free market and free enterprise! We do have lots in common!

*The Frenchman:* Now, let me ask you a final question: to supporters of limited government what is democracy made for?

*The American:* I would recommend you go to a foreign and individual thinker: Friedrich A. Hayek. He is very clear: do not make democracy a fetish; do not talk too much about democracy; democracy is not a goal, the finality, the end... Democracy is a means, a way. The final goal is freedom: It's very important to understand that democracy may avoid arbitrary but also can be a dictatorship of the majority and of ideas. The value, the true value is individual freedom.

*The Frenchman:* Now let's have another glass of French wine.... But before we make a toast, can you tell me about a place where we could meet to discuss such ideas?

*The American:* I give you just one name: The Federalist Society!

RANDOLPH: I can't resist. The Frenchman mentions subsidiarity, which is from the Maastricht Treaty, and it's operating in states. And the American says I am reminded of something? You know what he was reminded of? The Articles of Confederation.

Our next speaker is Tom Palmer. He is senior fellow at the Cato Institute and director of Cato University, the Institute's educational arm. He is also the director of the Bern Project on Middle East Liberty, which sponsors an Arabic-language libertarian website and is publishing books on the subject. Before joining Cato, Mr. Palmer was an H. B. Ehrhardt Fellow at Hereford College, Oxford

University, and President of the Institute for Humane Studies at George Mason University. He regularly lectures on political science, civil society, and other topics in this country and abroad.

**TOM PALMER:** Thank you very much. It's an honor to be here. I have to say, my heart was really warmed to see one of my great heroes, Bastiat, in Mr. Briard's powerpoint presentation. One of my life projects is to translate the words of Bastiat into every written language on the planet. Thus far, I've gotten eleven, with a few more to go.

Let's launch right into our discussion of democracy. It's an essentially contested concept, as they say in political theory. To paraphrase Ronald Dworkin: We all have the concept of democracy; we can talk about it meaningfully. But we have different conceptions of it. And if we don't get clear on what conception we're invoking, there's going to be confusion rather than actual conversation. I remind us of this because it's something that's been forgotten in American foreign policy.

In 1819, Benjamin Constant, often cited as a Frenchman although technically he was Swiss, discussed the difference between ancient liberty and modern liberty in a brilliant essay that clearly identified some key issues. He said of ancient liberty, it "consisted in exercising collectively, but directly, several parts of the complete sovereignty; in deliberating in the public square, over war and peace; in forming alliances with foreign governments; in voting laws, in pronouncing judgments; in examining the accounts, the acts, the stewardship of the magistrates; in calling them to appear in front of the assembled people; in accusing, condemning, or absolving them. But if this is what the ancients called liberty, they admitted as compatible with this collective freedom the complete subjection of the individual to the authority of the community. You find among them almost none of the enjoyments which we have seen form part of the liberty of the moderns." And Constant's concern was modern liberty rather than a focus on democracy or popular sovereignty per se.

We were warned again 54 years ago by J.L. Talmon, in his book, *The Origins Totalitarian Democracy*, that democracy is not an inherently liberal concept. Fareed Zakaria's fine book, *The Future of Freedom: Illiberal Democracy at Home and*

Abroad, also focused on the possibility of illiberal democracy.

Iran, mentioned earlier, is a fairly good example of such. Plausibly, you can change power through elections. Indeed Iran is not even a single-party totalitarian state; it has a multitude of different power centers. But it is hardly a liberal society, hardly an example of modern liberty.

The dangers of unlimited democracy should be obvious to all who will but consult history. For one thing, it undermines itself. You run the risk of “one man, one vote, one time,” which is one of the legacies of some modern democratic thinking. Students of Roman history should be aware of the dangers of Marian-style democratic movements, which tend to focus power on one man or one party as the carrier of the will of the people, as the Roman popular politician Gaius Marius considered himself.

A desirable democracy—a democracy that is stable, that can persist in any sense—requires limited government. It requires, for example, a loyal opposition. This is what we just witnessed in American politics. One party replaced the other in control of the Congress, and everyone expects the opposition to be a loyal opposition. They’re not going to take to the streets or blow up train stations because they lost the election. But such loyalty is impossible, or at least extremely unlikely, if the losers who form the opposition fear that by losing an election, they risk losing everything: their goods, their property, their rights, perhaps even their lives. You cannot have a loyal opposition without a concept of limitations on power, and limits on the power of the party that has won to punish those who lost. And without a loyal opposition, you cannot have a democracy.

Liberals, and I include in that most, probably all, of the people in this room—(regardless of what you may call yourselves in the context of American or French politics, we’re all liberals)—reject the single-minded focus on popular sovereignty that constitutes so much of the discourse of modern democracy and instead favor constitutional liberalism, which crucially includes a democratic component. As I noted, the people just went out and turned one party out of office and put another in charge of the Congress. But to be successful as a democracy there must be a clear limitations on the domain of public choice. It must be limited, or it will not be stable.

But stable and lasting democracy not only

requires a framework of limited government, it requires a separation of powers—most particularly, a Judiciary that is at least substantially independent of swings in the popular mood and undue influence from the elected or popular branches of government. Mansur Olson, the late political economist, very neatly pointed out, that “the conditions that are needed to have the individual rights needed for maximum economic development are exactly the same conditions that are needed to have a *lasting* democracy. Obviously, a democracy is not viable if individuals, including the leading rivals of the administration in power, lack the rights to free speech and to security for their property and contracts or if the rule of law is not followed even when it calls for the current administration to leave office. The *same* court system, independent judiciary, and respect for law and individual rights that are needed for a lasting democracy are also those that are required for security of property and contract rights.” So, there’s a very close connection between democracy, the rule of law, and also economic and social development.

Douglass North, a Nobel Prize winner in economics, pointed out in a series of papers with his co-author Barry Weingast that a key role of constitutionalism is facilitating commitments by those in power. Once the holders of power have made a commitment, they face the problem of time inconsistency. They made some commitment to get into office, but now they hold power and have no more incentive to fulfill that commitment. What is needed is a system that can require office holders—force them—to fulfill their commitments; including commitments to respect individual rights.

The second point I’d like to bring up is that such a system of limited government is an *achievement*. That has been forgotten in recent years, particularly in this country. It is an *accomplishment*. Students of constitutional history know very well the struggles, compromises, and the bitter fights that went into that achievement. It is not the natural equilibrium to which human societies move if some little obstacle is removed. What we’ve witnessed in this country is an astonishingly naïve understanding, or misunderstanding, of law and social and political development. We were told by the now much-maligned neoconservatives that all you need to do is get rid of some psychopath who stands in the way of a society moving towards natural equilibrium; that

the natural equilibrium, the default condition, of human societies is Oregon. The single-minded focus on elections in the constitution of a democracy or its definition has had very serious negative consequences for the promotion of authentically liberal democracy. The more foundational and indeed inherently valuable elements of liberal democracy have been neglected; likewise the historical processes that tend to produce them. We have witnessed this in Iraq very, very, very clearly.

Our president “mis-underestimated,” as he would put it, not only the difficulty of actually creating a liberal democracy, but also the wickedness and evil of our enemies. Al Qaeda in Iraq does not want to expel the United States from Iraq; they want to drag us in deeper and deeper and deeper. That’s their purpose. The destruction of the Golden Shrine of Samara, the real turning point of the war I think, was a deliberate attempt to provoke a terrible civil war. Our political leaders did not understand that there are actually bad and wicked people on this planet who want maximum destruction, who hate liberal democracy, and who will do anything imaginable to stop it coming about. Quite often when I’m in Europe, I’m irritated by European intellectuals who claim that Americans are naïve. Usually, I find it irritating. But in this case, it’s spot on. Our leaders were astonishingly naïve about the conditions for the creation of constitutional liberalism.

Third, attempts to export or promote democracy by military force have demonstrably negative effects on our own system of constitutional government, which we ignore at our peril. Since we’ve had this shift to a war mentality, we’ve seen a serious erosion of civil liberties; most notably, to many of us, the horrifying, effective suspension of the writ of habeas corpus, that most important guarantee of our liberties--that simple Anglo-Saxon legal act more important, in my opinion, than elections and political campaigns. We have seen the ballooning of governmental powers; an administration and a Congress that have spent money faster than any other administration since LBJ; the creation of enormous new bureaucracies that are little more than agents of corruption of our constitutional system, spreading largesse and pork-barrel politics all through the country; enormous increases in governmental handouts and interventions into social and economic relations. All of it justified in terms of this war on terrorism and the necessity of promoting

democracy.

I should point out, too, how fundamentally irrational and—I’ll be very blunt—stupid the war on terrorism is. This war is the most misconceived imaginable. Terrorism is a tactic. You cannot wage war on a tactic. An organization or a network such as Al Qaeda, foreign states such as the Third Reich or the Soviet Union--you can wage war on them. But waging war on a tactic is an open-ended commitment. You’ll never know when you won. You’ll never know whether you’ve made progress. And you’ll never know when it’s over. It’s a fundamental mistake.

I’d like to conclude with two things. One is a quotation from one of our other speakers, from an editorial in the *Weekly Standard* from December 2003, a ringing endorsement of the Bush foreign policy and the promotion of democracy as the central element of our foreign policy. “Bush has made it clear that the only exit strategy from Iraq is a victory strategy, with victory defined as democracy.” I hope there will be some discussion by the author on that remark shortly. But I would like to conclude by echoing Mr. Briard’s comments that the promotion of liberalism is not something we should leave to government. It is something that we can do as individual citizens. My colleagues and I are very active in that process. We have published Hayek, Bastiat, Montesquieu and Adam Smith in Arabic, Persian, Kurdish, and Aziri. Those had never appeared in those languages before. We run seminars for young bloggers and journalists throughout the Middle East. We just did a program in the Republic of Georgia with people from 28 different nations—Uzbekistan, Tajikistan, all the scary Stans, as well as the entire former Soviet Union and the peripheral countries, Iran, Iraq, Turkey, and so on—asking the hard questions about how they can foster the rule of law and enjoy the blessings of individual liberty. I would encourage you not to leave it to our incompetent federal government to promote liberalism. That is the job of citizens.

Thank you.

**WILLIAM KRISTOL:** Thank you, Judge Randolph. This is a very interesting panel; one of the most unusual panels I’ve ever been on, I would say: a Democrat, a Frenchman, a federal judge, a Libertarian: four dubious groups. But these are the best representatives of all those groups, I would say. Some of my best friends are—well, some of my acquaintances are

Democrats, Libertarians, federal judges, Frenchman. It's been an interesting discussion.

It's also a pleasure to be here with the Federalist Society. I've spoken and visited many Federalist Society conventions and chapters. I think I was a bit player at the beginning of the Federalist Society, in the early 1980s with Lee Lieberman and Dave McIntosh, Steve Calabresi, Peter Kuntzler, and Mike Joyce—who then ran the Olin Foundation and moved onto the Bradley Foundation. and was so important to creating many intellectual and political institutions that have played a big part in the rise of the conservative movement, in the area of constitutionalism; similar to libertarian and traditionalist efforts over the last 25 or 30 years. I very much admire what the Federalist Society has accomplished, and I just want to say, before getting into the topic, don't relax. You've made great progress over 25 years in law schools, in the bar and the public court on constitutional matters. I really believe that to be true. One forgets what it was like in 1980 when Bob Bork was a lonely law professor and Nino Scalia too. That was about it; there was not much of a revival. (Cato maybe did not quite exist. I don't remember.) The whole recapture of the thought of the Founders—the constitutionalist tradition, with all its differences—had barely begun in the Academy. And, obviously, things were very different on the federal bench and in the public debates.

I was thinking, when the Republicans lost the Senate, it reminded me of 1986, 20 years ago, when I first came to Washington to work for Bill Bennett. I watched them lose the Senate in 1986 and didn't really realize at that the time that the main effect of that would be that Bob Bork would be defeated in 1987. You know, Scalia had been confirmed in '86 by a Republican Senate. Rehnquist had been promoted. His promotion to Chief Justice had been confirmed and ratified by a Republican Senate. The Democratic Senate defeated Bob Bork and I would hate to see history repeat itself, having had Roberts and Alito confirmed by a Republican Senate in 2005. It would be a shame. This president, like Ronald Reagan, whatever his other flaws on matters of judicial appointments, has been pretty good. He tried to do the right thing and take good advice most of the time—a couple of midcourse corrections we will pass over in silence. But, one should not give up. I myself know nothing; I have no inside knowledge.

Justice Stevens could well step down at the end of the term in 2007. We could have a very similar sort of analogous situation to the Bork nomination. But I would not give up. Justice Thomas was confirmed by a Democratic Senate in October of 1991, something I worked on a little bit when I was Dan Quayle's Chief of Staff with Lee Lieberman and Mike Luddig and many others who have been associated with the Federalist Society. I know you guys don't get directly involved in political matters. But as an individual matter I think would be a very important to be engaged now, more than ever. The next two years are awfully important for the constitutionalist cause on the lower courts, on the Supreme Court, at the state level, and obviously what happens after 2008 is important as well. This is the moment: we can make a fundamental difference in the history of the country, or slide back again.

You know, I don't think there is—we'll stipulate that there are tensions between liberty and democracy. Every intelligent person has understood that. There are tensions between elections and limited government, and they tend to go together much more often than not. I would nonetheless point out, that elections are a very important part of preserving liberty; self-government is a very important part of liberty. So, one shouldn't overdo the hostility between these two elements. As a practical matter, it can't just be an accident or a fluke that the strongest advocates of restoring constitutionalist government in the United States have also been on the whole the strongest advocates of strong U.S. foreign policy, which has included fighting for American principles abroad and, where possible, promoting American democracy abroad.

Reagan and Bush are certainly the two presidents most associated with that point of view, and also the two presidents who have done the most at home for the sake of restoring constitutionalist government. Generally speaking, if you care a lot about liberty, constitutional law, constitutional democracy, constitutional self-government, you will care a lot about strengthening, restoring, or correcting it at home. And you will do what you can to defend it and promote it abroad. This isn't as much a tension as people sometimes make it seem. I would say, again as a practical matter, an inward-looking focus entirely on our own liberties, a defensive attempt to simply preserve our constitutional order and let everyone else



defend for themselves, or let them take five centuries to develop all the appropriate social structures before they can be ready for constitutional self-government will not work. It will not strengthen constitutional government here at home, in my view. And I think there's a lot of historical evidence for that. Judge Randolph recently referred to the sensible advice to change; before you change others, change yourself.

We were a deeply flawed republic in 1939 and 1941; segregation being the most obvious black mark. This was the America of *Plessy v. Ferguson*. It was the U.S. of *Korematsu*, for that matter. It was the U.S. of the court-packing plan. But it didn't make our efforts to go abroad and defeat the Germans and the Japanese any less legitimate because FDR tried to monkey with the court, because part of our constitutional law was based on a deeply flawed understanding of the 14th Amendment, which we've since repudiated. You can't wait all the time to fix everything at home before trying to defend yourself and defend your friends abroad.

It's true that we were attacked on December 7, 1941. We didn't choose that war. We only went to war when attacked. But is that something that we are proud of—that we waited until December 7, 1941? Would it not have been healthier to be more engaged in Europe in the '30s? Would it not have been healthier to stop the slaughter of World War II earlier, if we could have?

I don't know any political philosophy. I got a degree in it from Harvard, which suggests that I probably have negative knowledge about it. But still, I know a little bit about these arguments. Of course, at a theoretical level there are tensions and problems, and they shouldn't be minimized. But at a practical level, on the whole, strong support for liberty at home goes with a strong support for liberty abroad. It's become very fashionable to denigrate elections. Oh, how silly people are. Don't they know that democracy is about winning elections? Yes, most Americans know that. I know that. George Bush knows that. In Iraq, the problem was not elections. The elections went incredibly well. The elections showed, actually, that the Iraqi people liked the chance to vote. They voted pretty responsibly. They voted according to ethnic and sectarian lines, but not for the most radical exponents of the different ethnic factions. And of course, we voted for decades, and still do in some ways, along various religious and ethnic lines.

I come from a voting group, Jewish Americans, that had the great distinction—I saw in the exit poll a week ago, of voting 88-12 Democratic, one point behind African Americans. This is deeply upsetting to a lot of my liberal Jewish friends, that we didn't quite pass Black Americans in their totally monolithic and idiotic devotion to the Democratic Party. It is actually embarrassing and makes you wonder about human progress. Anyway, we vote on these lines. The Iraqis voted on these lines. The elections weren't the problem in Iraq. If anything, it was kind of a fancy version, if I could say this, of the kind of point of view Tom was expressing. We've learned that elections don't solve everything. We waited too long to get to elections, I would think; many of observers of Iraq now think. We talked ourselves into the notion that they weren't ready. We spent a year and a half in occupation before letting them vote. In fact, the vote was the best thing that happened in Iraq, and arguably the fundamental problem in Iraq was a lack of water, failure to have sufficient troops, and the failure to crush the insurgency early and crush the sectarian militias early. Leaving that aside, it probably would not have been better to go to elections earlier. I wouldn't minimize the importance of the elections. A lot of liberties have come to the world because of an insistence on elections; (I'm thinking of Asia and Central Europe). And a lot of liberties have been crushed at the same time that elections were canceled, abrogated, or in the case of Iran, severely limited.

So again, there's no automatic conjoining of elections and democracy, democracy and liberty, elections and other freedoms, elections and limited government. But, on the whole, we can advance both of these causes together--and we should--because having the right to select one's rulers is an important part of liberty and an important part of freedom.

If I could just respond quickly to Tom's somewhat—to his ridicule of the president for the War on Terror. I mean, look, the President was being polite. He didn't call it the war on Islamic Jihadism. Maybe he should have from the beginning. I don't know that we'd pay much of a price for that. People understood what he was talking about. But we are at war with Islamic Jihadism. And saying we are not doesn't change the fact that we are.

You know, what is "Trotsky"—just to provoke a little more. I actually was never a Trotskyite, and you know, my father wasn't after Agent 19. I've

never even really read Trotsky. But I believe one of his famous lines to someone who wanted to stay out of politics was, “You know, Comrade, you may not be interested in the revolution, but the revolution is interested in you.” Some people at Cato, many of whom are friends of mine, seem more interested in farm subsidies than in Jihad. But you know, even if you’re not interested in the Jihadists, they’re interested in you. We shouldn’t kid ourselves: if we have to retreat and withdraw from Iraq, we’ll have very bad consequences and we will pay a big price. But I don’t think it need happen. I’m very much for trying to prevent that from happening.

I propose a division of labor. Some of us will focus on winning the war against Islamic Jihadism and some of us will focus on confirming the Supreme Court justices and lower court judges and trying to restore constitutional government in America. If we can agree to focus on those two things but still support each other, I’m happy to help Cato in their attempt to cut farm subsidies.



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## HON. KARL ZINSMEISTER: DOMESTIC POLICY ADVISOR TO THE PRESIDENT

### A SOCIETY WITHOUT DICTATORS

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**INTRODUCTION:** My name is Allyson Ho, and it is my privilege to introduce Karl Zinsmeister, who serves as the President's domestic policy adviser. It's a privilege because it gives me the opportunity to express my gratitude for his deeply principled leadership and service to our country.

Before he was named by the President to serve as his domestic policy adviser, Mr. Zinsmeister had been a reporter embedded with our troops in combat zones in Iraq. Out of that experience, he has written two books chronicling his time with our troops in harms way, and his evident admiration for and respect for their sacrifice and service is nothing short of inspiring.

Mr. Zinsmeister served for a dozen years as editor-in-chief of the *American Enterprise*, and national magazine of politics, business, and culture. He was also the U. B. Fuqua Fellow at the American Enterprise Institute here in Washington, DC. His studies and writings have covered topics ranging from economics to social welfare and demographics to cultural trends. He is a graduate of Yale University—don't hold that against him—and spent time engaged in further studies at Trinity College in Dublin, Ireland.

I am so pleased to have the privilege to introduce the President's domestic policy adviser, Karl Zinsmeister.

**HON. MR. ZINSMEISTER:** I can't tell you what a treat it is to have Allyson introduce me. She was one of the first people I worked with when I joined the White House as a completely wet-behind-the-ears rookie, and helped get me started. It's great to see her.

I first started speaking at Federalist Society events in the mid-'80s, not long after the Society was founded. In those days it was more a conspiracy of ideas, as opposed to a full-blown organization with dues-paying members and a logo and a secret handshake. (I assume you have a secret handshake.)

Back then—and 20 years is not so long ago—federal domestic spending was only about half what it is today, in inflation-adjusted terms. You have to ask yourself: how did we let that happen, a doubling of government's bulk in a comparatively short period

of time? The answer is that this is what government does, organically, if you don't make sure something different happens. The vine just grows and grows and grows, unless the gardener keeps it manageable.

John Adams warned, "Government turns every contingency into an excuse for enhancing power in itself." For generations, Americans have relied on various barriers to hold the kudzu in check. Most particularly, we've depended on James Madison's parchment barriers. But there have also been economic and cultural and even physical barriers that moderated the scope of government. My friend Chris DeMuth has argued that Jefferson did us the favor of adding a climatological barrier when he seated the Federal government in Washington, whose summer environment kept would-be empire builders away from their workbenches for several months of the year—until Willis Carrier undid that safeguard by air-conditioning buildings.

Today, we can't rely on heat and humidity, or the modesty of a young nation's resources, or, alas, even on Madison's parchment barriers to keep self-aggrandizing government in check. Instead, we have to be wise and good. To keep appropriate limits on the state, we're going to have to rely on solid principles, stoutly defended.

Washington is not really my natural habitat, but about six months ago I was pleased to answer a call to serve as this Administration's domestic policy adviser, because there would be chances to contribute to the taming of Leviathan. Before I started work in the West Wing I gave some thought to the broad principles I'd need to keep in sight during my service in behalf of modest government. And I thought that this morning, rather than talk about specific domestic policies, I would review some of those large principles I consider central to governing well.

A good starting place, I think, is the principle of *equality*. Equality not only in the political sense, but just as importantly in the moral sense. In America, every man, woman, and child is presumed to have not only equal rights, but also equal dignity. There's an old aphorism I try to live by which counsels: "Never be haughty to the humble, or humble to the haughty." Both halves of that are important.

“Never be haughty to the humble”: That’s a concept, deeply rooted in Christianity, which lies at the very heart of Western democracy.

And then there’s the other part: “Never be humble to the haughty.” That piece is a more peculiarly American formulation. It comes from our Yankee forebears: Don’t tread on me. It comes from our frontier, where residents adamantly insisted that every man is as good as the next, that every woman is as worthy as another.

This was taken very literally in many places. It didn’t matter if you were rich, or blueblooded, or the boss of the works: if you tried to lord it over a Nantucket sailor, or Kansas sodbuster, or Arizona ranch hand, there was a calculable chance you’d end up with a bop on the nose, or worse. In his book *Washington’s Crossing*, David Hackett Fischer captures this feisty egalitarianism in George Washington’s New England regiments.

The historical roots of this include the fact that many of our immigrants arrived on these shores in open rebellion against aristocratic pretensions. Another root was the fact that most Americans owned their own land or trade. And then there was the reality that most households were armed. You don’t bully people with firearms strapped to their hips, or hung over their mantels.

There has been an understanding in American society that you need to *uphold* your equality through responsible actions. But if you act respectably in this country, you are owed respect in return—no matter whether your father made his living “fumbling in a greasy till,” as Yeats sneered, or perhaps as a writer of greasy sonnets.

This isn’t just some democratic courtesy. It’s the best way to productively involve all citizens in our self-governing society. The last senator I sat down with was the son of a Greyhound bus driver. The fact that there is no wall separating drivers from senators is a wonderful thing for this country, not just morally but practically. It makes us both a freer and a stronger society than Yeats’s brittle European oligarchy.

Where should this tradition of equality lead an American political thinker? I suggest it ought to propel us to a powerful *respect for everyday choices*.

I believe it’s important we resist the impulse to “improve” the lives of ordinary people without their consent. For American history suggests that everyday citizens, not “experts,” are generally the best arbiters of law and policy.

Remember how William F. Buckley once declared that he would rather be ruled by the first 2,000 names in the Boston phone book than by the Harvard faculty? That’s not just rabbleroxing, or obscurantism. Our Founding Fathers made the very same choice. Though it was a radical idea at the time, they concluded that the large body of ordinary Americans—intently focused on their private affairs and the facts on the ground in their home communities—would be less likely to drift into misunderstandings of human nature, social reality, and economic truth than persons who manipulate theory for a living. (Like idiot domestic policy advisers.)

We are dramatically different from other nations in this. Even today in advanced countries like Japan and most European nations, society is much more traditionally commanded from above. A small elect anointed at places like the Sorbonne, Tokyo University, and in tight networks of gatekeeping institutions and clans, exerts disproportionate control. In France, nearly all forms of social power are tightly centralized in Paris. In Britain, likewise, if you want to be at the heart of things, you have to be in London. There is one locale which dominates as the finance center, educational center, seat of government, and creative hub. That is not true in the United States, however. Here, power and talent and financial resources and cultural authority are much more democratically scattered across the country, from Boston to Nashville to Charlotte to Atlanta to Houston to Silicon Valley to Seattle.

The egalitarian instinct of our Founders has proved practical and wise. At 230 years of age, the U.S. government is now the oldest and stablest on the planet. We’ve dodged the traumas of revolution, genocide, and expansionist war that many nations steered by enlightened elites have stumbled into. Our highly decentralized, bottom-up economy has outperformed all counterparts managed from above by mandarins. And our citizenry has turned into (statistically speaking) the most educated, inventive, hard-working, faithful, and charitable population on the planet.

This is not a question of good ordinary citizens vs. wicked intellectuals. Everyday Americans are not saints or savants with magical decision-making powers. But there are structural reasons why individual households will often make better decisions than experts. For one thing, they usually have richer

information. Trying to separate good schools from mediocre ones, or excellent doctors from poor ones, for example, is very hard when attempted from a government bureau or academic office. We try! But we usually fail. Yet individual Americans make those kinds of judgments routinely. Rule by the millions works because the millions are close to daily realities. And when they do make errors in judgment, their errors usually cancel each other out.

The general superiority of decentralized problem-solving reflects some iron rules of nature. Consider a simple example: Even a half-inebriated crowd can empty itself out of any football stadium in a matter of minutes. Yet commanding that process from some master perch is, as those of you with some background in mathematics or statistics will know, an almost insoluble problem. You could cover the field from goalpost to goalpost with hardware and programmers, and you'd end up frustrated. There are just too many variables: 80,000 people; 55 exits; scores of stairways; pillars that block certain routes; backups in specific aisles; it's just too much to orchestrate. Yet leave each slob to himself and he'll be opening the door to his Chevy before the scoreboard lights are cool. He may not realize that he's "exhibiting large-scale adaptive intelligence in the absence of central direction," as scientists put it. But he is.

I read a book some time ago called *Ants at Work*, written by a Stanford entomologist who intensively studied a large colony of harvester ants for 17 years. (And you thought your professional expertise was narrow.) Her goal was to discover how these tens of thousands of tiny creatures coordinate the specialized tasks essential to colony health—food harvest and storage, garbage toting, child care, tunnel making, war fighting, etc. Who's directing the show to make sure the right work gets done?

The answer, she discovers, is that *nobody* is in charge. Each colony "operates without any central or hierarchical control.... No insect issues commands to another." These complex societies are built instead, she reports, on thousands of simple decisions made by individual creatures, with those many micro-decisions melding together to yield an efficient macro-result. Humans being more sophisticated than ants, there is reason to think we have even less need for hierarchy, caste, and central direction.

And, contrary to George Orwell, as human society becomes more technological, we are

relying more rather than less on decentralization of authority. Not many years ago, supercomputers were extraordinarily complex and centralized devices, where all roads and all wires led to one extremely expensive custom-made processing chip. Today, there is no emperor-king processor in a supercomputer. The latest versions are made with more than 16,000 plebeian, everyday chips just like the one in your Dell, all working in democratic parallel. And this so-called "distributed intelligence" has turned out to be vastly more powerful than the elegant genius of the old Cray supercomputers that worked from the top down.

Or take the Linux computer operating system—the computer code which has become the backbone of the digital world. As many of you probably know, there is no master control over what goes into Linux. Thousands of informal contributors just add and subtract and tinker with Linux, and then put their result out there in the marketplace. And in a fascinating and distinctly non-chaotic process, Linux quickly turned into the most flexible and powerful and error-free computer language available.

This pattern of complex problems being solved by small actors working locally without heavy central direction is not just the story of the Internet, it is a phenomenon common all across nature. And it is something Americans in particular incline toward. During the Battle of King's Mountain in the Revolutionary War, American Colonel Isaac Shelby instructed his men, "When we encounter the enemy, don't wait for the word of command. Let each one of you be your own officer." His scattered backwoods marksmen went on to defeat a larger force of regimented soldiers by relying on that self-directed process of decision making.

So: back to the West Wing. How should this American inheritance affect those of us who are advising the President? Well, my view is that it ought to incline us strongly toward *decentralism*. We must always try to resolve issues at the lowest possible level of governance. We need to be powerfully protective of individual sovereignty, local control, and self-determination. Not out of ideology, but out of simple practicality and surrender to the facts of nature.

Local citizens not only tend to have better information than remote authorities on the best ways to solve a problem, they are also likelier to tolerate variety, and to tailor actions to local peculiarities. That's critical, because what works in Utah is

sometimes different from what works in New York. The realities of human society suggest strongly that policy makers should avoid one-size-fits-all policies, and instead encourage experimentation wherever possible.

A corollary to recognizing the power of decentralization is *respecting evolved civil society*.

The reason any wise member of government should avoid stepping on churches, and fraternal organizations, and non-profit groups, and small businesses is not because they have voters in their ranks who might rise up and punish us. Rather, government should approach these kinds of groups with humility because there is priceless information on societal success encoded in their operations. These groups have sprung up, and survived, because they have captured valuable, tested, time-proven truths. If we squash a highly evolved institution like traditional marriage, we throw away the lessons of literally millions of trials and errors on what works in affairs of the heart. When we disrespect the ancient verdicts of religion, we discard a motherlode of hard-won wisdom. Government, if it is to avoid becoming oppressive and unlimited, must leave lots of room for the essential institutions of civil life to do their vital work.

That leads me to my next critical principle of humane governance, which is *thrift*. Thrift is another kind of humility—the humility which recognizes sensible limits, and avoids over-extension and over-indulgence.

The U.S. has traditionally been a very thrifty nation. And that has had a lot to do with our being a lightly ruled nation. At the very same time that heads of state in France, England, Japan and other nations were living and decreeing amidst royal splendor, George Washington was presiding over our nation's government from a small Philadelphia house he had furnished with his own money. He had three cabinet advisors, and two people on his personal staff. When they went on vacation, he wrote his own letters. The entire Federal apparatus totaled 350 civil employees in all its branches.

At one point, Washington and a couple of assistants decided to tour the South. The President slept in inns along the way, with the innkeepers having no idea he was coming. The tour lasted three months, and for almost two-thirds of that time the government could not keep track of where the President was. Not exactly an imperial state.

This was no fluke of our early history. As late as the end of Teddy Roosevelt's term in office, the federal government was only a tenth its present size in employees, and one-fifteenth its current scope in spending per capita. Today, our national government remains about a third smaller (as a portion of the economy) than counterparts in most other industrial nations. But there is a constant tendency for the government to bloat, and this must be resisted if the liberty of Americans to choose their own lives and to spend their own resources are to be preserved over the long run.

Liberty is the key word here. I believe every member of government should be reminded each morning, ideally via talking alarm clock, that in our country, government is just a sideline, not the heart of society. America's most important accomplishments are private and personal and communal. The government is there, in essence, to pave the road and keep the peace so you can take your daughter to a Chopin concerto.

The enlightened and humane thing for a political leader to do, therefore, is to avoid unduly sucking power and resources into government in ways that will constrict the other opportunities open to citizens. I always try to ask myself when evaluating a policy: Will this help individuals and families and localities create richer lives for themselves? I repeat: "...for themselves"—not via someone else proclaiming an accomplishment in their name.

"The mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately," admonished Thomas Jefferson. That expresses the central vision of American politics: that *government should serve, not rule*.

We believe people are generally not to be commanded by others, but should make their own decisions and order their own lives. As obvious as that sounds, it is not a principle many governments have respected over the centuries. Even in the most advanced cultures, history shows that there is a powerful taste for booting and whipping the masses, and accumulating power in a central state.

The American ideal is very different. "Government," warns one aphorism from our founding era, "is force. Like fire, it is a dangerous servant and a fearful master."

As much as possible, I suggest, the Federal government ought to hand off ruling assignments

and authority, and pass down resources and responsibilities to individuals and smaller institutions. A wise government will bolster private entities, and prefer the local to the large. Leaders at all levels ought to concentrate on offering Americans *choices* rather than edicts.

And if we will just do these modest things, our citizens will enjoy the natural efficiency, and freedom, and richness of a society without dictators.



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## TELECOMMUNICATIONS:

### NET NEUTRALITY: BATTLE OF THE TITANS

*William P. Barr, Paul Misener, Christopher S. Yoo; Moderator: David M. McIntosh*

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**INTRODUCTION:** I'm David McIntosh, a partner at Mayer Brown. I'll be the moderator for today's panel on Net Neutrality and the future of that issue. I want to give you a little bit of background. As you know, in the 109th Congress, there was a large, long effort to bring telecom deregulation bills forward. Towards the end of that effort last year, the issue of Net neutrality surfaced as the major stumbling block for that deregulatory effort. In the House, there were amendments to bring Net neutrality as part of the Bill that were defeated. In the Senate, it was still being negotiated, and incrementally different versions of Net neutrality were included in the Bill that Senator Stevens had worked in his commerce committee.

Now although last I heard, Senator Stevens still hold out some hope that in this lame-duck session there might be a compromise on a bill passed, most people feel that it's very unlikely and that the issue will be returning once again in the 110th Congress, only this time with very different committee leadership. Chairman John Dingell, whom I served with, is going to be Chairman of the Commerce Committee. Ed Markey, who is a big proponent of Net neutrality, will chair the Telecommunications Subcommittee in the House. In the Senate, Senator Inoue will take over chairing the Commerce Committee. His staff has indicated that they want to take a look at Net neutrality in a serious way. There will also be changes, I think, that come ultimately as a result of last Tuesday's elections, on the way issues are decided in other areas of government. Chairman Dingell has indicated that he thinks the '96 Act is outdated and wants to bring forward some type of telecom act. But it won't be the same as it was in the 109th Congress. He has plans to modify the universal service fund and look at media ownership.

One thing that I want to mention at the outside is that the term "Net neutrality" has different meanings to different people. There's the minimalist approach, as I call it, which says essentially that there should be limits on Internet service providers, stopping them from prohibiting any of their subscribers from posting or delivering in e-mail or trap visiting any site on the web. Then, provisions from the Markey Bill that say, in addition to not denying access, providers

should be prohibited from favoring or discriminating against Internet traffic. You've got Commissioner Tate's working sort of definition, which wants to add to the AT&T merger a prohibition on AT&T charging websites for delivering their content to Internet users.

As my friend James Gatusso at the Heritage Foundation has pointed out, what's at stake here is whether an Internet provider can prioritize different bits of information. As messages and websites are broken down as they travel through the Internet, can you create a priority and charge a fee for faster delivery? In the end, there are many folks -- Randy May, who I've worked with, mentions this all the time--who wonder if you make Net Neutrality policy, how do you avoid then taking the next step in treating Internet providers as common carriers, and with that the concomitant rate regulation? These are questions our panelists will address and educate us on.

I'm going to read you a brief little bio on each of them, and then let them talk in the order that I'll introduce them. Our first panelist is former Attorney General William Barr. Bill is currently the Executive Vice President and General Counsel of Verizon, where he heads the Legal, Regulatory, and Government Affairs Group. Prior to that, he was with Bell Atlantic and GTE. He has also practiced law in Shaw Pittman and has served at the Justice Department, both in the first Bush administration, ultimately as Attorney General, and then served in the Reagan administration in the White House.

Our second speaker is Paul Misener. Paul is both an engineer, having gotten his engineering degree from Princeton, and a lawyer, graduating from George Mason. He is currently Amazon.com's Vice President for Global Public Policy, and he's responsible for formulating and representing the company's public policy positions worldwide. We are glad that he is here joining us today on this debate. At an earlier point in his life, he was also a practicing attorney at Wiley, Rein and Fielding.

Our final speaker will be Professor Christopher Yoo. Professor Yoo is no stranger to Federalist Society conferences. He is currently a professor of law and Director of the Technology and Entertainment



Law Program at Vanderbilt University, although he informed me that he is now planning to move to the University of Pennsylvania. Vanderbilt's loss will be Pennsylvania's gain. He has done a lot of work in this area, in particular in his book, *Networks in Telecommunications, Economics and the Law*.

So I will now turn it over to the panelists.

**WILLIAM P. BARR:** Thank you very much, Dave. It's a pleasure to be on this panel this afternoon with my distinguished co-panelists.

It is no accident that the broadband revolution was launched on deregulated networks. It started in the last decade, with the cable companies investing over \$100 billion to convert their broadcast pipes into two-way broadband pipes. For a while, cable dominated the field because phone companies were subject to a regulatory regime that required them to share the lines and to sell their services at regulated rates.

It was precisely when those rules were lifted that phone companies started making substantial investments. Investments soared in broadband. DSL deployment has sharply ramped up since deregulation, and DSL is now gaining share on cable modem's growth. Now, the phone companies are moving to the next generation of broadband. Verizon is spending \$18 billion to deploy our fiber-to-the-premises system to 18 million customers by 2010. AT&T is spending \$4.6 billion over the next three years to deploy fiber-to-the-node to 19 million homes. Wireless companies are, meanwhile, investing in their wireless networks to deploy 3G broadband technology. Verizon Wireless has spent \$3 billion so far to reach 200 million people by the end of this year.

Fixed wireless has now become a viable broadband alternative. WiMAX reportedly will allow speeds up to 155 Mbps over a range of 30 miles. Clearwire, with Intel's backing, is now offering WiMAX in 30 cities and expanding. TowerStream is offering WiMAX in six metropolitan areas. In August, Sprint announced that by the end of 2008 it will spend \$3 billion to build a nationwide WiMAX network to provide customers access to the Internet at 2 to 4 Mbps. Several hundred U.S. municipalities are in the process of installing citywide WiFi networks. Already, about 65 municipalities have such networks. The three satellite companies are continuing to

invest in substantially improving their nationwide broadband offerings and report that subscribership is increasing. Recent technological advances have now made broadband-over-power-lines ("BPL") a feasible access alternative, and Google-backed Current Communications is rolling out BPL in Texas and Ohio. Current speeds are up to 3 Mbps.

The bottom line is that we have underway probably the largest infrastructural deployment in recent history. Over the last two years, Verizon has been the number one capital spender in the country. Unlike most historic infrastructural projects of this scale, however, these builders are not being granted exclusive franchises and promised relatively safe returns. They're rolling out their networks in fiercely competitive markets, markets that are subject to extraordinary technological risk. When Verizon puts fiber down a street at the cost of about \$850 per home passed, we do not know whether any customer on that street is going to sign up for our service. And when we drop a line to the house at roughly \$1,000 per home, we have no idea whether that customer is going to turn to cable, WiMAX, or some other competitor shortly thereafter.

Again, it's no accident that these investments are being made in a deregulated environment because companies are going to make these kinds of investments only if they see an opportunity to earn a return that is commensurate with the risk, and only if they have the freedom to innovate, differentiate, and make commercially sensible decisions that they need to compete and win in the market.

Let's consider now the argument of the advocates for broadband regulation. Their basic claim is that the market for last-mile Internet access is really a duopoly controlled by cable and phone companies with enough market power to harm competition in the market for content and applications. Their prescription is a set of *ex ante* blanket rules governing the way business is transacted on the Internet in a comprehensive regulatory scheme.

Now, the claim is frequently made in the public debate that what the last mile providers are going to do is block or interfere with the content at Yahoo or eBay or Amazon or the like that people are reaching over the public Internet. But that's not really what the debate is about. We've made clear that consumers should be able to reach any lawful website that they want with the access service they have bought, and

we do not and will not block, degrade, or interfere with the consumers' access to those websites. Indeed, one of the reasons we're making the investments we are is precisely to enhance the experience and the range of services that our end users can get over the public Internet.

The real issue is this. Broadband pipes not only enhance what people can get over the public Internet. They also make possible new kinds of priority delivery services, quality of service capabilities, and functionalities that by definition cannot be accommodated on the public Internet. The fact is that the public Internet as it is now configured could not seamlessly accommodate the explosion of gaming, on-line movie viewing and other bandwidth-intensive applications that are envisioned for the future. The question is whether we are going to be able to build the infrastructure and to develop these new functionalities and capabilities and offer these new services to businesses, so they can in turn offer to end users new services that otherwise would not be available at all.

So, for example, if Johns Hopkins Hospital wanted to develop and deploy a home monitoring network by which it could monitor very sick patients at home and provide certain medical services remotely right to the patient's home, we should be able to deploy for them a network with very high degrees of quality of service, security, reliability, and end-to-end management of their traffic. The so-called net neutrality advocates say that if a network owner wants to provide a new enhanced service, they should only be able to charge the end user; they should not be able to charge the company that wanted to provide these new services. The result is that the company that wants to provide new services for its customers would be banned from working to help the network company build this new service.

Some say that if the network provider is going to provide new enhanced service to some content or applications providers, and do it for a fee, then the network provider has to provide the identical service to all comers on exactly the same economic terms. Some add that the network owner must be prohibited from providing itself any functionality or capability that it does not make available to all comers on the same terms. These non-discrimination models require, as they always have, intense regulatory oversight of all the physical and economic terms of

transactions. Some regulator will have to determine which parties are similarly situated, what kind of businesses are equivalent, what kinds of terms are equivalent, what different portions of deals could be carried over to another deal, etc. But more importantly, non-discrimination regimes like this ultimately lead to regulated prices, that is, to tariffed rates set by regulators.

Obviously, in our system, the presumption is against regulation. The burden is on those seeking regulation to show that in fact there is a market failure causing harm to competition; and, moreover, that the regulation will actually improve things, not make them worse.

The threshold problem with the broadband regulation argument is the harm it posits. Network providers simply lack the market power to harm competition in the content and applications market. No phone company or cable company has the market power to injure competition among content and applications providers.

The suggestion that this is a duopoly is an exaggeration or misrepresentation. The broadband market is fiercely competitive today, and its trajectory is to become even more competitive. As noted earlier, multiple technologies deliver broadband services. And many of these technologies—such as WiFi, satellite, and WiMax—have comparatively modest build-out costs. The result is that barriers to entry are comparatively low, while the incentives for entering the market are high. Thus, consumers have multiple choices of access providers, and the choices are rapidly expanding. Eighty-one percent of zip codes have three or more choices. Fifty-three percent of zip codes have five or more choices. Twenty-one percent have ten or more. Broadband prices clearly do not reflect market power. On the contrary, they have been trending downward very sharply, and speeds have been increasing. DSL prices have fallen nearly 30 percent in three years, and by nearly 50 percent at any given speed. And cable modem prices have decreased 70 percent in three years on a per-Mbps basis.

Moreover, advocates of regulation are engaged in a sleight-of-hand here as to what the relevant market is. The broadband regulation argument hinges on the power of the last-mile provider over the upstream content-and-applications market—and that is a national or global market. Whatever Verizon's share today in a particular city may be, it only has 12

percent nationally and 2 percent globally. Because of this fractured structure of the industry, no last mile provider has power over the national or global market for distribution of content and applications.

Moreover, last mile providers such as the telecommunications and cable companies lack the incentive to limit the experience of their end users on the public Internet. Indeed, we are selling—and actively promoting—the ability to reach Internet websites. In a word, we sell access. That’s our primary business. It is in our interest, obviously, to increase the value of what we are selling by maximizing the amount of content and applications that are available to the end user. At the same time, we know that end users will shun a system that restricts their access to desired content. No network can succeed in the broadband marketplace if it acquires a reputation for not delivering on customers’ universal expectation of access to the content they want.

It should not surprise you that when given the lack of market power or the incentive, the history is clear: broadband regulation advocates cannot point to any of the harms that they are concerned about as actually having materialized in the marketplace. The one paltry poster child that they wheel out really shows the vacuousness of the claim. In 2005, Madison River Communications, a small rural telephone company with 190,000 lines, blocked Vonage, a VoIP provider, from terminating on their system, apparently over concerns that Vonage was not paying them access charges. This was a legal dispute about a question that is still being contested: does VoIP traffic have to pay terminating access charges as other long-distance companies do? In any event, the FCC staff quickly reached an agreement with Madison River whereby the company paid \$15,000 and agreed to stop blocking the calls. That is not a predicate for the kind of massive regulation that is being called for.

In short, the broadband market is characterized by multiple competitors, falling prices, increasing transmission speeds, new investments, and vibrant innovation, all characteristics of a marketplace that is not in need of intervention by regulators. A fundamental problem of these *ex ante* regulations that are being proposed is that, as Professor Chris Yoo has pointed out, they are addressed to the wrong problem. The premise of net neutrality regulation is that our policies have to be targeted to fostering competition

in the content-and-applications market. But that market already is highly competitive and becoming more so. If, however, as some regulation advocates suggest, the problem is concentration or scarcity at the network level, then the policy imperative should be to broaden the availability of network capacity and network capabilities by promoting investment in multiple diverse networks. If the problem is too few networks, the solution is more networks.

Even if the ultimate concern is the content-and-applications level of the marketplace, it is still the imperative in the first instance to give priority toward policies geared toward encouraging the deployment of diverse networks. It is hard to imagine a wealth of new applications being written if there are no networks to support them. And each time a network owner invests and innovates to create a new network capacity and function, it enables a whole spectrum of content and applications that did not exist before.

The fallacy of the regulation approach is that it posits the problem of network scarcity but fails to address it. To the contrary, it assumes that enduring network scarcity is a given and prescribes a regulatory scheme that carves up network resources to all comers, either for free or at regulated rates. The problem, of course, is that these very regulations will deter the building of new networks by severely constraining the ability of network owners to innovate, differentiate, and earn a return that justifies investment in networks. This ends up locking scarcity into place and stunting the market.

It is critical to understand that today’s network infrastructure will not support the rich array of content and applications that are on the drawing boards. And the problem is not just capacity on the last mile or capacity on the backbone. It goes to the very network functionality of the public Internet. The real constraints to applications, right now, are the limitations that have been built in to the public Internet. The public Internet gives no set of bits priority over any set of bits. It also operates under the regime that the level of service that you can provide is best efforts. It does not allow for quality of service on the Internet, and this could preclude many types of next-generation content and applications.

Now, this does not mean that the public Internet is going to be superseded. On the contrary, it is going to remain the primary delivery vehicle for most of the kinds of consumer content and applications with

which we are familiar—and that is exactly why we are investing in making the backbone more robust and making the last mile robust. But it does mean that if we are going to expand the universe of applications, we are going to have to promote the diversification of networks: networks that allow prioritization, networks that allow a range of quality of service, networks that are optimized for particular kinds of content and applications. And the regulatory regime that is being promoted does the opposite. It deters investments, and it threatens the ability to recoup investment and deprives the network owner of the freedom to compete. The proposed regulatory regime equals a less diverse Internet. It means not more but fewer products, services and players.

Take, for example, the dictate that network providers should not be able to charge upstream providers for new and enhanced services. This is intuitively and obviously wrong. If we do something with Johns Hopkins Hospital, why should only the patients pay? The infrastructure and new functionality we are building makes markets. These markets are two-sided markets. There are times when customers want to pay to reach the businesses, and there are times that the businesses want to pay to reach the customers.

Take the market for express delivery served by companies like Federal Express and UPS. There are times when consumers are willing to pay for express delivery—for example, when I need a book delivered overnight—but there are also times when the sender is willing to pay for express delivery—as, for example, where a law firm has to get a brief to a court immediately. The idea that only customers should be able to pay for delivery forecloses large avenues of efficient activity and eliminates key revenue sources for network providers to recover their investment.

Content and applications providers like online gaming companies may be willing to cover some of the expenses of improved delivery services and to help make a market for their services. Ultimately, the nirvana for gaming is to have virtually no latency in the system, so that when I make a move on one side of the earth, it is almost instantaneously perceived on the other. That requires a very robust network with a very high degree of quality of service and prioritization. A gaming company may want to enter into a transaction with a network company to provide just that kind of capability. For example, perhaps

when the user accesses a game and wants to play it, a burst of capacity is made available on that site from the gaming company to allow that to happen. There is no reason why these kinds of arrangements should not be allowed to take place. This improves competition on the network level, and it improves competition at the content-and-applications level.

Some proponents of Internet regulation concede that network providers should be able to charge upstream for these services, but demand that if a network owner provides this for anybody, it has to provide for everybody on the same terms. That kind of requirement is unnecessary and harmful. First of all, network providers have incentives to maximize the diversity of content and applications on their networks, as I have described. Moreover, once it is conceded that a network provider can negotiate a commercial arrangement with a content provider that wants to reach the customer, what is the reason for not allowing those very same market forces to govern the transactions with the second, third, and fourth content provider?

The problem with non-discrimination requirements is the certainty of regulatory failure. Enforcing non-discrimination obligations requires the regulator to determine which providers are similarly situated. Take for example the Johns Hopkins hypothetical I described earlier, in which Johns Hopkins traffic was prioritized from end to end (including the last mile). Suppose another company—say, Victoria's Secret—notes that Johns Hopkins traffic was given this prioritization in the last mile and demands the same last-mile prioritization. That requires the regulator to price that last-mile bit of prioritization, which was but one component of the whole Johns Hopkins transaction. Isolating that one aspect of the larger deal, defining it, and pricing it are devilishly hard to do, making the risk of regulatory failure here alarmingly high.

Moreover, if the advocates for broadband regulation believe that this is not a competitive market, that we need these rates and regulators because there is a bottleneck, are they really going to be satisfied with a commercial, real-market rate? Or, as in every case in telecommunications until now, will they require the regulator to determine what the rate should be? How this is going to be done in a competitive market is beyond me. The regulators have shown that they cannot do this. This will end up in

undercompensation of the network companies. The bottom line is that network companies are unlikely to take the kinds of risks and make the massive kinds of investment going on today if all they can expect are regulated rates for their return.

If a problem arises, there are rules in place sufficient to deal with it. The FCC has said that it has authority over this market, and it stands ready to come in if it sees any abuses or anticompetitive conduct. That's the way it should be. Until actual harm arises that can be reviewed in context to see whether it harms competition, whether there is market power, etc., there is no reason to impose *ex ante* a broad set of rules that locks in concrete how the Internet—and commercial relationships on the Internet—should proceed.

**PAUL MISENER:** Before I begin, thank you very much, Bill. That was a great introduction to your views on this debate. You have also given me an opportunity to speak a lot slower than I had planned. I'm from Amazon.com, and my remarks today really do represent only Amazon's views on this matter. There are other companies we've worked with over time that may not agree with everything here, and I hope there's enough substance to show that we're a little bit closer than perhaps is imagined.

So let's quick-start with how the Internet works. I'll talk about what net neutrality means to us and really describe the meat of this issue, how it is a disagreement on the facts, not so much on the slogans or the philosophy. And then, provide some more discussion of how the net ops get paid; (hopefully, this is a place where Bill and I perhaps can narrow the chasm).

The engineering is really at the core of the policy. The home user has a subscription with a broadband network provider like Verizon. Verizon then is interconnected to the Internet backbone. On the other end is a service provider, a content provider online, like Amazon, Yahoo, or YouTube; they're connected through agreements with a business ISP. How does the content that is provided or made available by the service provider brought to the home user? Well, it's very simple. There's something called the hypertext transfer protocol, which governs how communications are made on the web, and there's a command called "get." So, when you type in a URL on the top line of your browser, or when you click on

a link on a webpage, it actually sends what is called the get command. The get command is destined to a particular server. In fact, it's destined to a particular file on that server. And so, when the page comes up and you see it, all that is, is a file. And you go on and you send a get command to have that file sent to you. It's actually called a resource. You've certainly seen this before; the uniform resource locator, the URL. That's the resource. It really means just content, be it the webpage, be it a video, an image, text, whatever. But the important policy point here is that the resource, that is the content, only gets into the Verizon or Comcast network if the home user who has paid for the access has asked for it. This is unlike every other medium in history, where it was decided by the publisher, the broadcaster, the writer, the author, what gets sent out to the consumers. Here, the consumer chooses. If no consumer ever chooses the particular content on the other side of the web, that content never gets into the Verizon network. Interesting, huh?

So, how do net ops get paid? Well, this is really basic stuff. Right now, they are paid. There's a network operator on the consumer side who gets paid by the consumer. It is not a fixed rate necessarily. It's been priced that way in some markets, but you can see the differences in prices between DSL and cable modem access, which is explainable largely by the different speeds that they provide. DSL is cheaper because it's slower in those markets. Likewise, the other ISP, which may or may not be one of the major residential ISPs, gets paid by the business. Amazon pays a lot more for access than Joe's bookstore.com.

The residential broadband network operators want to introduce a second way to charge, to sort of reach through the web and be able to get money for capacity, for content transiting their networks. And they want to charge the source of that content, even though the source of that content didn't put it into the network; it was just made available and pulled by the user who's already paying for it. That's not the end of the diagrams, but we'll get back to them in a second.

It's funny; I've heard so many times how no one knows what net neutrality means, everybody disagrees on it. You know, that must mean it's amorphous and can't be regulated or legislated. Well, that's true of everything. What is the war on terror? What is health care? What is any number of the much

more complicated things that Congress and the FCC deal with? Net neutrality is actually relatively simple compared to the big issues the Senate and House hit everyday.

The core idea of net neutrality is nondiscrimination based on the source or ownership of the content. I've underlined those two words because, you'll notice, it doesn't say the kind of content or the timing of content or the particular technical needs of the content, but rather, the source of the ownership. So, if AT&T wanted to prioritize all Internet video over all Internet data files, fine. That makes perfect sense. That's a rational network management decision. But to choose among the providers puts the network operator in the position of deciding for consumers which content gets favored over other content.

I've heard the Johns Hopkins example before, and I'm a big fan of that particular institution. But the fact of the matter is, you don't want to have a circumstance where the network operator cuts a special deal with Johns Hopkins that it forbids Mayo Clinic. Otherwise, Verizon steps into the position of being an HMO for all of its customers. You don't want that. You don't want Verizon HMO. And, in that sense, net neutrality is really about preserving the openness of the Internet, which has been so great for consumers and innovation.

I want to draw a distinction here, because none of us—well, probably few of us in this room—are great fans of the '96 Act. I share a lot of sympathy with Bill on that particular point. But the '96 Act was about busting up market power. It was trying to dismantle the market power of the telephone companies. This is not what we're seeking to do. We acknowledge that they have market power. We say it's okay for them to have market power, so long as that power over the network is not extended to market power over content in ways that have never been done before. We're not seeking to bust them up, just to prevent them from extending the power that's extant.

So, the disagreements is just kind of a bunch of slogans. Believe me, my side of the debate has been guilty of sloganeering also. I get that, and I'm trying to distinguish Amazon's particular viewpoints from everything else by being very specific about what we mean. Let's walk through a couple of these. First, "Content shouldn't fill the pipes for free." Perhaps some of you are familiar with some of the comments

made by the leadership of network operators who say they don't want their pipes being used by companies like Amazon for free. Well, we agree.

The content, as we learned on the very first couple of slides, injures the pipe only when the paying customers go and get it. We're not pushing it out there. We're not a cable content provider that is pushing it out to that set-top box and filling up their pipes, the network operators' pipes. The only reason our content gets there is when they're paying customers ask for it.

Next: "Let the competitive free market work." Well, I am a free market guy, too. I agree: let the competitive free market work. The problem is: there isn't competition. With all due respect to Bill, it is not a competitive market at all. Over 98 percent of residential broadband access is provided either by the phone company or the cable company. These other nascent technologies he discussed are interesting, and they're going to be great at some point hopefully, but they're nowhere being relevant players in the market.

Bill talked a little bit about the zip codes. Well, the fact of the matter is that people don't buy their broadband Internet access for a zip code. They buy it for a house. And while there may be many, many providers within that particular zip code, the individual house, the individual consumer, only has either the cable pipe or the phone pipe—at least 98-plus percent of them if you believe the FCC.

What are some of the other slogans we hear a lot? "We shouldn't start regulating the Internet." Again, I agree. I'm for that. But the fact of the matter is that nondiscrimination rules govern most of consumer Internet access—in fact, by far most and arguably all, because it was not clear for a while. When the Commission started to look at reclassifying broadband access, by far the vast majority of Internet access was under these nondiscrimination rules. So these are historicals. This is a new thing. This would be largely a reinstatement. We can debate about whether it actually applied to cable, but that's not important because the vast majority of consumer access was dial-up at the time.

"Network investments are good for consumers." I totally agree, but that's not to say that the network operators would suffer under a nondiscrimination rule. In fact, in the year preceding the Commission's decision to reclassify (that is, to deregulate) broadband

Internet access, the network operators applied 60 percent more lines in just that one year. They were investing heavily even though the nondiscrimination rules applied. In fact, if you subtract cable from that equation, if you just talk about the ones that were undeniably regulated (that is, the telco providers), it's well over 200 percent more lines in the year before the Commission acted to deregulate. They don't need to discriminate to invest.

"Video competition is good for consumers" An important thing for consumers. But how ironic would it be if, for the sake of getting one more video provider, we cut off access to hundreds or thousands of other ones? I have to say that the net neutrality legislation is really part of a much bigger telecom reform bill that you're probably aware of. This is the original net neutrality Snowe-Dorgan Bill that we put in. This would survive by itself as legislation. This, even thinner bill -- essentially two pages -- was the amendment proposed to debate the Telecom Act. It would accomplish what we want in net neutrality.

This, on the other hand, is the telecom act that Bill's company supports. This is the light regulation, light regulatory touch, the light legislation that he's in favor of. But it's this very heavy legislation that he fears.

Interestingly, there's another slogan that's out there, which says, "Common carriers are bad for consumers," as if somehow net neutrality equated to common carriers. That's simply not true. Nondiscrimination is not all common carriers. There's a lot of bad stuff that used to apply to Verizon that shouldn't apply anymore. But this huge bill, interestingly enough, in many places relies on nondiscrimination rules. They want nondiscrimination in law so long as it runs in their favor.

Now, network operators should be paid for their service. This makes perfect sense economically, out of fairness, and for getting a bigger, stronger Internet out there. So, let's talk about this in a little more detail. Basically, you have these content providers (call them Yahoo and Google, or Amazon and Google, whoever you want it to be) to a neighborhood. And the network operator, the broadband residential Internet access provider, be it Verizon or Comcast or AT&T, have all these functional elements to their network. They could be servers. They could be cards. They could even be cached—that is to say in memory --

within a server card. Those are functional elements.

When User A, in his or her home, gets some content from OSP #1, it should in no way interfere with user B's ability to get content from OSP #2. If User A wants high speed or some extra service provided by OSP #1, that's fine. OSP #1 ought to be able to pay for that so long as it never hurts though OSP #2's ability to serve the second home user. That's the basic model. This is how it exists today. By the way, the home user is paying. Both of the users are paying Verizon or Comcast, and then the online service providers are paying for Internet access at their end.

There's something that's done today commonly called edge serving. I don't know if you've ever gone to CNN, but if you watch as the page is loading, you'll see up there in the URL line something that comes up that looks like Akamai. Akamai is a company that provides Web servers at the edge of the network. The reasoning is that, by distributing content around the country in the high population areas, CNN servers in Atlanta don't get hit every time somebody in New York, Detroit, or Los Angeles looks for the latest news on the home page. Most likely it's going to hit an Akamai server that's located in or right around those cities. This goes on today, and if Verizon wants to get into this business, more power to them. That's great. They can do this. This is an example of how the OSPs can pay the residential network operator, like Verizon, more money for enhanced services. But you'll note what it doesn't do. It doesn't in any way interfere with the ability of home User B to get stuff from OSP #1. When it gets to that router device, there's no discrimination.

Here's another thing that happens today. The OSP can sell to Amazon or Google or whomever a private line that skirts the bulk of the networking. It can skirt the cloud entirely, the local network. This is another example of how Verizon can and does sell services to the content providers, who then pay for enhanced service because it doesn't have to go through all these little bumps along the way. But again, when it gets to that router device, there's no discrimination.

A lot has been said about quality of service and how advocates of net neutrality say that we should not allow the network operators to provide quality of service based on the source or ownership of the content. I'm one of those funny guys who actually

disagree. I think it would be okay for quality of service to be sold by the network operators. But there's a catch, and I'll describe this. Here's how it works. This private network here doesn't interfere with the other traffic around there. How would you do that with quality of service? When Bill talked about prioritization, he said we're not going to block anything but we're going to prioritize some stuff; we want to be paid to prioritize. Well, you can't pay for useful prioritization unless everybody else suffers degradation, right? If all the seats in an airplane were first-class, no one would pay extra for them, right? So the very fact of the matter is that you pay to get priority, to get better than everybody else. Otherwise, no one would pay for it. Why would you? This is OK; except that's not how it works here.

How it works here is you're actually going around the network and you're getting better service, but not at the expense of these guys. It's not actually hurting them. And the only reason is because that's a new capacity. It didn't exist before. So you're not subtracting away from OSP #2; you're actually adding something in. So the same thing can be done for quality of service within the network.

Here's how. Why doesn't Verizon offer something new inside the network? Remember that little box; that could be a new router, it could be a new card, it could be better software. What it does is provide priority, a faster service, better speed for OSP #1, the red guy, and it gets through faster to home User A down there. But what it doesn't do is in any way affect OSP #2 and home User B, because it's new capacity. So quality of service paid for by the OSP, by Amazon, by Google, a new capacity within the network, seems fine to me. Why shouldn't it be? It's just a private network.

Likewise, if they wanted to do something called "the turbo button." BellSouth has experimented a little bit with this; the concept is that the home user pays a little bit more to get a boost in speed. That's fine so long as it's at a new capacity; but if it's not new capacity, every time the guy down hits turbo, User B's content gets screwed up, its slowed down. And that's not fair. So, the concept here is—(and I'm positing this as possibly a middle ground for discussion)—is that quality of service and new capacity ought to be acceptable under net neutrality rules. But if it's in the existing capacity, where it hurts other consumers' ability to get at other content on the Web, that's a problem.

I'm going to spend just two minutes, if I may, on answering a couple of Bill's points. First, he said that falling prices are an indication of the competition. Well, no, not necessarily. Firms try to price at the profit-maximizing point, and if they've priced too high, they can still come down to a profit maximization point, or closer to it—at least firms with market power can—and still drop their prices. So it's actually been suggested that that is probably what's going on here. What is it, something about 85 percent or so of homes are passed by residential broadband Internet access? And about 40 percent—(that's probably forgiving)—take it? That's a huge gap of people who could get it but don't. Why? The vast majority say it's too expensive. Well, I think right now prices are falling in part because they view the ability to pick up more consumers, even if their subscription profits from existing consumers decrease slightly. It gets them, again, to the profit maximizing point.

A lot of them inaudible that DSL is cheaper than cable. Well, in many respects it's a different service, as I mentioned before. It's slower, so you want to pay less for it. That makes perfect sense. That's buying by quantity. But this business about applauding this slight drop in prices for broadband Internet access as being evidence of competition strikes me as more or less like the policeman who's pulled you over—doing 65 in a 25-miles-an-hour zone. You say to the policeman, "Well, last week I was doing 75; you should be happy." The fact is, we're not even near the competitive price, and it's because we've got this very powerful duopoly.

Again, I do believe it is based on facts, the disagreement between us. And I think if we really look hard and decide what the facts actually are—and I'm trying to base my views on published sources like the FCC—we'll get closer to a solution, because, as Bill acknowledged, much of our argument, the pro-net neutrality folks' argument, rests on competition. We at Amazon believe that when there is a demonstrable level of competition, some sufficient level—and we can argue about what that is—that would be the end of such rules. There would be no need for the regulation when a truly competitive market is in place. I think there are others perhaps in Washington who believe this should last in perpetuity. I don't. Amazon doesn't. And so I hope we can, at some point, sit down and agree on the facts and possibilities



like this way of providing quality of service and new capacity, and then hopefully get beyond just the slogans.

Thanks very much.

**CHRISTOPHER YOO:** In many ways, the debate over network neutrality is the direct result of the dramatic changes in the nature of the Internet over the last decade. The current Internet is effectively standardized on a suite of protocols known as TCP/IP, which for purposes of the network neutrality debate has two distinctive features. First, it routes traffic on a “best efforts” basis without any guarantee that any particular packet will ever arrive. Second, it routes traffic on a “first come, first served” basis that does not give priority to packets associated with particular content or applications.

This approach worked fairly well when the Internet was primarily a means for academics to exchange e-mail and text files, in which delays of less than a second were virtually unnoticeable. Starting in the mid-1990s, the privatization of the NSF backbone and the accompanying elimination of the commercialization restrictions transformed the Internet into a mass-market phenomenon. The number of people using the Internet exploded, which in turn caused an exponential increase in the number of possible connections. The emergence of new applications also caused a dramatic increase in the heterogeneity of network usage. It is only natural that the Internet would evolve to meet these new demands. Consider, for example, Internet telephony (also known as voice over Internet protocol or “VoIP”). The International Telecommunication Union standard requires service with latency of no more than 0.3 seconds. Anything less renders telephone service unusable.

Furthermore, graphics-intensive applications, such as video and graphics-intensive online gaming, require more bandwidth than e-mail and web browsing and are often exhibit greater variability of demand, which in turn makes it all the more important to permit network owners to experiment with new approaches to network management. One solution would be to increase bandwidth. Another solution would be to give a higher priority to the traffic associated with applications that are sensitive to delay. Still another solution would be to cache content at multiple locations around the Internet, as

is currently done by content distribution networks like Akamai. Which solution will represent the most efficient approach at any time will depend on their relative costs. The law of diminishing marginal returns dictates that the marginal gains from any one approach will eventually tail off to the point where some alternative architectural solution becomes preferable. Technological change can also cause costs to change in ways that may change the costs and benefits associated with any one approach. There thus seems no reason to presume a priori that any one approach will emerge as the best solution in every situation.

Mandatory access requirements like network neutrality threaten to limit network owners’ ability employ alternative approaches to network management. As I have noted in my earlier work, access requirements entail the adoption of four corollaries. First, regulators must require the network owner to permit third parties to interconnect with their networks. Second, the regulatory scheme must define and standardize the interface through which interconnection must occur. Third, because the network owner could render any access requirement a dead letter simply by charging unaffiliated content and applications providers more for access than it charges to its own proprietary services, any access regime must also include a nondiscrimination requirement. Fourth, access requirements necessarily entail some form of rate regulation. This is because a network owner could charge a nondiscriminatory price and still effectively exclude unaffiliated content and application providers simply by charging uniformly exorbitant prices. Such a price would have no real impact on the network owner’s bottom line, as it would simply transfer profits from the content and applications subsidiary to the last-mile subsidiary.

Network neutrality would thus necessarily require the imposition of a fairly intrusive regulatory regime that includes elements that have proven extremely difficult to implement in the past. Furthermore, the standardization and interconnection requirements threaten to retard innovation by locking the existing interfaces into place. Under the best of circumstances, the requirements of the Administrative Procedure Act dictate that any adjustments to the interface would take a minimum of several months. The need to preserve such experimentation is what has led a growing number of senior network

engineers, including TCP/IP co-author Robert Kahn, end-to-end co-author David Clark, and the so-called “grandfather of the Internet” David Farber, to oppose network neutrality. Even worse, mandating access through regulation would politicize the decisionmaking and would render access vulnerable to the well-recognized defects of the administrative process revealed by public choice analysis.

In addition to expecting network owners to employ a broader range of techniques for managing network traffic, the increasing heterogeneity of network usage should cause pricing to become more complex. To date, pricing on the Internet has been relatively simple. Networks have traditionally offered end users “all-you-can-eat” pricing that charges a single, flat fee that does not vary with the amount of bandwidth consumed. Economically rational end users will increase their network usage until the marginal benefit they would derive from any further increases no longer exceeds the marginal cost of doing so. Because under all-you-can-eat pricing the marginal cost of increasing consumption is always zero, end users continue to increase their consumption so long as they derive any positive benefit, no matter how small. The problem from a social welfare standpoint is that increases in consumption impose congestion costs on other users that are not taken into account when individual users calibrate their demand. The wedge between private cost and social cost gives end users a systematic incentive to overconsume.

One logical way to eliminate this problem is to charge end users a usage-sensitive price set equal to their marginal contribution to congestion. The problem is complicated by the fact that determining the congestion costs created by a particular user at any particular time can be quite complex. As an initial matter, if the relevant portion of the network is slack, the marginal contribution to congestion may be essentially zero. The situation is more ambiguous if the relevant portion of the network is saturated. The network may be able to accommodate additional traffic by rerouting it along different pathways, depending on the other traffic in the network. If large portions of the network are close to saturation, it is also quite possible that the increase in congestion will cause a cascade effect that amplifies the impact of the increase in congestion. Rationalizing consumer behavior by charging the usage-sensitive fees precisely calibrated to their contribution to congestion would

thus require a dynamic pricing scheme that varied depending on the particular configuration as well as the volume and pattern of other traffic passing through the network.

Network neutrality is not only questionable from the standpoint of network management; it may well harm consumers. A network owner that charges all end users a single, flat price would naturally set that price equal to the cost imposed by the average user. This would effectively require low-volume users, who impose less than average congestion costs on the network, to cross subsidize the high-volume users, who only pay the average contribution to congestion even though they are responsible for a disproportionate amount of the congestion.

There is also no reason to expect that the pressure to make pricing more complex will be limited to the side of the market in which last-mile providers bargain with end users. The key to this insight is recognizing that last-mile providers operate in a two-sided market. On one side of the market, they bargain with end users. On the other side of the market, they bargain with content and applications providers. We should expect pricing with respect to content and applications providers to become more complex as well. Some content providers, such as bloggers, primarily transmit text, which uses relatively little bandwidth and is not particularly sensitive to delay. Other content providers, such as providers of streaming video, have much higher bandwidth requirements and require guaranteed levels of quality of service. If network owners are not permitted to experiment with differential pricing, they will be forced to fund any network improvements by charging a uniform price to both types of users, even though the non-bandwidth-intensive providers do not need and do not use the additional network capabilities. The far more sensible approach would be to permit network owners to charge more to those content and application providers that benefit from the network improvements without having also to charge more to those providers who were perfectly happy with the network’s capabilities before it was upgraded.

Furthermore, the fact that this is a two-sided market means that the prices charged to end users and the prices charged to content and applications providers are linked in a fundamental way. Consider what would happen if, as some network neutrality

proponents suggest, network owners were prevented from varying the amount they charge particular content providers and application providers, but were permitted to vary the amount they charge particular consumers. Such a regime would limit network owners' ability to extract surplus from content and applications providers, while giving them greater ability to extract surplus from consumers. The net effect of such a regime would have the somewhat perverse effect of forcing consumers to bear a greater proportion of the costs of network improvements, such as building fiber to the curb.

The most serious problem, however, is that the network neutrality debate is focusing on the wrong policy problem. According to the economic theory, any vertical chain of production will only be efficient if each level of the chain of production is competitive. This in turn suggests that the central focus of competition policy should be to identify the level of production that is the most concentrated and the most protected by entry barriers and attempt to render that level more competitive. In the case of the Internet, the level of production that is the most concentrated and protected by entry barriers is almost certainly the last mile. That being the case, one would expect the network neutrality debate to turn on how best to promote competition in that segment of the industry. Instead, network neutrality proponents direct their proposals on how to maintain and promote competition in content and applications, the segment of the industry that is already the most competitive, the least protected by barriers to entry, and thus the most likely to stay that way.

The proper focus of the debate should thus be on the impact that mandating network neutrality would have on the competitiveness of the last mile. In the past, access requirements (such as the unbundled access requirements established by the Telecommunications Act of 1996 and the "equal access" mandate created during the breakup of AT&T) were imposed when competition in the last-mile was believed to be infeasible. As a result, policymakers and courts abandoned the first-best goal of promoting competition in the last mile and instead pursued the second-best goal of promoting competition in complementary services, such as long distance and information services. The infeasibility of last-mile competition rendered the fact that access requirements deterred investment in alternative last-

mile technologies of little import.

The analysis changes dramatically once competition among alternative last-mile providers becomes economically viable. Once that occurs, the proper course of action is to return to the first-best policy goal of promoting competition in the last mile. Commentators have long recognized how access requirements can dampen incentives to invest in alternative network technologies, by rescuing those denied access to the existing network from having to invest in alternative sources of supply, which in turn deprives those seeking to build those alternative networks of their natural strategic partners. This dynamic is eloquently demonstrated by the conduct of device manufacturers and content and applications providers after the Supreme Court's *Brand X* decision made clear that FCC regulation would no longer guarantee access to existing last-mile broadband networks. Immediately after *Brand X* was decided, Disney, IBM, Intel, and others began pouring money into new last-mile technologies, such as broadband over powerline and wireless Internet. Most dramatically, Google promised to build a wireless broadband network for San Francisco for free. This was not an act of corporate charity. Faced with the alternative of being cut off from the network that exists today, these companies began investing in creating the network of tomorrow.

Vertical integration theory also suggests that network neutrality is unlikely to yield consumer benefits in terms of price. According to standard oligopoly theory, the prices charged on each side of the two-sided market depend on the relative bargaining power of the parties, which in turn depends on the number of available alternatives. Prohibiting network owners from discriminating in the upstream market in which they meet content and applications providers will not alter the number of options available in the market in which they meet end users. More concretely, in my house in Nashville, Tennessee, I essentially have only two last-mile broadband options: cable modem and DSL. I would still have the same number of options even if network neutrality were imposed. As a result, I would not expect the prices charged by last-mile providers to change one whit. Imposing network neutrality would, however, have a dramatic impact on the bargaining power in the upstream market in which network owners bargain with content and

applications providers, in which they determine how they divide up the rents extracted from end users. Although the division of those rents are of acute interest to the shareholders of those companies, it is not ultimately a policy problem. In that sense, network neutrality is less about protecting consumers and is more a battle between the Comcasts and the Googles of the world.

Lastly, allowing different networks to pursue different networking strategies allows them to compete on dimensions other than price and network size, which are considerations that favor the largest players. Increasing the number of ways in which networks can compete with one another can make it easier for multiple networks to survive notwithstanding the scale economies created by large sunk costs and network economic effects. I can see a world in which three last-mile networks can coexist: one optimized for current applications such as web browsing and e-mail; another using priority-based routing to facilitate delay-sensitive applications like VoIP; and a third focused on providing security to facilitate e-commerce. Allowing this type of network diversity allows smaller networks to survive in much the same way that specialty stores survive in a Wal-Mart world. by targeting subsegments of the market that place a particularly high value on a particular type of network service.

There would thus seem to be good reason not to erect categorical restrictions that would prevent network owners from experimenting with alternative pricing regimes and alternative approaches to network management. To say that deviations from network neutrality can be economically beneficial is not to say that they will necessarily be beneficial in every case. Although modern economic theory indicates that integration of content and conduit will rarely harm competition, the post-Chicago literature has identified the existence of narrow circumstances under which vertical integration can harm competition. It is for this reason that the literature and the doctrine has never embraced calls to treat vertical integration as legal per se.

Fortunately, the Supreme Court's antitrust jurisprudence provides a useful guidance on how to proceed. Under this approach, practices are categorically prohibited only if they evince such a "pernicious effect on competition" and such a "lack of any redeeming virtue" that nothing would

be lost declaring them illegal without requiring any demonstrable harm or inquiring whether any efficiencies exist that might justify the practice. When particular practices may be either economical beneficial or detrimental, the Court has refused to prohibit them categorically. Instead, it has permitted those practices to go forward until concrete harm to competition can be demonstrated in a particular case. Barring a practice only after a concrete harm to competition has been demonstrated gives technological and economic progress the breathing room they need to move forward.

The network diversity approach that I am advocating would thus forego *ex ante* regulation in favor of an *ex post* case-by-case approach in which the burden of proof rests on those challenging the practice. In particular, my approach would require proof of concentration and barriers to entry in the relevant markets. It would also require the articulation of a coherent theory explaining why a particular network owner has the incentive to discriminate against particular content and applications providers in a manner that harms competition. For example, network owners that do not offer their own auction sites have no incentive to discriminate against eBay. On the contrary, they can be expected to embrace eBay as the best method for maximizing the value of their network to their subscribers. Conversely, a telephone company may have some incentive to discriminate against VoIP; but would have no incentive to discriminate against services that they do not offer, like streaming video. Cable operators may similarly have incentive to disfavor alternative sources of video content, but have no incentive to reject technologies that allow them to provide voice service.

In short, even if the concerns raised by network neutrality proponents are taken to heart, they would not support imposition of a general network neutrality rule requiring network owners to provide nondiscriminatory treatment for all content and applications. At most, they would support a targeted rule limited to content and applications that competes directly with proprietary services offered by the network owner. Any expansion beyond that scope would impose regulation even in the absence of a coherent theory of why the market is likely to fail.

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## CRIMINAL LAW & PROCEDURE:

### BRINGING TERRORISTS TO JUSTICE: CAN CRIMINAL PROSECUTION WORK?

*Jennifer Daskal, Kenneth M. Karas, Stephen A. Saltzburg, Kenneth Wainstein;  
Moderator: Lois Haight*

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**LOIS HAIGHT:** I'm Judge Lois Haight. I'll be the moderator of the panel today. Bringing terrorists to justice: how do we do it so that we can protect our citizens, our state, our human rights, and the rule of law?

Terrorists recognize the rights of no one. They work in the dark to plan mass murders and loss of innocent life with no particular target except the State. They wear no uniform. They carry no arms in plain sight and answer to no identifiable government structure. They have struck the United States many times in the past few years, both abroad and at home, and as we sit here today they're planning more attacks, on a more deadly scale, using atomic and biological weapons -- weapons that are becoming more and more available, especially with the reluctance of the United Nations and the world community to stop their spread, certainly in Iran and North Korea. Can we deal with this question and many questions through our criminal justice system or will it shatter under the strain?

To answer these questions and many more today, I have a very distinguished panel I would like to introduce. I'll give you a little bit of the format. They'll speak for approximately 10 minutes. They will then have some time to rebut what others have said, if they are want to rebut.

First, we have Judge Ken Karas. He is United States District Judge for the Southern District of New York. He graduated from Georgetown University with the B.A., and he received his J.D. degree from Columbia University School of Law. (Due to my age, I never, ever say the date they graduated because I don't like people telling when I graduated.) He also served as an Assistant United States Attorney for the Southern District of New York and Chief of the Organized Crime and Terrorism Unit until his departure from the Office in 2004 to become a judge. While at the U.S. Attorney's Office, Judge Karas worked in numerous terrorist investigations into

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*\* The Hon. Lois Haight is a Superior Court Judge in County of Contra Costa, California.*

the associates of several terrorist groups, including Al Qaeda, Hamas, Egyptian Islamic Jihad, and the IRA. He was part of a team of prosecutors who in 2001 convicted four Osama bin Laden's followers for their role in the August 1998 bombings of the American embassies in Nairobi and Dar es Salaam. He also participated in the prosecutions of Zacarias Moussaoui, who pled guilty to being part of several conspiracies that involved the September 11 terrorist attacks. Judge Karas has been the recipient of the Distinguished Service Award and the John Marshall Award from the Justice Department, and in 2001, he was named Federal Law Enforcement Association's prosecutor of the year.

Jennifer Daskal joined the Human Rights Watch in October of 2005 as Advocacy Director of U.S. Programs. She comes from the Public Defender's Office Service in the District of Columbia, where she has argued many cases before the D.C. Court of Appeals. Her Washington, D.C. experience also includes a center, a budget and policy priorities, the Council of Economic Advisers and the Department of the Treasury. She graduated from Harvard Law School, received an M.A. in economics at Cambridge University where she was a Marshall Scholar and is a Brown University graduate. Ms. Daskal's work focuses on immigration, criminal justice, and counterterrorism policies of the United States.

And finally, we have Kenneth Wainstein. He is the First Assistant Attorney General for the National Security Division of the United States Department of Justice. He also served as United States Attorney for the District of Columbia and held two senior positions in the Federal Bureau of Investigations. He served as Chief of Staff to the Director, and he also served as General Counsel of the FBI. He is a graduate of the University of Virginia and the Boalt Hall School of Law, University of California at Berkeley. He has handled many prosecutions, and the varieties include fraud, narcotics, public corruptions, murder, federal racketeering, and violent street gangs. He also received the Director's Award for Superior Performance in the U.S. Attorney's Office in 1997

and 2000.

Please help me welcome the panelists today.

**KENNETH M. KARAS:** Thank you, Judge Haight. Good afternoon all.

In addressing the question about the prosecution of terrorism cases in civilian court, and really the subject of whether or not this is a viable option, what I'm going to talk about is the experience I had working on terrorism cases at the U.S. Attorney's office. I worked on a number of cases—sometimes called “spit in the street” cases. We file these under what we call the Al Capone Theory: you go after people who you have some indication are members of terrorist groups, but can't reveal that information in court, and charge them with credit card fraud and all kinds of other non-terrorist crimes. I'm not going to focus on those cases because they're not actually terrorism prosecutions in the sense that terrorism charges were brought. Instead I'm going to talk very briefly about the bin Laden case (also known as the East African Embassy Bombing case) and the Moussaoui case, and go through some of the challenges we faced in those cases, because, on the one hand, it could be argued that these kinds of cases can be brought in civilian court, and on the other hand, it could be argued that they perhaps demonstrate the outer limits of what can be done in civilian court.

To start with the Embassy Bombing, there were a number of things about that case were quite unique. It involved, as a percentage, a tremendous amount of foreign evidence: evidence that was collected abroad, evidence that required witnesses from foreign nations to authenticate the exhibits. This meant that we did not have the use of subpoena power, we really couldn't use the grand jury. And we really relied on the good graces of our allies to provide not only the evidence but the information. I'll talk more about this later, but suffice it to say that terrorism has become a hybrid in this country, part criminal and part national security. Back in the mid '90s, with the World Trade Center Bombing cases, the Justice Department saw terrorism as a law enforcement matter, and we worked with the criminal agents in the FBI, not the intelligence agencies. But outside the United States, terrorism was treated as a national security matter. So, we would have to go begging for evidence abroad, not dealing so much with law enforcement, but rather security

services, the intelligence branches and so forth.

I can't tell you the number of people who broke out in hives when we asked for witnesses to introduce evidence into an American court and explained that these witnesses would have to be cross-examined; that we had to turn over certain discovery. We had to explain to them the openness of our court system. I remember speaking to the head one security service who spoke a language I did not. I did not know what he was saying, but I knew the word “no” in his language; that was emphatically driven home to me. So, this aspect of the case obviously complicated things; and it does, I think, present an issue with any case that involves truly international crimes.

The second thing to note about the Embassy Bombing case, which I think is going to become more common, was the production of classified discovery. There were a number of items we had to produce because of the *Brady* obligation: the obligation to turn over information that might be exculpatory (material to the defense). Because it was a capital case, this included not only be information that would perhaps exculpate the defendants, but also information that the defendants could use in mitigation of the death penalty. For example, one mitigating factor that is often used is the circumstance of equally culpable, or more culpable, individuals not getting the death penalty. Lawyers who feel that their client was less involved than these accomplices but nonetheless still facing the death penalty obviously want to get that information. So, you can imagine the amount of classified information generated about Al Qaeda, even back in the late 90s, that didn't at all exculpate the defendants, but in fact inculpated others who arguably might not have been up for the death penalty.

Other classified items we hoped to use once they were declassified. But anything we wanted to use, we had to turn over pursuant to Rule 16 allegations. That brought on an interesting issue about security clearances for lawyers. Some of the lawyers who were court-appointed, and excellent lawyers, for very understandable reasons did not want FBI agents running around their neighborhood asking very personal questions about them for a security clearance. To get the clearance, they had to fill out the same form we filled out—that anybody in the government has to fill out—the SF86. That got litigated. Judge Sand, the judge who presided over

the Embassy Bombing case, ultimately ruled that it did not violate the defendants' choice of counsel to require that the lawyers get a security clearance, nor did it violate the lawyers' personal rights. But that is one district court opinion in what may be many others. The added dimension certainly introduces complication.

A couple of other issues unique to that case—really, to all these cases: There was evidence that we introduced that was, at the time it was collected, the product of a foreign intelligence collection operation. Subsequently, the fruits of that operation were declassified and we were allowed to use them. It was a house search in Kenya involving electronic surveillance. The wrinkle was that the house was occupied by a naturalized American citizen, and the authority to search came under Executive Order 12333. Section 2.5 allows that kind of operation to take place with the permission of the Attorney General. Once the intelligence was declassified, there was tremendous litigation over whether the fruits of such operations should be allowed in. Whether there was in fact a warrant, there is a foreign intelligence collection exception to the Warrant Clause in the Fourth Amendment. Judge Sand ruled that, because the U.S. government had sought Attorney General Reno's permission, the exception applied. To the extent there was intelligence collected before the Attorney General's authorization, he found such evidence not in compliance with the Fourth Amendment requirement, but then nonetheless allowed it to come in because the Exclusionary Rule did not apply. (The Exclusionary Rule says that to the extent that law enforcement officers engage in an illegal search or seizure, such evidence may not be entered. But there is caselaw out there that holds that if the motivation to collect this evidence is not for use in criminal court, there's no point to the deterrent value of the Exclusionary Rule.) And so, ultimately, all the information came in. But there again, it's a single district court opinion.

The final thing that made that case very complicated was security; physical security of people in the courtroom to be sure, but also security in the prison. It was really the first case where the special administrative measures that the Justice Department adopted in the mid '90s had been applied in full force and effect, requiring that each inmate be isolated in a cell by himself, their mail monitored, very strict restrictions on phone calls and visitors, limiting third-

party calls so that every attorney would have to sign an affidavit that when they spoke to his or her client they wouldn't pass them on to somebody else. The purpose to all this was not only to promote security inside the prison, but also to make sure that any discovery that was turned over, while not classified, was still very sensitive. The defendants needed to prepare their defense; they didn't get to communicate with Al Qaeda. In the briefing, both in the Embassy case and in the Moussaoui case, the argument was made that Al Qaeda monitors very carefully what happens in court. In fact, you may remember that there was a terrorism manual found in England—Attorney General Ashcroft had it during one of the post-9/11 hearings. That was an exhibit at our trial. One of the things in the manual is communicating to the brothers on the outside anything that they learn, that's turned over in discovery, etc. So, we were very conscious of that risk. We had protective orders that the lawyers accepted, and the judge authorized. Part of the idea behind these special administrative measures was to make sure that while the government complies with its discovery obligations it doesn't give free discovery to Al Qaeda.

With respect to the Moussaoui case—two issues made that case unique. First, Moussaoui went *pro se*. Because, what do you do when there is, as there was in the Embassy case, a tremendous amount of classified discovery? Moussaoui wasn't going to fill out the SF-86. And, even if he did, he wasn't going to get a clearance. Judge Brinkman did something I thought was very creative. She appointed, over Moussaoui's objection, the original lawyers who had been appointed to represent him as standby counsel. They were in charge of everything related to classified discovery, including trying to get certain information declassified to show to Moussaoui. (This was also, incidentally, an issue that came up in the embassy bombing case. You can imagine the enormous amount of complication, logistically speaking and in making sure that nothing we did was going to undermine the broader effort against terrorism.)

The second issue, unique to the Moussaoui case, but which has also affected other cases, was the question of access to unlawful enemy combatants being held by other components of the U.S. government. Moussaoui's lawyers, the lawyers that Judge Brinkman appointed, sought access to these individuals and got the classified discovery. They

said, “This is going to exculpate Mr. Moussaoui, and it’s also material to the death penalty.” There was a pretrial access issue and a trial access issue. Judge Brinkman ultimately ruled no on the pretrial access, holding that the paperwork they were getting, the classified discovery, was sufficient to meet the government’s obligation for pretrial access. But she did rule that there was a Sixth Amendment right to access to these individuals on Mr. Moussaoui’s behalf. The government said no; that it was highly classified, part of an ongoing conflict and intelligence collection. They were not going to allow these interrogations to be disrupted and jeopardize the ability of others in the government to collect actionable intelligence.

Ultimately, Judge Brinkman ruled that the information was material, and that the substitutes that the prosecutors had proposed—permissible under this statute, called the Classified Information Procedure Act—were insufficient. She held that they were not enough to provide Moussaoui with the same substantial defense. (That’s what the language is in CIPA. CIPA does not allow judges to tell the government they must declassify. The government has the authority to say no. But the judge has the authority to impose a sanction.) At this point, the defense requested to dismiss the case. Brinkman rejected the request, but said she would forbid the government from seeking the death penalty and from arguing that Moussaoui had any involvement in the 9/11 plot; only that he was generally trying to kill Americans.

That went up to the Fourth Circuit, and two to one, the Fourth Circuit reversed. They agreed with Judge Brinkman that the information was material to Moussaoui, but they disagreed with her on the substitutions; finding, at least in the abstract, that substitutions could provide substantially the same defense to Moussaoui. The circuit remanded Judge Brinkman to work out the logistics of the substitutions, which she did; everybody, I think, knows, the case ultimately did go to a sentencing phase.

Anybody who worked on these cases from the defense side—any of the judges, any of the prosecutors—will tell you that this sort of case is very difficult. It presents a lot of very novel legal issues. There’s a tremendous amount of logistics that have to be worked out. You have to become a part-time diplomat. You have to engage lawyers from all over

the U.S. government and think very creatively, no matter which table you sit on. As these international terrorism cases get prosecuted—(and they are truly international crimes)—these problems are bound to come up again. One of the most troublesome limitations, I think, is going to be how much foreign evidence is used. If the case against a terrorist depends—as 80 percent of the cases do—on evidence collected from a foreign government—especially a foreign government that is just not going to cooperate, hand over the witness you need to authenticate this document or that telephone intercept—then, what do you do? The same problem arises with use of classified information.

Another issue I have not raised, but which came up in the Embassy case, is *Miranda*. In the Embassy case, a lot of the defendants were interrogated while in Kenyan and South African custody. Under Kenyan law, there is no requirement that *Miranda* rights be provided; they were in Kenyan custody and had no right to counsel. So, when the FBI agents went to interrogate some of the suspects, there was a bit of a conundrum. What do you tell them? The Justice Department advised us to tell them that when they got back to the States they would have a right to counsel. But you can invoke a right to silence and the other *Miranda* warnings. That got us in a lot of trouble with Judge Sand.

Fortunately, there came a point where my colleague Pat Fitzgerald, the prosecutor, Mirandized. The South Africans have their own *Miranda* warning, (which is almost word-for-word to the American *Miranda* warning); so, we were able to rely on that evidence. But as you can see, the international component of these things is very tricky. So, to conclude, there are challenges in these cases. Sometimes they’re foreseeable; sometimes they’re not. But they do push the limits of what can be done in civilian court.

**JENNIFER DASKAL:** Good afternoon. I’m going to shift the topic a little bit and talk about the alternative justice system that was set up first by the Bush administration and then by Congress, when it asked passed the Military Commissions Act this fall.

The title of this talk is “Can criminal prosecution work?” Just recently, the Department of Justice issued a press release proudly announcing that they had successfully convicted and prosecuted close to



300 terrorism or terrorism-related cases in Article III courts since September 2001. Looking at those numbers—the DOJ’s own statistics—it seems that there is a simple answer to the question posed this panel. Yes, criminal prosecutions do work.

By comparison, in the more than four years since the military commissions were set up by President Bush in 2002, no one has been convicted. [Note: Since the time of this talk, one man—David Hicks—has pled guilty to one count of providing material support and sentenced to a suspended sentence of seven years, with just nine months to serve. By comparison, John Walker Lindh and Richard Reid, two of Mr. Hicks’ alleged compatriots, received 20 years and life imprisonment, respectively, in US federal court.]

Now, to be fair, the commissions *couldn’t* convict anyone. They were bogged down in litigation, and ultimately struck down by the Supreme Court this summer in *Hamdan*. Just this fall, Congress passed a Military Commissions Act authorizing a new set of commissions that have been heralded as the way forward—the system that will finally put the alleged masterminds of 9/11 on trial and give them their due. But it’s my guess that these commissions, with a new set of rules and a new set of procedures, will also be the subject of controversy and court challenge; further delaying the day that some of the suspected leaders of the worst terrorist attack in U.S. history are brought to justice. And while I, like everyone here, want these individuals brought to justice. I also think that there are good reasons for some of these court challenges and for concerns about these commissions. My talk will focus on what two of the biggest concerns about these commissions: the underlying justification for them and their jurisdiction.

I want to start with a very basic premise: that the procedural protections provided in criminal protections, and to a large extent mandated by the Constitution, serve a very important societal interest. They protect society from getting it wrong—from imprisoning and potentially executing innocent men. The procedures may at times be onerous, as we’ve heard from Judge Karas. They may be cumbersome. They may slow down convictions. But they prevent, to a large extent, major miscarriages of justice. They check executive overreaching. And they keep the government honest.

The arguments in favor of the commissions

first set up by the President and now authorized by Congress start from a very different premise. They assume that the executive has gotten in right; that the detainees in Guantanamo Bay (for whom the commissions are primarily designed) are the “worst of the worst,” and that the only job of the commissions is to marshal the evidence—which is assumed to exist—against these men, showcase their guilt, and publicly punish them for their horrific crimes. In the words of President Bush, The men at Guantánamo Bay, who these commissions were largely designed for, are “suspected bomb makers, terrorist trainers, recruiters and facilitators, potential suicide bombers.” If these men are who the government says they are—guilty, horrible people—the cumbersome procedural protections are unnecessary impediments to swift justice.

But there is good reason to question that underlying premise—even with the detainees at Guantanamo Bay. There’s been far too many military and intelligence experts, including former intelligence and military experts from within the Bush administration, who have questioned the administrative’s narrative. We now know that US forces captured only a tiny fraction of the detainees who ended up at Guantanamo. Many now believe the Pakistani government and others turned over or sold to the U.S. a large number of insignificant Taliban fighters who are potentially even innocent people, even as it protected more important figures with connections to the Pakistani intelligence services or the money to buy their freedom. As Michael Sheuer, the special advisor of the CIA’s bin Laden unit until 2004, says of those turned over by Pakistan, “[w]e absolutely got the wrong people.”

And if that’s true, then basic procedural protections are essential—not just for the individual detainees, but to ensure the accuracy and credibility of the US justice system, and to protect the public perception about the United States commitment to fair justice and rule of law, both in the United States and around the world.

This ties into the second point of this talk—about jurisdiction. While these commissions were designed with an eye towards prosecuting the worst of the worst, the commissions set up by Congress are authorized to try a much larger category of individuals: any noncitizen who falls within a very broad definition of “unlawful enemy combatant.” In

so doing, it has blurred what is perhaps one of the most important underpinnings of the laws of war: the distinction between civilians and combatants.

Under the laws of war, there is a very important distinction between those who are combatants, such as members of armed forces and civilians who are taking part in hostilities, and civilians not actively engaged in hostilities. Deeming somebody to be a combatant has incredibly important consequences. Under the laws of war, combatants may lawfully be attacked and indefinitely detained without trial until the end of hostilities.

The Military Commissions Act expands the definition of “combatant” in a way that blurs this distinction. The definition of “combatant” includes those who have “purposefully and materially” supported hostilities, even if they have not directly engaged in hostilities themselves. This turns ordinary civilians, such as a U.S. resident who sends money to a banned group into “combatants” who can be placed in military custody and hauled before a military commission. All those “material support for terrorism” trial cases that the Department of Justice has successfully prosecuted and involve non-citizens, could be taken out of Article 3 courts. Those individuals could be placed in military custody and subjected to trial by military commissions.

An even more disturbing and circular provision in the Military Commission Act specifies that anyone who has been determined to be an unlawful enemy combatant by what’s known as a Combatant Status Review Tribunal—the military administrative boards set up to ascertain the status of the detainees at Guantanamo Bay—is an enemy combatant for purposes of the jurisdiction of the military commissions. This means that once somebody’s been determined to be an enemy combatant by these administrative tribunals, that individual can no longer challenge the jurisdiction in their trial. But these administrative determinations that somebody is an enemy combatant does not in any way represent a full and fair opportunity for the individual to challenge such a designation. With the exception of the 14 detainees moved to Guantanamo from secret prison in September, all of the detainees have been before these review boards and determined to be “unlawful enemy combatants.” But these determinations were made on the basis of classified evidence that the detainee has never seen, putting

the detainee in the impossible situation of rebutting secret evidence; the presumptions are all in favor of the accuracy of government’s evidence; the detainees are not represented by counsel; and every detainee’s request to put on witnesses was denied, unless the witness happens to also be in Guantanamo (which, by definition, makes him untrustworthy in the eyes of the military review board). The system in a nutshell: Enemy combatants are who the President or Secretary of Defense says they are; an administrative tribunal affirms this; and that this cannot be challenged.

This is an enormous expansion of government power to bypass an existing criminal justice system any time it wants to accuse a noncitizen of a terrorism-related crime.

The possibility that the United States would use these laws in this way is not just a hypothetical fear. Take the case of Ali Saleh Kahlah Al-Marri, a citizen of Qatar, who’s in the United States lawfully on a student visa. He was indicted for credit card fraud, and in pretrial motions proceedings—just weeks away from trial—when, in 2003, the government declared him an unlawful enemy combatant, took him out of the Article 3 court and moved him to a military brig in South Carolina, where he was initially held incommunicado for 16 months. He was finally informed of the nature of the allegations against him almost two years after he was originally detained, as the result of a *habeas* challenge by his attorneys. The government is now arguing that the Military Commissions Act strips Al-Marri of any habeas rights, and has moved to dismiss his case, arguing that they can detain him indefinitely so long as they give him the administrative review hearing (CSRT) akin to that provided the Guantanamo Bay detainees.

This is an enormous—and I would argue terrifying—expansion of military jurisdiction over noncitizens like Al-Marri, who was on the eve of trial in an Article 3 court and arrested far from the battlefield. Under this logic, any noncitizen accused of a terrorism-related crime could be taken out of a civilian criminal system, placed in military custody, detained indefinitely, and, if tried, subjected to an entirely new system, without established rules or precedent. Even if acquitted he could continue to be detained indefinitely, until the end of what may very well be a perpetual “war” against terror.

Under this same theory, Russia could justify the arrest of an American aid worker in Chechnya on

the grounds that Chechnyans are, in the eyes of the Russians, terrorists and that the American providing this aid was providing material support to terrorism. That American could be subject to indefinite military detention, trial, and, if convicted, even execution under the Russian military justice system. This is obviously not something that the U.S. would stand for, but this is the precedent set by the laws passed by Congress.

I want to end by highlighting what the President and many members of the administration have said many times, which I agree with as well: that the fight against terrorism is to a large part a fight for hearts and minds. If, in the process of fighting terrorism, the United States jettisons the very institutions it is fighting for in the name of swift, easy justice, then to a large extent the United States will lose that fight.

**KENNETH WAINSTEIN:** Good afternoon. What I thought I'd do is give a bit of an overview of our counterterrorism efforts since 9/11; "our" being the United States government's terrorism efforts. If there's a theme to take from my remarks, it's that, over the last five years, by necessity, we have had to step back and look at some of our preconceptions, and some of the paradigms we've been operating under, sometimes for generations, and rethink them. We have had to make sure that the paradigms we work under actually fit the new circumstances of this war on terror. If we find they don't, we change them. We've had to do that many times; and that raises all sorts of questions. We just heard a set of questions raised about one of the paradigms that we've dramatically changed, and that's the establishment of military commissions as a way of trying people for terrorism crimes. That's prompted all sorts of questions, and that's good. I think it's a healthy process. This is a time of change. We have to meet our national security needs. But we've got to make sure we're doing so responsibly. And I think we are.

Before I run through what we've done the last five years, I think we've got to understand where we were before 9/11. You got a taste of that from Judge Karas's remarks, from his first-hand experience with some of those high-profile terrorism cases we tried. So, I'll put this simplistically: pre-9/11, our approach had much less focus on national security matters; much less public, political attention on terrorism as a major threat to our national security.

Operationally, as Judge Karas alluded to, we took an approach that law enforcement operations and intelligence operations were distinct undertakings that were done pretty much independently of each other. That was by culture and by organizational setup. As Judge Karas mentioned, we had a wall that prevented information from passing, and coordination between, our intelligence assets and law enforcement operators.

I can speak to this personally, as a long-time federal prosecutor myself. Law enforcement followed a sort of traditional, linear approach to prosecution. We'd see there'd been a crime; think about how to build a case; go to the grand jury; get the charges; put them together; and get a conviction. That conviction was the end result; we were seeking a conviction. It was a very linear approach, which works very well for most of our programs. It is not the ideal approach, though, to counterterrorism. Our prosecutions before 9/11 had a preventive element, of course. Every prosecution we undertake has prevention in mind. But 9/11 changed everything. Overnight, there was an intense focus on easing unnecessary limitations on our counterterrorism, or preventive capacity, while retaining those limitations necessary to make sure operations remained within the constitutional and legal lines. The best example is what was passed 45 days after 9/11: the PATRIOT Act, which provided us with new authority, but mainly lowered the wall and actually mandated that information be shared between our criminal and intelligence agents.

Prevention became the watchword of our counterterrorism efforts. That was not just semantics. We had always looked to prosecution as a way of deterring and preventing. But Attorney General Ashcroft made clear that prevention was paramount; that we were going to use every asset, every tool we had to incapacitate terrorists, neutralize threats, and prevent 9/11 from happening again. We were able to do that as of October 25, 2001 because we had the PATRIOT Act, which allowed us to share information between our intelligence agents and our law enforcement folks, allowed them to work closely together. Let me take a second to tell you what that means. That means that if Ken Wainstein is identified in Wichita, Kansas as having ties with terrorists overseas—that he is picking up bomb-making materials, and looks like he is a threat—we make sure that we get all the information we can from

the intelligence community about him. We learn everything that intelligence has on him. We also have a prosecutor joined at the hip with the agents trying to run down the investigation. Now, it might happen that no criminal tool is ever used; that we never use a criminal tool at all. But, if it looks like Wainstein's about to pull the trigger and set off a bomb, we've got a prosecutor who's been thinking every step of the way about getting evidence to support a criminal charge so we can incapacitate him when we need to incapacitate him. It might be that we don't pull the trigger, that we just keep surveilling him to try to get as much intelligence as possible: to find out who his confederates are, et cetera. But, we have that prosecutor. And that is a fairly new innovation since 9/11, allowed by the PATRIOT Act. This is the purpose behind the new national security division, to have the prosecutor and intelligence assets working side by side.

This approach, the preventative approach, has been very successful, I think. We haven't had an attack since 9/11. That's attributable in part to the very good work of the U.S. government. But there are still challenges. One that I'd like to focus on Judge Karas talked about, which is the difficulty of trying some of these larger terrorist cases, especially terrorists brought in from overseas, in Article 3 courts. As he mentioned, most, if not all, of these cases involve large amounts of classified information. It is a very sensitive matter, how to handle that classified information—especially when the evidence is from foreign countries. The hearsay rule is also a tremendous problem in a lot of these cases. You might recover evidence from the battlefield in Afghanistan, or maybe from an apartment in Pakistan, and under our rules here, you're going to have to have the person who recovered that piece of evidence come into court and say, yeah, I got this disk, or I found this laptop, or I found this casing diagram. That's often very difficult when you're talking about recovering evidence from a war zone, and we're operating in theaters of war now overseas, and that's creating the evidence that's the basis for a lot of these cases.

As Judge Karas said, the ability to control the proceedings—international terrorism cases have a lot of—you know, difficult characters coming through there. These defendants are looking to use that as a soapbox, to get up in that trial and propound their terrorists views. And I believe that Al Qaeda manual

that was recovered back in the late '90s, I believe that actually directs Al Qaeda brothers to do exactly that. If tried, use that trial as a way of spreading their Jihadist rhetoric.

And security is a huge problem. I think the Moussaoui case is an example. I've forgotten the number, but I saw the price tag that went in to just securing the courthouse, much less all the participants, and that's a huge, huge challenge, to do these cases on a grand scale.

So a military commission, of course, is one of the answers. Military commissions came online for a number of reasons, but they do address those challenges. In terms of allowing hearsay to be used in a fair way, and giving us a better way to control the proceedings, enhance security and avoid a lot of the disruption and expenses of ensuring that these trials are done securely. And also, obviously, classified information—they have rules that allow for the use of classified information, but also maintain the fairness of the proceedings.

So the bottom line that I'd leave you with is that we have had to really take a look at all these paradigms and rethink them all along the way. I've just ticked off a few of them. We used to think that terrorists would be prosecuted in Article 3 courts. Now we're looking at another option. I don't think it's an either/or thing. It's not going to be all one way or all the other, but there is a place for both.

We used to think that there had to be a wall between law enforcement and intelligence. That wall is gone, and nobody is advocating that it be resurrected.

We used to think that law enforcement and intelligence operations couldn't be integrated, and now we have prosecutors and intelligence agents working side-by-side.

We used to think that the FBI was and should be primarily a law enforcement agency, that it should focus on the John Dillingers out there in society. Now you have an FBI with, I can't remember how many, but hundreds of analysts and reports officers, producing quality intelligence products in a way that it never did before. We used to think that the DOJ organization was set in stone; it had been set in stone for generations and would never change. Now we have a National Security Division, a radical change.

And as a prosecutor, I think I am as good an example as anybody. I always thought of the prosecution as sort of the end result. That's what you did. There was a crime, you prosecute, get a conviction, get a pat on the back, and go on to the next one. Now I see that prosecution is merely one tool in the toolbox, one weapon in our arsenal, to prevent terrorism. And whether it is using the spitting on the sidewalk approach in prosecuting someone for credit card fraud or visa fraud or something relatively minor, or if it's doing a full-blown terrorism prosecution, *a la Moussaoui*, it doesn't matter. Prosecution is a way of incapacitating someone to prevent that person from carrying out or supporting others who are carrying out attacks. And if prosecution is not the best way of doing that, then another option should be pursued.

So, these are all ways we had to rethink our approach, and I think that's been healthy. Re-examination, I think has been a creative process. It's one that we're still—that's still ongoing today as we evolve our operations to meet the evolving threat. I think it's a process that's been good for the country and good for our national security.

Thank you.



LIMITED GOVERNMENT AND THE RULE OF LAW

Thank you, everyone at the Federalist Society for your commitment to the subject of this year's conference, limited government, and to the rule of law.

I thought I would begin by sharing with you a few thoughts about last week's election from a Republican's point of view. The voters obviously wanted to get our attention last week. While I would have preferred a gentler reproach than the one they delivered, I'm not discouraged nor should any of us be. Democrats had a good election night. We did not. But no defeat is permanent. And parties, just like individuals, show their character in adversity. Now is the occasion to show ours.

The election was not an affirmation of the other party's program. Try as hard as I could, I couldn't find much evidence that my Democratic friends were offering anything that resembled a coherent platform or principled leadership on the critical issues that confront us today. Nor do I believe Americans rejected our values and governing philosophy. On the contrary, I think they rejected us because they felt we had come to value our incumbency over our principles, and partisanship, from both parties, was no longer a contest of ideas, but an ever cruder and uncivil brawl over the spoils of power.

I am convinced that a majority of Americans still consider themselves conservatives or right of center. They still prefer common sense conservatism to the alternative. Americans had elected us to change government, and they rejected us because they believed government had changed us. We must spend the next two years reacquainting the public and ourselves with the reason we came to office in the first place: to serve a cause greater than our self-interest.

Common sense conservatives believe that the government that governs least governs best; that government should do only those things individuals cannot do for themselves, and do them efficiently. Much rides on that principle: the integrity of the government, our prosperity; and every American's self-respect, which depends, as it always has, on one's own decisions and actions, and cannot be provided as another government benefit.

Hypocrisy, my friends, is the most obvious of political sins. And the people will punish it. We were elected to reduce the size of government and enlarge

the sphere of free and private initiative. We increased the size of government in the false hope that we could bribe the public into keeping us in office. And the people punished us. We lost our principles and our majority. And there is no way to recover our majority without recovering our principles first.

While times may change, the values and principles for which we stand do not. Your work and the mission of the Federalist Society is critical to ensuring that our nation remains faithful to the self-evident truths and enduring principles that have always made the American experiment an inspiration and example to the world.

Ideas like "limited government" or "the rule of law" can sound pretty abstract when we talk about them here in Washington in the halls of Congress. And it's a measure of how divided our politics have become that they are often taken for partisan "buzz words." In fact, they are ideas worth fighting for; worth dying for. And Americans have fought and died for limited government and the rule of law for well over two hundred years, in places as close to home as Brandywine Creek and as far away as Iwo Jima, at Gettysburg and Khe Sanh, at Kandahar and at Shanksville, Pennsylvania.

So, it's important that we remind ourselves that limited government and the rule of law are more than the arid clichés of partisan political debate. In fact, they are the essential underpinnings of our freedom, and the principles for which the Federalist Society has been fighting since its formation over 25 years. To lose either would be to lose freedom, for they are our strongest bulwarks against tyranny. People are suffering today physical and emotional agony, terrible loneliness, and even death to advance those ideals in countries where the power of the state observes no limits, where human dignity is denied the respect and the protections that must form the basis of morality, in any culture, any religion, and any society.

We should never forget their sacrifice and purpose. In the name of those brave people, I want to share with you today my understanding of and support for these vital ideals.

The genius of our founding fathers wasn't that they were better people than those who came before them; it's that they realized precisely that they did

not have a greater claim to virtue, and that the people who followed them weren't likely to be any more virtuous than they were. That critical insight led them to realize something important about power: if its exercise isn't limited, it will become absolute. Power always tries to expand. It's a law of nature, of human nature. As James Madison wrote in *The Federalist* No. 51:

What is government but the greatest reflection of all on human nature? If men were angels, no government would be necessary. If angels were to govern men, no internal or external controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

The Founders saw the truth of this insight play out in their lifetimes, in the arbitrary exercise of power by King George III, and in the ominous rise to power of Napoleon in France. Our parents' generation saw it in the rise of Hitler and Stalin, and in the post-war twilight struggle against communism. We've seen it in our generation in the reign of the Taliban in Afghanistan, of Saddam Hussein in Iraq, of Kim Jong Il in North Korea and the reign of the mullahs in Iran. We see it most starkly today in Osama bin Laden's vision of a global medieval caliphate.

There are cultural differences in other parts of the world, to be sure, and we must adjust our tactics based on our understanding of those differences. But there are some basic underlying truths: unlimited government confers unlimited power on its leaders to impose their will on others. That's one truth. Here's another: people generally don't want to live their lives in the crosshairs of government oppression. They want to be free to make for themselves and their children, by their own decisions, talents and industry, a better future than they inherited.

The solution that our founders devised guides us to this day: limited government. Understanding the natural tendency of power to expand, the founders designed our government to restrain it.

They created a federal government of enumerated powers, of three branches whose reach was limited by the powers of the other branches, by the powers reserved to the states, and by the rights reserved

to individuals. They divided the power to make war between Congress and the Executive, making the President the commander-in-chief but giving Congress the power to raise and fund armies and declare war. They gave Congress the power to raise and appropriate money to support the government but the president the power to spend. They gave the President the power to negotiate treaties, but the Senate the power to ratify or reject those treaties. They gave the President the power to appoint judges, but the Senate the power of advice and consent.

They enumerated certain baseline individual rights, but instructed that this list was not exhaustive, and they provided that the rights and powers that were not enumerated were reserved strictly to the states and the people.

They created courts of limited jurisdiction, which could hear only "cases or controversies" "arising under" the Constitution. The further development of the common law we inherited from England, and the scope of the individual rights reserved to the states, were questions left to the individual states, removed from the jurisdiction of the federal courts.

By limiting government in these ways, the founders attempted to ensure that no one branch could dominate the others, that the federal government could not usurp state powers, and that one individual asserting his rights could stop the entire machinery of government from taking away his freedom.

Why has the appointment of judges become such a flashpoint of controversy in the past twenty years or so? When you understand our system in the way I've just described, when you see the wisdom in it and the humility it requires of public servants, it's easy enough to understand why we are so concerned that the judges we appoint share that understanding of the nature and limits of power.

Some basic attributes of judges follow from this understanding. They should be people who respect the limited scope afforded federal judges under the Constitution. They should be people who understand that the founders' concern about the expansive tendency of power extended to judicial power as well as to executive or legislative power. They should be people who are humbled by their role in our system, not emboldened by it. Our freedom is curtailed no less by an act of arbitrary judicial power as it is by an act of an arbitrary executive, or legislative, or state power. For that reason, a judge's decisions must rest

on more than his subjective conviction that he is right, or his eagerness to address a perceived social ill.

This truth was well understood by Chief Justice Roberts' mentor, my fellow Arizonan Chief Justice William Rehnquist, whose passing we mourn. During his thirty-three years on the Court, Justice Rehnquist earned our respect for his sharp intellect, his strong sense of fairness, and his enormous devotion to the Court and to public service. His profound understanding of the balance inherent in federalism, between the states and the federal governments, as well as between the three federal branches—left us a strong legacy.

It's a legacy I hope will be respected by the judges President Bush has nominated, and in whom we have vested great trust to discharge their judicial duties with prudence and principle.

I am proud of my role in persuading my fellow Republican Senators to respect the limits of our own power and not abolish the filibuster rule—changes which promised to empower a different majority under another president to impede our cause of limited government and constrained judicial power. Instead we have focused with considerable success on assuring that a high percentage of the President's nominees have been confirmed. And those judges and justices will interpret our Constitution as our founders intended.

The efforts we undertook a year and a half ago, working with Senators of both parties who were concerned about abuses of the filibuster tradition, resulted in a substantial increase in the confirmation of the President's Circuit Court nominees. Priscilla Owen, Janice Rogers Brown, and Bill Pryor have all been confirmed, and this year Brett Kavanaugh was confirmed to the US Court of Appeals for the D.C. Circuit. The President nominated these individuals; I supported each of their nominations; and we fought successfully to confirm them. President Bush now has a higher percentage of his nominations confirmed to both the District Courts and the Circuit Courts than did President Clinton during his presidency. I am also proud to see Chief Justice Roberts and Associate Justice Alito serving with such distinction on the Supreme Court. They are good people, deserving people, and their decisions will be grounded in the text and history of the statute, regulation, or constitutional provision under consideration, and

interpreted narrowly in light of the specific facts of the case before them.

Of course, to paraphrase Mr. Madison, if angels wrote laws, we wouldn't need judges at all. Unfortunately, angels don't write laws; Congress does. And we're called a lot of things, but no one would mistake us for angels. Too frequently, we write laws that are unclear, we vote on laws we haven't adequately debated, and sometimes, I am sad to report, we vote on laws we haven't even read. When we pass laws like that, we leave too much to the discretion of our federal judges. We fail in our role to ensure that the judiciary's scope is limited. As we debate reforms to the practices and procedures of Congress, I hope, particularly we Republicans, will take an honest look at how we fail to fulfill our constitutional responsibilities when we write laws that invite judicial activism and misinterpretation.

Why these restraints on federal judges? Because the structure of our government, by itself, will not ensure our freedom. That structure, while it reduces the likelihood of tyranny, is only as strong as our commitment to the rule of law, and the rule of law depends largely on our judiciary's commitment not to impose its will arbitrarily on us.

That's why the appointment of federal judges has become such a flashpoint issue for so many. Judges stand in our system where our commitment to limited government meets our commitment to the rule of law. To the extent that judges impose their own will, they undermine both the structure of limited government and the rule of law.

History teaches us that without the rule of law there is nothing—no form of oppression, no form of physical suffering—that people will not inflict upon one another. I know this to be true. I see it in the appeals I receive every day from supporters of human rights advocates around the world who have been imprisoned, tortured and murdered for daring to challenge the tyranny of their governments. I have seen it in countries such as Burma, where I have met with the woman who willingly surrendered the privileges and comforts of life in the West but has, on behalf of her people, refused to surrender voluntarily her inalienable right to freedom. And I saw it many years ago, as I watched men deprived of every liberty, who were routinely tortured, maintain their dignity and their loyalty to their country, and its ideals. That is why I have been outspoken in



opposition to using torture against our enemies. The moral strength that enables people to stand up to tyranny in other countries resides in their conviction that were the situation to be reversed they would not avail themselves of the abuses of power that they have suffered.

We Americans stand for something in this world. We stand for a vision of human happiness and potential, of human freedom, based on limiting the powers of government and respecting the rule of law.

Those are the ideals I fought for in my youth, and that I fight for today, at less personal risk than faced by the Americans who now stand a post in foreign countries in defense of our interests and ideals. We best honor those who are fighting and dying in the deserts of Iraq and the mountains of Afghanistan by not losing our way.

We honor them by insisting in our every action, from the appointment of federal judges to the trial of enemy combatants, that our ideal of limited government under the rule of law continues to be respected.

So let's resolve here today not to lose our way. We're in one heck of a mess in Iraq, and the American people told us loud and clear last week that they are not happy with the course of this war. Neither am I. But let's be clear: that's the limit of what they told us about Iraq and the war on terrorism.

The American people didn't tell us to forget the people we lost on 9/11, who were going about their lives free to work and dream and love, unaware that they were the intended victims of a jihad. They didn't tell us to forget the sacrifices of our soldiers in Iraq and Afghanistan, or to choose a course that would imperil their mission.

They didn't tell us to abandon our friends in remote parts of the world to moral monsters like Osama bin Laden or to apostles of hate like the Taliban who oppress everything they cannot understand.

Above all, they didn't tell us to forget our ideal of limited government.

I think the American people want us to reaffirm who we are. So let's do that today, my friends.

We are a nation that limits the reach of government because government by its nature will, if permitted, limit the reach of the human heart.

We are a nation that limits the reach of government because we understand that no

government should have a right to impose itself between human beings and their lawful aspirations to make of their lives what they will.

We limit government because the greatness of our country, our productivity, resourcefulness and compassion, is not a product of the state's decrees or prerogatives, but derived from the free exercise of the rights and responsibilities of liberty.

We are a nation that limits government so that government cannot limit us.

I believe this notion of limited government will stand as our lasting contribution to the world. We are proof that people can frame a government to serve as an instrument of the people, not the other way around.

And by our actions both at home and abroad we will prove once more, as we did in the last century, that regimes like the Nazis, or the fascists, or the Soviet Union, or the Taliban, which place the interests of the state or a movement or a cause above the rights of the people, are on the wrong side of history.

America must remain ever vigilant in the preservation of our governing ideals. You must continue your good work in service to that essential work, because you know something that we here in Washington too often forget: that neither the courts, nor Congress nor the President can make us a great country. Only the American people can do that, if we, all three branches of government, safeguard their rights, which we have sworn an oath to do.

The endless ranks of Americans who have died in service to that ideal, and who fight to defend it today, demand of us, who do not share their sacrifice, that we use our talents and industry to keep that ideal inviolate within the boundaries of the country they have loved so well.

I thank you for keeping faith with their faith, and for lending your hearts and minds to the enduring and noble cause of preserving in our time the greatest experiment in human history: government "of the people, by the people and for the people."



FEDERALISM & SEPARATION OF POWERS:  
EXECUTIVE POWER IN WARTIME

*Richard A. Epstein, Roger Pilon, Geoffrey R. Stone, John Yoo; Moderator: William H. Pryor, Jr.*

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

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

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

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

To my far left, Richard Epstein is the James Parker Hall Distinguished Service Professor of Law at the University of Chicago, where he has taught since 1972. He has also been the Peter and Kirsten Bedford Senior Fellow at the Hoover Institution since 2000, and presently is the director of the John M. Olin Program in Law and Economics. He's written

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\* *William H. Pryor Jr. sits on the U.S. Court of Appeals in the Eleventh Circuit.*

numerous books and articles on a wide range of legal and interdisciplinary subjects. He's a graduate of Columbia College, Oxford University, and the Yale Law School.

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

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

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

War by Other Means: An Insider's Account of the War on Terror.

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

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

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

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

The Founders of the Constitution, I think, all started with the same position, that if you're have a safe that contains valuables, like the liberty of the people and their security, you don't want to give all the keys to the safe to a single person. What you want to do instead is to figure out how to divide the power in ways that are consistent and coherent and, then, to create checks in each branch of government over what can be done in another branch. A general endorsement of the twin principles of separation of powers and checks and balances does not answer the specific question of exactly what division and what checks apply in a particular setting. In order to answer that particular question, you have to patiently sift through the various provisions to see how they interlock.

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

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

The basic architecture of Article I gives, as we all know, Congress the power to declare war. The

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

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

Article II has a slightly different configuration. It says, of course, that the President shall be the commander-in-chief of the army and the naval forces and the militia when called into actual service. It does not use the word “power” to describe his position. John Yoo and I have had this ongoing debate as to whether the use of the words “shall be” as opposed to the words “have the power” has any particular significance. In this particular context, I think that the difference matters, and for this reason: if the Constitution gave the President a commander-in-chief “power,” then that particular power would give him the ability to initiate conflicts on his own motion. That outcome creates a genuine

contradiction in the constitutional structure, which is not required (or welcome) under any views of separation of powers or checks and balances.

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

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

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

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

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

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

In working through this analysis, there will always be kinds of loose points based on our constitutional history. It’s not perfectly clear, for example, what it is that we mean by a declaration of war. We often use the term “authorization” of military conflicts so as to give some flexibility as to when or whether we engage in war; I think that approach is perfectly consistent with the constitutional scheme, because the authorization means that the President cannot act unilaterally, so that a key check on its power is preserved. In addition, there are certain some kinds of low-level military activities that probably don’t rise to the level of being war. I do not think that the Constitution demands declarations of war before trying to rescue individuals taken prisoner overseas and similar kinds of low-level interferences. But

nonetheless, we can say with complete confidence that the major claims of untrammelled and unchecked executive power are indefensible if the President may decide to bomb Russia today, such that the only thing that Congress can do, as John Yoo suggests, is to withhold appropriation in the next two years. That distribution of powers strikes me not an implementation of our constitutional scheme, but as its total perversion.

Thank you.

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

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

I want to begin, however, with the context, because how we view what’s happening goes far, I believe, toward explaining why the debate has been so intense. Are we at war? By historical standards it doesn’t seem so. Yet the attacks of 9/11, killing 3,000; the bombings around the world since then, from Bali to Great Britain; and the threats that arise daily are hardly ordinary crimes. Around the world in recent years, tens of thousands have been killed by the deliberate acts of Islamic terrorists.

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

Yet if this is war, as I believe it is, then our aim

cannot simply be to prosecute terrorists *ex post*. We must prevent their acts *ex ante*, just as MI-5 did recently with flights out of Heathrow. But in an asymmetrical war, how do we do that consistent with a Constitution dedicated to liberty and limited government? I submit that the answer is closer at hand than many have noticed. Quite simply, in foreign affairs, unlike in domestic affairs—and here is where I part company with Richard—the Constitution is deliberately underdetermined, and it bows to the executive.

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

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

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

and to declare war. They often declared war in the midst of war, moving the nation from an imperfect to a perfect war.

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

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

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

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

But if presidents may wage war without a declaration of war, and have throughout our history, they surely must have the implicit power to gather the intelligence necessary to do that. We come, then, to my second concern: the NSA surveillance issue.

Let's note first that foreign intelligence gathering is a 'round-the-clock affair, done during war and peace alike. Every president since George Washington has engaged in this practice. Indeed, the duty to do so is entailed in the oath of office.

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

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

The issues here are far too complex to be addressed in the couple of minutes I have left—indeed, the Federalist Society has published a 135-page answer to the critics, which I commend to all. But for all that complexity, the dispute boils down in the end to the simple question of whether the president is the nation's principal agent in matters of war and peace and, if so, whether Congress has the authority to try to micromanage the exercise of that power. Madison, Jefferson, Hamilton, and most others in the founding generation were quite clear on the point. Here is Madison: "All powers of an Executive nature, not particularly taken away must belong to that department," with Jefferson adding,

"*Exceptions* are to be construed strictly—" a rare point of agreement between Jefferson and Hamilton.

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

Yet the cases say nothing of the sort. *Youngstown*, which the critics often cite, the *Keith* case of 1972, the *In re Sealed Case* of 2002, which was the only decision the FISA appeals court has ever handed down, all clearly distinguish domestic surveillance for ordinary law enforcement purposes from foreign intelligence gathering. Citing *U.S. v. Truong Dinh Hung*, which dealt with pre-FISA surveillance based on "the President's constitutional responsibility to conduct the foreign affairs of the United States," the FISA appeals court said, "[t]he *Truong* court, as did all the other courts to have decided the issue, held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information . . . [w]e take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power." The Supreme Court let the decision stand.

Let me conclude by stepping back just a bit. What we're seeing here, I submit, is the latest stage of the Progressive Era, about which Richard has written so colorfully and correctly—for the Cato Institute, no less! (I should know: I commissioned and edited the book.) In the 1930s, Progressives essentially rewrote the Constitution, submitting to the tender mercies of congressional micromanagement vast areas of life that the Constitution had left to *private*

ordering. Having largely completed the effort by the late '60s and the Great Society, they turned their attention to two areas the Constitution had left mainly to *political* ordering—campaign finance and foreign affairs. The Federal Election Campaign Act of 1971; the draconian amendments of 1974, to say nothing of the recent McCain-Feingold Act; the War Powers Resolution of 1973; the Foreign Intelligence Surveillance Act of 1978—all are efforts by Congress to micromanage what until then had largely been ordered by politics. And in each case, Congress has made a mess of things, of course, to no one's surprise.

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

Thank you.

**GEOFFREY STONE:** Let me begin by saying that when we talk about the President's authority in his role as commander-in-chief, it's important to distinguish between two different conceptions of that authority. The first is the President's power to act as commander-in-chief in the absence of any congressional authorization or limitation. To the extent the commander-in-chief authority carries with it a set of implied powers; we can say that the President may act in a reasonable and proper manner to fulfill his responsibilities as commander-in-chief. But there will be outer boundaries. For example, the President, as commander-in-chief, cannot constitutionally set the price of chicken in peace-time in Nebraska. That would be a violation of the Constitution because the President would be exceeding his power as commander-in-chief, if he claims that was the source of his authority. That's going to be a reasonably broad

power within the realm of issues relating directly to the military security of the United States. That's one way of defining the commander-in-chief power.

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

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

Let me take a moment or two to elaborate. In the NSA case, as Roger said, before 1978 there were no explicit statutory limitations on the authority of presidents to engage in foreign intelligence surveillance. This all changed in 1978. Two developments were relevant. First, during the Watergate investigations, many investigative abuses came to light. Second, in 1972, the Supreme Court, in the *Keith* case, unanimously rejected the claim



that the President had inherent authority to engage in domestic national security wiretaps—without probable cause and a warrant. At the same time, the Court put aside the question of whether the same holding would be true for foreign intelligence surveillance. That was an open question.

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

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

Now, it may be, as Roger said, that FISA is out of date, and it may be that in light of 9/11, we would want to authorize the President to engage in much more aggressive foreign intelligence surveillance than FISA permits. Both of those propositions are perfectly plausible. But the proper way, the legal way, the constitutional way for the President to address that question is for him to go to Congress and seek an amendment to FISA. That's clearly the process

FISA anticipated. The proper course was not for the President secretly to disregard FISA—I'll come back to the secretly point in a moment—and to institute, in defiance of the law, a program that in my view clearly was unlawful. Rather, it was for the President to say FISA is no longer appropriate in light of changing technology and world conditions, and to propose that Congress amend or repeal the law. Then there could have been a debate on the proposal. The *Padilla* case is another example. Here, the President secretly decided that he has the inherent authority as commander-in-chief to seize an American citizen at O'Hare Airport, to bring him to a military base, not to inform anyone—friends, family, coworkers, neighbors—that he has been seized by the United States government, to hold him incommunicado in a military base, not give him any access to a lawyer, and not allow him any judicial determination as to the legality of his detention. The President made his own, secret determination that he has the unilateral authority to detain an American citizen in circumstances that the Supreme Court implicitly held in the *Hamdi* case clearly violate the Due Process Clause of the Fifth Amendment. No thoughtful and responsible lawyer could believe to the contrary.

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

My final observation is that there are two dangers, at least, in such overly aggressive assertions of executive authority. One is, of course, the violation of

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

Thank you.

**JOHN YOO:** Thank you to the Federalist Society for inviting me to speak at 6 a.m. my time this morning. I don't know why they chose to do that. It's also a great pleasure to be on this panel with these distinguished commentators and professors. We've been having, I think the four of us, a running debate in the press and in different locations about these issues. It's great to actually be all in one place at one time.

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

And so the very notion or idea of executive power was not just that it would execute the written laws but that when the public safety required it, it would be able to act quickly to respond to those kinds of things. I don't think that's actually inconsistent with what Geoff described as the first type of argument about executive power, and that's actually how I would characterize it in, say, a wiretapping program. It was a response to a great attack that was clearly unforeseen by those who wrote the FISA law, the President had to respond quickly and at some times secretly, in order to intercept these kinds of

communications with terrorists inside and outside the United States, and that you wouldn't, at first, want to have a broad public discussion about it because in doing so, you would be tipping off the enemy of our technological advantages in being able to intercept their communications.

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

Let me also supplement what Roger said with a discussion of history; not the framing period of history but the history of our country in wartime since the framing. I would throw out this argument. The basic thesis I have is that the greatest presidents, the ones if you look at the polls of all the political scientists and historians and law professors, of who our greatest presidents are, they have been the ones that have drawn most deeply upon this reservoir of constitutional power, have made at times what people at the time thought were dictatorial, extraordinary claims of executive power, but did so to protect the country. And because of that, history has viewed them often as quite successful not because they drew just on the power but because they matched the power to great emergencies.

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

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

commissions to try thousands of people outside the civilian system. He did not ask for congressional permission of the military detention and trial system until 1863.

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

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

President Bush, I'm afraid, was not the first person to think of this idea of warrantless wiretapping. In May 1940, over a year and a half before Pearl Harbor, President Roosevelt ordered J. Edgar Hoover to conduct interception not of just international phone calls but every communication in the United States, all phone calls in the United States, to search for "subversive elements" who would be helping the Axis powers during the War. At that time, there was a statute which prohibited any warrantless interception of calls. There wasn't even a FISA at the time, and there was a Supreme Court decision concluding that the President and the Executive Branch could not seek that kind of authority. Now if you look at the memoirs of Justice Jackson, who was Attorney General at that time, he talked to members of Congress quietly about getting Congress to approve that program. He was told the members of Congress would not vote for it, and so

he decided that the Executive Branch and the Justice Department would continue to do it anyway.

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

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

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

At the end of World War II, the Supreme Court decided not to exercise judicial review over enemy alien combatants held outside the United States, and

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

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

Thank you.



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HON. ARLEN SPECTER: UNITED STATES SENATE, PENNSYLVANIA

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**DEAN REUTER:** Good morning and welcome on this second day of the Federalist Society's National Lawyers Convention. We have an eventful day planned for you. Tonight, the vice president; later today, Governor Haley Barbour and Secretary Michael Chertoff; also, panel debates on executive power in war time, civil rights in the 21st century, the proper role of state AGs, law firm and diversity hiring, ABA accreditation of law schools and much, much more. To begin our day, we are very pleased to welcome Judiciary Committee Chairman Senator Arlen Specter.

We here at the Federalist Society place a great deal of emphasis and importance on the role of the Judiciary, so I'm going to introduce Senator Specter in that context. One of my favorite parts of the Federalist Society's statement of purpose reads, "It is emphatically the province and duty of the judiciary to say what the law is, not what it should be." Unfortunately, this is not a self-executing provision. It takes the right people in black robes to help make this statement a reality, and in this regard we owe Senator Specter a considerable debt of gratitude, for he can be credited with a tremendous, unparalleled, indeed an historic, accomplishment. That, of course, is the confirmation of two U.S. Supreme Court justices in the space of six months time, Chief Justice John Roberts and Justice Samuel Alito. It was due to his leadership that last night at our banquet we were able to hear from Justice Samuel Alito, rather than Judge Samuel Alito. Senator Specter ran a very tight ship before and during both confirmation hearings, controlling everything with seeming ease, while preserving collegiality with all the members of the Judiciary Committee. If you followed the hearings and the exchanges that took place between the announcement of each nomination and the subsequent confirmation, you will recall that Senator Specter was unflappable, unflinching, and unyielding when it came to making certain that the nominees got fair hearings. From the beginning, it was clear that the hearings would be run openly and expeditiously. The Roberts confirmation took only ten weeks; the Alito confirmation, which included the Christmas break, only slightly longer: 13 weeks. Senator Specter's superior management skills, tact, and tenacious perseverance were clearly in evidence

throughout and should not be forgotten. He was indeed the cooler head that prevailed, and happily the effects of Senator Specter's leadership will be felt on the Court for decades to come. Please join me in welcoming Senator Arlen Specter.

**ARLEN SPECTER:** Thank you. Thank you. That's more applause than I can remember receiving. I infer that most of it is for Chief Justice Roberts and Justice Alito, but thank you. I make it a point whenever I begin to speak to take off my watch and conspicuously place it on the podium to give my audience a false sense of security that I will pay attention to the time. But I really will, and reserve time for questions and answers, which I understand to be your format.

I appreciate that very nice introduction, Dean. I was especially interested in your statement about the confirmation of two senators. I would like to see two senators someplace other than the United States Senate, so long as they're Democrats, to give us a majority. It would be too high a price to pay to confirm them to the Supreme Court, but I would certainly be amenable to confirming them to a district court. So, maybe we can work out an arrangement on that at a later time.

The confirmations of Chief Justice Roberts and Justice Alito are obviously of enormous importance. I think it is accurate to say that the confirmation of a Justice is the most important thing the Senate does, with the possible exception of a declaration of war. And to have Chief Justice Roberts in there at 50 with the prospect of decades of service -- Justice Stevens is now 86 and Justice Alito at 55--is an achievement. It certainly was a highlight of the Judiciary activity during my chairmanship, and it may turn out to be the highlight of the administration of President Bush; certainly one of the highlights, beyond any question.

We had lively hearings. When Chief Justice Roberts was up, Senator Biden went on and on and on--(not uncharacteristically). One of the fascinating parts about questioning by senators is, when most senators finish the so-called question, any one of six, eight, or ten responses could be given. It's not a very complicated art to ask a single question. If you ask a single question, you move in the direction you'd

like to find out some information about, as opposed to asking a question that could be responded to in many, many ways--and then having to listen to the answer – another principle totally ignored in the Senate. (I'm serious about this. I've come to think that it's a violation of the Senate canons of ethics to listen to an answer.) But you recall that Senator Biden wouldn't let Chief Justice Roberts answer the questions. I believe the senators ought to have a lot of latitude when they ask questions, but there comes an endpoint when they have to permit a response. I said, "Senator Biden, let Judge Roberts answer the question." And he responded, "But he's giving misleading answers." But I said, "Well, you may think so, but they're his answers; let him answer the question."

During the confirmation proceeding of Judge Alito, you may recall that Senator Kennedy got confused. He thought he was the chairman. And right in the middle of a key part of questioning, he interrupted and said, "I want a subpoena. I want a subpoena for the records of Samuel Alito when he was at Princeton." And I responded, "Well, if you really want to subpoena, as opposed to a grandstand play, why didn't you ask me about it when we were in the corridor earlier this morning?" I never see Senator Kennedy in the Senate gym. The rumor is that Senator Kennedy hasn't been in the Senate gym since the Johnson administration – (that's the Andrew Johnson administration). But we got through it, and we got them confirmed, and it's a great thing for the Court.

President Bush called up and said, Arlen, when do I get my next pick? We got them through and he called it a "pick", and I said, "Well, I can't exactly tell you about that, Mr. President. That's up to a higher authority when that will happen." But it will be an extraordinary event to see how that will unfold. I have it very much in my mind. You cannot have an eight-person Court because that would result in a lot of 4-4 decisions and the Democrats will be put to the test. It is an eventuality that we have to be concerned about.

We had some progress on the judges. Judge Bill Pryor had been held up. We got through Janice Rogers Brown. We got through Priscilla Owens. We had to get Brett Kavanaugh a second hearing. We got him through. The questioning by Senator Schumer on Judge Kavanaugh I thought was beyond

the pale and practically like rehabilitating a witness at trial after prosecution has muddied the waters. Josh Bolton told me a few days after we had that hearing that he got home from the White House very late, about 11:30. He turned on TV and did a little surfing, and came to C-SPAN. They usually play the Judiciary Committee when I'm on at about 3 a.m. I have an enormous following among America's insomniacs. Bolton said it was about 11:30, and he couldn't turn it off, it was so engrossing.

But we got Kavanaugh through, and now we'll get Peter Keisler through. Even the *Washington Post* says that. I thought we'd be in only a week. That was the rumor when the Democrats won, that we'd be here only a week. And now we're going to be in the week of the fourth and the week of the 11th, so I'm going to go ahead and put Michael Wallace back on the list, whom I talked to last night, and the others the President nominated. I'm not optimistic, as I told Mike last tonight. He expressed his appreciation for what we've done thus far. I questioned him at some length on his confirmation hearing and brought out his exemplary record. I wanted it all on the table before anybody else had a chance to question him. That's a big advantage of being the Chairman, by the way. You get the first chance to question; you can set the table and the stage.

The President has exercised his constitutional authority to nominate and has sent them back to the Senate; so, we're going to take them up in regular order. And if the Democrats want to obstruct them, as they will have the power to do in a couple of weeks, that's their call. But there will be another election. The voters of South Dakota held Senator Daschle accountable for his obstructionism, and that's something they will have to keep in mind. It's very much in my mind as to strategy and the approach in how to handle them.

We had a good confirmation hearing on Attorney General Gonzales. We got him off the stand at 4:30 in the afternoon. That, by the way, is the secret to getting a nominee confirmed, getting him on and off the stands. If John Bolton had had a one-day hearing, he would now be the confirmed Ambassador to the UN. But if they drag on and on and on, that just works to the detriment of the nominee. We're still going to deal with Bolton this term. I don't know quite what will happen. It's a pretty tough situation in a lame-duck session, as

short as it is. I was on one of the Sunday talk shows last week with Schumer, and the question came up about the Democrats' confirmed dates, and Senator Schumer pontificated about how the President ought to have great discretion when he has foreign policy and defense matters. When my turn came, I said I think the Schumer Doctrine is a really valid doctrine; let's just apply it to Bolton. And Schumer quickly retreated. It's nice to see Schumer in retreat.

We had some interesting legislative matters. We got out class action reform, which had languished for years. We got the Bankruptcy Code revised. That had also languished for years and years. For the first time, we got asbestos out of committee and onto the floor. We faced opposition by the trial lawyers on asbestos reform, and I don't know what the future of that will be, but I'm going to press the new majority leader to take it up, to see if we can't deal with that issue. Senator Hatch had a great idea on the trust fund concept, and we're going to be pushing there and in many, many other directions.

Well, I'm up to the 12 minute mark, and that's about as long as any speech ought to be. So I'd be glad to respond to questions. And as I always immediately add, I'd be glad not to respond to questions.



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## GOVERNOR HALEY R. BARBOUR: MISSISSIPPI

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**DAVID MCINTOSH:** This morning, I have the pleasure of introducing a very good friend, and in many ways a mentor. When I was a young man working in the Reagan White House for the first President Bush, I would seek his counsel as various thorny issues and fighting with the bureaucracy would come up. His advice was always wise. He went on to be selected Chairman of the Republican Party, and in 1994 thanks to him and the efforts of many people and the voters back in my home state I was selected to serve in Congress in that tidal wave. I've been thinking, as I've been mulling over what to say in this introduction, that perhaps we ought to draft him to come back to Washington and help us figure out once again how to get back to that majority.

But the people in his home state, Mississippi, called him back to service as Governor there. They did so in a prominent way. Many of us saw him bring a lot of new industry and business to that state, letting them turn the corner into the 21st century. I'd hope that some of the rumors that people were approaching him and thinking someday he could be our presidential standard-bearer were indeed true. But then the Lord intervened and sent the disaster of Katrina to his home state and hit them hard. His leadership in that state, particularly when you stand it up against others in the region showed how it could be done. He does deserve applause for that because he has turned it around. He has helped the people of his state get back on their feet, rebuild, and once again turn towards prosperity. In recognition of that, *Governing* magazine yesterday announced that he is the number one Outstanding Governor of the 50 governors in the United States. Congratulations, Governor Barbour. It is a pleasure to have him here. I do hope we will see him more in Washington. Without further ado, let me give you Governor Haley Barbour.

**HALEY BARBOUR:** Thank you, David. I appreciate those generous remarks very much, and I too have enjoyed our friendship, while at the White House, when you were a Congressman, and times in-between. You know, I was honored to be asked to do this, and I gave a lot of thought to what I ought to talk about. There are a lot of things that we could talk about. I do not often get a chance to speak to a

national group of leading attorneys and people who care about the principles of government that I care about. So, I thought to myself, if you want to get one message over, what should it be?

I think sometimes we see things that seem pretty obvious and get exactly the wrong lesson. That's an important point for conservatives, for people who believe in limited government, to not get the wrong lesson from the election last week. You know, I was elected chairman of the Republican Party in 1993. In 1992, we suffered the worst loss for Republicans in decades, going back to 1964. We had 174 Republicans in the House, 42 in the Senate, 17 Republican governors. And our candidate for president, the incumbent, had just got the lowest percentage of the vote for any Republican candidate for president since 1912.

What was the lesson? Well, I can tell you the lesson. Not that the American people had changed their minds about conservative policies, about the market economy or limited government. The lesson was that the American people had changed their minds about us. They thought we hadn't adhered to the principles they had voted for when they elected us in 1988. And I think we see that again in this election. The American people haven't turned their back on individual freedom and personal responsibility—the essentials of limited government. They just think we Republicans, who've campaigned on that, stood for that, and in fact practiced that a lot in recent years, strayed away in the last few years.

Part of what happened last week, of course, was a recurring historical fact that in the second midterm election of two-Republican presidencies, Republicans usually take big losses. There have only been four of them since World War II: 1958, Republicans lost 13 seats in the Senate; 1974, when we lost nearly 50 seats in the House; 1986, when we lost eight senators and lost control of the Senate; and now 2006 when, in all historical honesty, we had an average election for a two-term Republican president's second midterm election. We lost about 30 in the House, which is about average. We lost six in the Senate, which actually is a little below average, and we lost six governors. Now, that doesn't mean it wasn't a bad election. It was a bad election. But the history let us know on the front end that we were ripe for a bad



election, that we were going to be running in a bad environment.

Of course, this is greatly exacerbated by the fact that Americans don't like long wars. Don't take my word for it. Ask Lyndon Johnson or Harry Truman. The 24-hour news cycle has made it even worse, because the media thinks their job is to tell the American people the worst things that have happened in Iraq that day. The one thing I will say about President Bush, it's not news to him that Americans don't like long wars. He is very aware of that. He's been made aware of it time and again. But he's said he's going to be for what he thinks is right, whether it's politically popular or not. There's a hell of a lot to be said for that in this country, for people who will do what's right rather than what's popular.

My old boss, Ronald Reagan, used to say that at the end of the day, good policy is good politics. But sometimes, you're not still alive by the end of the day; or still in office. I do think it's important, however, that we not lose sight of the fact that since probably 1984, we've had essential parity between the two parties in this country. There's been equilibrium in American politics. It's shifted here and there, but overall it has stayed pretty close to the center. We have 49 Democrat senators; 49 Republican senators. The vote in the presidential election, 51 to 48, and before that it was 48-1/2 to 48-2/10, or whatever it was. The American people are pretty evenly split on things, and different issues can cause people to shift slightly.

I think the things that hurt us the worst, very honestly, in Congress at least, were scandal and spending. When you consider the fact that we have as a significant part of our party people who are religious conservatives, things like corruption, the Foley scandal, for instance, have a lot more impact. I remember when Gerry Stubbs was a Democratic congressman from Massachusetts; he plied a teenage page with alcohol; and then committed homosexual acts with him. Instead of the Speaker of the House doing what Denny Hastert did to Foley, telling him to resign, Gerry Stubbs was reelected five more times, served as a committee chairman, and the majority leader of the House-to-be, Steny Hoyer, voted on the floor not to censure him. Times have changed, I guess. But the fact of the matter is, his constituents were a whole lot more willing to tolerate bad behavior than are a lot of the social conservatives who vote Republican.

So, sometimes what hurts a conservative wouldn't hurt a liberal, or what hurts a liberal wouldn't hurt a conservative. But the corruption, I think, was serious. We may overstate sometimes the damage done by the perception that Congress was spending too much money. But while it can be overstated, it also is real. You heard it from the business community, particularly, more than anybody else—dissatisfaction that we were spending too much money; that we were a party of big spending just as much as the Democrats have been a party of big spending.

So as you look at the election, try to keep those things in mind. I think the real test of where we go from here, to some degree, is where the Democrats try to go. Are they going to try to be the dominant force in Washington? It's very hard for the President not to be the dominant force in Washington. But I'm more concerned personally about where the Republicans are going to go. I think it is incumbent upon us to practice what we preach. I don't think there's any cure better than what my old friend Lee Atwater used to say. "Be for what you're for; don't try to be for what's popular, don't try to be for what you think's going to be popular by the next election. Be for what you're for."

When I was political director of the Reagan White House, I can tell you, President Reagan had millions of Americans who would disagree with him on this and that, but who admired him for the fact that he'd tell you the truth, and he'd do what he said he was going to do. They voted for him because there is an enormous political premium, in America at least, for keeping the promises you make. Now, we conservatives have an added advantage there. If we will adhere to the conservative policies that we believe in, the results will be great because those policies work.

You know, the market is better for the economy than government control. I don't know why we have to prove that to ourselves about every 10 or 15 years, but we do; and if we stick with it, it works. In fact, the economy in this country today is pretty dang good.

In Mississippi, we have people who are making more money than they've ever made before. Our personal income has grown 11 percent in the last two years, despite being hit by the worst natural disaster in American history, with 70,000 people

losing their jobs overnight. That's 70,000 people who qualified for disaster unemployment. And yet, the income in our state continues to go up. The economy is growing, and it's largely because of good policies. We have stuck with the right kind of things, and if Republicans will do that on a national level, in my view it's more important than who is the next candidate for president.

We've got some good candidates running in 2008. But the more important thing in my mind is who we are as a party; what the Republicans in Congress do in terms of policy and principle. If we stand by the right policies, I promise you the Democrats will hang themselves. We just have to let them.

I remember fondly Clinton/Care, the proposal to create a government-run health care system. You know, the American people are just smarter than politicians give them credit for. Give them a little time and they'll figure it out.

Or President Clinton's economic plan—soon to be known as the largest tax increase in American history. People remember that. We're going to see that repeated.

The question is, where are we going to be? You know, every few years you can do like the Democrats and run an election that just says, "The people who are in office are bad; vote for us because we need a change." But usually in American politics, you've got to give the American people something to vote for. David and our guys did that in 1994 when instead of just saying, "We know you don't like Clinton, let's throw the Democrats out," we ran on the Contract with America and said, "Elect us and here's what we'll do." A lot of people don't remember that, in the first few years, every one of those things was acted on in some way or another. And I remember fondly President Clinton's acceptance speech at his own convention in 1996 when six of the things that he took credit for had come out of the Contract with America. Good policy is good politics.

Because we're trying to save some time for questions, I'm going to stop, except to say that we just lost one of the great economic thinkers of our side in Milton Friedman, and I think if we will hitch ourselves and stay hitched to those kinds of economic ideas and then do the same things in terms of foreign policy, national security, domestic policy, then we're going to just be fine. But we've got to prove to the

American people that we've got the discipline and the courage to do that. We're going to learn a lot about our courage and discipline in the next couple of years.

Thank you all very much.



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HON. MICHAEL CHERTOFF:

SECRETARY, UNITED STATES DEPARTMENT OF HOMELAND SECURITY

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**RON CASS:** I promised Leonard Leo and Gene Meyer and Dean Reuter that I would give a serious introduction for the Secretary, although when he heard I was introducing him, he did raise the threat level to Orange. Secretary Chertoff proves that a very smart Jewish boy can grow up to be a successful lawyer. He overcame a number of obstacles in his career. It got off to a very shaky start. He attended Harvard College and then Harvard Law School. He then clerked for Justice Brennan. So, you can see, this was really going badly at the beginning.

But the Secretary was able to turn it around. He had a very successful private practice at Latham and Watkins, and then a career in public service. He was a U.S. attorney and special counsel to the Senate Whitewater Committee, endearing him to one particular senator. He was the Assistant Attorney General of the United States for the Criminal Division, and then he was appointed as a circuit judge to the United States Court of Appeals for the Third Circuit, thereby covering not only the Virgin Islands but also Trenton, Camden, and Newark.

When the President was looking for someone to take over the Department of Homeland Security he turned, as he had on other occasions, to Michael Chertoff, putting him in charge of terrorism, nuclear threats, immigration, border control. (No one mentioned hurricanes at the time when you were appointed, I think.) I recall vividly the pictures of the Secretary when he was appointed. He had a full head of dark hair. He was confirmed by 98 to nothing. Senator Clinton has asked for a recount, but I think he has done a spectacular job. I'm delighted that he is here with us.

Please welcome Secretary Michael Chertoff.

**SECRETARY CHERTOFF:** Ron, thank you very much. I don't usually address lawyers groups anymore. One of the benefits of my current position is that it's the first I've had since I graduated from law school in which I do not act in the capacity of a lawyer. And I'll tell you, it's wonderful. Every time there's a problem, I say, go ask the lawyers about that.

But I am delighted to speak to this group because I think the premise of the Federalist Society is

that ideas matter in the world of the law and that our views on the role of the courts and our philosophy of law actually have real-world impact on the way we organize our lives and conduct our daily affairs. When I was in law school, the Society had not yet been formed. We were still in the full flush of the Warren Court years, back when the phrase "judicial activism" was seen as a term of admiration. Those of you are younger may find it a little hard to imagine an environment in which only very few of us were willing to talk about things like judicial restraint and to suggest that judges couldn't solve every single problem—to be facing, really, a majority that looked at us like we were demented.

Actually, one of those who was a year behind me but I think probably had a very similar experience was John Roberts, now the Chief Justice. They were very few people, frankly, who in my era were in a position to argue seriously for what Chief Justice Roberts has, I think, very accurately described as judicial modesty. Now, first, let me tell you what I think the phrase "judicial modesty" means. It means things like deferring to the political branches that represent the will of the people. It means cautiousness in the use of judicial remedies and humble recognition of the fact that sometimes there are unintended consequences. It means mindfulness of the limits of judicial competence.

You know, judges are, by and large, pretty smart. When I was a judge, my colleagues were pretty smart. But they don't necessarily understand everything. And a kind of modesty about and understanding of your own competence is, to me, a significant element of the proper behavior of a judge. A critical element of judicial modesty is rigorous observance of the self-limiting elements of jurisdiction. You have to be particularly careful about policing yourself to make sure you don't overstep boundaries because judges, after all, are generally giving last word about jurisdiction.

So what I think is really fascinating is that, by forming the Federalist Society, the visionaries who created the organization established a forum in which these ideas of judicial modesty could be openly discussed in a collegial environment. Essentially, they

created a counterweight to the prevailing academic orthodoxy of the '60s and '70s, and that was a very positive thing. Of course some people have taken up the idea that really the Federalist Society is like the modern day Da Vinci conspiracy, a secret society that controls all of the legal jobs and legal decision-making in the administration. We know that is nonsense. But what the Society did was create a forum in which one could challenge ideas that had previously been accepted as the conventional wisdom.

I'm not going to say that the philosophy of judicial modesty or similar conservative philosophies now dominate the legal landscape; far from it. Many people still believe, whether in academia or on the courts or practicing law, that the purpose of the courts is to pursue a vision of social justice as conceived by legal thinkers and judges. But now, in large part because of the work that the Society and others have done, the claim for judicial modesty is sufficiently well-established that everybody understands, even the critics, that it must be addressed. Judges and lawyers that take an activist approach realize that they have to respond to this critique. Conservatism and judicial modesty have now become forces to be reckoned within the intellectual discourse of the law here in the United States. In short, you've leveled the playing field, and that has been a very good thing.

Your work is not done, however. I'm going to ask you to confront a new challenge, and that is the rise of an increasingly activist, left-wing, and even elitist, philosophy of law flourishing not in the United States but in foreign courts and in various international courts and bodies. For decades, the judges, the lawyers, and the academics who provide the intellectual firepower in the development of international law and transnational law have increasingly advocated a broad vision of legal activism that exceeds even the kind of legal activism we saw in the academy here in the '60s.

So now you're scratching your head and you're asking yourself, why does the Secretary of Homeland Security care about this? Well, in my domain much of what I do actually intertwines with what happens overseas, and what happens in the world of international law and transnational law increasingly has an impact on my ability to do my job and the ability of the people who work in my department to do their jobs.

I'll give you a recent example. Some of you may have followed in the press that there was a difference of opinion between the European Union and the United States about the use of something called passenger name record data, which is basic information that you get when you buy a ticket or work through a travel agent as part of the process of planning your trip to the United States. There's great value to us in having access to that information as part of the process of determining who we are going to allow in to the United States. That, of course, is a fundamental core power of any sovereign. You get to decide who you're going to admit and who you're going to reject. It turns out that this very modest amount of information, like your address and your credit card and your telephone number, helps us determine whether people seeking to come into the country have connections to terrorists that, at a minimum, suggest we ought to put them into secondary inspection before we grant them admission. This strikes me as an eminently reasonable power, and I can tell you that it is a critical tool in protecting this country.

But privacy advocates, particularly in the European Parliament, believe that because that information is collected in Europe, among other places, they should determine how we use that information. This led to a very substantial debate. Fortunately, we resolved it with an agreement which addresses the principal concerns we have. Still, it focused my attention on how much my ability to do my job leading a department that protects the American people depends upon constraints that others want to put on us under their conception of either international or transnational law. So I've come to see in a very dramatic way that this has a real-world impact on how we protect ourselves.

Of course, it turns out that this is not a new issue. If you go back to 1986, there was a case in the International Court of Justice called *Nicaragua v. the United States*, involving a challenge to the United States policy of supporting the Contras. The ICJ was confronted by a jurisdictional argument that the United States raised. The argument was that, based on the various treaties we and other countries had agreed to, the court didn't really have jurisdiction over the matter because all the relevant parties were not participating. But the court brushed

that jurisdictional argument aside and ruled against the United States on the ground that even if the treaties did not permit the issue to be addressed in that particular forum, there was customary law that allowed the court to act even though the treaties would have forbidden action in that case. That's a fairly significant and dramatic decision, at least in my view.

In 1998, the International Court of Justice again confronted the United States in *Breard v. Gilmore*. That case involved a Paraguayan who had not been given access to his consul—I think frankly because no one knew he was Paraguayan). He worked his way up and down the state system in Virginia after he was convicted and sentenced to death and literally at the 11th hour of his execution Paraguay went into the International Court of Justice and argued to have a court order imposed that the United States not complete the sentence imposed by a duly constituted Virginia state court.

Ultimately, the case went up to the U.S. Supreme Court, and the court ruled that because the plaintiff, Briard, had not exhausted or raised these issues at any point in the state court proceedings, he had waived his rights. There was a procedural bar under a 1986 federal statute that basically said that you have to raise your claims in accordance with state law for you to waive them. Therefore, the execution went ahead. But international lawyers in the international courts were outraged that we gave greater weight to a federal statute that came after the treaty in question, rather than deferring to an international court.

Of course, it has not only been the United States that has felt the vigor of what I would call this very activist kind of international adjudication. In 2004, the International Court of Justice waded into a thicket, probably one of the most difficult in the area of international relations: that is, Israel and its activities in the West Bank of the Jordan River. In a case entitled *Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory*, the ICJ issued a very broad advisory opinion concluding that the construction of a wall specifically designed to keep suicide bombers out of Israel, where they were blowing up people on a regular basis, violated international law; that it had to be dismantled, and that reparations had to be made.

Part of the reasoning was that Israel could not use the threat of terrorist attacks emanating from the Palestinian territories to justify the wall because the attacks were not attributed to a state. In other words, using what I would consider a very hyper-technical reading, the court was relatively dismissive of what most of us would regard as a very compelling fundamental attribute of state sovereignty—the right to protect your citizens from being killed by people coming in from outside. I think this sequence of decisions shows an increasing tendency to look to rather generally described and often ambiguous “universal norms” to trump domestic prerogatives that are very much at the core of what it means to live up to your responsibility as a sovereign state.

Now who is interpreting these laws? To the extent that this country is party to a treaty, if it's been ratified by the Senate and we have consented to it, it's fair that we live up to the letter of the agreement. But often, the letter of the agreement is not what controls. It is, in fact, what we have not agreed to that people seek to impose upon us. This begins with the judges and justices of various international courts, not appointed by or ratified by our legal or political process. What they say is customary international law is often the opinion of international law experts. That basically means professors. I'm sure it's an academic fantasy to imagine a world in which the writings of professors actually define the content of the law, rather than what Congress passes or has agreed upon. That's typically not, at least in my experience, the way we make law in this country, but it is quite seriously the view taken by some; that international law can be discovered in the writings of academics and others who are “experts,” often self-styled experts.

I think Congress itself has recognized that this tendency to have a very expansive and activist view of customary international law requires that we be very cautious about how we address the issue. Several times, for example, Senate has expressly put reservations into its approval of treaties to make sure that the treaties are interpreted and applied domestically in a limited fashion or, even more importantly, in a way that's consistent with our own fundamental constitutional requirements. Yet, again, the experts and sometimes the far-end adjudicators simply view those limitations as minor impediments in their insistence that we accept the full measure of

the treaty as ratified by others, even as ratified not by anyone but instead having its source in that vague and fertile turf of “customary international law.”

Of course, when one looks to the sources of this international law, one can hardly fail to note, for example, the composition of UN organs such as the Human Rights Committee, which often takes its view of international law from countries like Cuba and Zimbabwe—not notable upholders of the rule of law in their own countries. This is troublesome, when we consider the increasing tendency of the UN and similar bodies to enter into the domestic arena with aggressive views of international law that would require us, for example, to second-guess the PATRIOT Act or to accord illegal immigrants in the United States equal rights with those who are here legally.

Perhaps even more urgently, we see in the current arena the impact of international and transnational law on our struggle to defeat an enemy that wants to bring war to our shores, and successfully did so on 9/11. I’ve talked about the passenger name record issue we had with Europe, in which some in the European Parliament argued that the fact that the information was derived from Europeans coming to the U.S. meant that we should be forced in the United States to let Europe supervise and set the terms of how we make use of that information. A press report I saw today suggested a similar measure by some European privacy advocates to limit the way in which financial information that we gather can be used in our country because at some point that information may have passed through European hands. It seems clear that how we deal with this issue of international law is increasingly impacting how we defend ourselves and how we conduct our domestic affairs.

What’s the source of all this? Well, I think the source is something I said at the very beginning of this speech. It’s the fact that the concept of judicial modesty—which has at least respect in this country, if not perhaps complete unanimous agreement—is pretty much absent in those areas where people develop and discuss international law. If you look at the cases I’ve talked about, it illustrates the point very well. A critical element of judicial modesty is deferring to the political and democratic branches, to those who govern with the consent of the people. Even when we talk about overriding those with the Constitution, it’s because our Constitution is a

document which reflects the consent of the people. But in the *Nicaragua* case, the ICJ precisely rejected consent by pushing to one side the carefully crafted treaty limitations about who should be present in the court before the court could rule, and then simply went ahead, invoking “customary law.”

Recently, a leading practitioner in the area of international human rights law bluntly said that when the U.S. refuses to ratify a treaty, it doesn’t matter because we are still bound by customary international law. In the *Breard* case, where the international community gave short shrift to Congress’ mandate that we respect the procedural rules and regulations of the state courts (a critical element of federalism)—a specific act of Congress was viewed as an impediment to be brushed aside in the service of a more general and frankly vaguer set of international norms. What we see here is a vision of international law that, if taken aggressively, would literally strike at the heart of basic fundamental principles—separation of power, respect for the Senate’s ability to ratify and reject treaties, respect for federalism and the importance of letting the state courts set their own rules to govern what they do.

Where is all this leading? I’m going to quote from the same international human rights lawyer who gives us his vision of where we’re going with international law. He says in a recent book called *Lawless World*, “To claim that states are as sovereign today as they were 50 years ago is to ignore reality. The extent of interdependence caused by the avalanche of international laws means that states are constrained by international obligations over an increasingly wide range of actions, and the rules, once adopted, take on logic and a life of their own. They do not stay within the neat boundaries that states thought they were creating when they were negotiated.” Now I’m quite sure that is meant to be a happy statement of the way we’re operating now, but I actually view it as a chilling vision of where we could go, given the current developments in international and transnational law.

What can we do about it? Well, you know, traditionally, we have tended to act in a manner that I would call defensive. For example, after the *Nicaragua* case, the U.S. government withdrew jurisdiction. That ended the legal power of the International Court, such as it was, to compel a result. In some of the more extravagant assertions by some of the UN human rights organs, we simply

accepted the statement as a kind of hortatory request, and did not do anything further with it. Of course, those of you who follow the developments with the International Criminal Court know that we've sought to enter agreements with other countries to avoid the application of that court's rules against our own citizens when we haven't in fact ratified or agreed to that treaty.

But while these defensive means may be necessary, they are not, in my view, part of an efficient approach to the increasing challenge to our ability to conduct our domestic affairs. First of all, the fact is that, whether we like it or not, international law is increasingly entering our domestic domain. The Supreme Court has begun to bring it in through cases like *Hamdan* and *Alvarez Machain*—which allowed a very small opening, but still an opening, in the door under the Alien Tort Claims Act, to international human rights law being a source of direct causes of action here in the United States. Through various European and other domestic protection rules, there's an increasing effort to control use of information in our own country to determine who comes in from outside. And of course, international law is being used as a rhetorical weapon against us. We are constantly portrayed as being on the losing end and the negative end of international law developments.

In fairness, there are some positive things that a properly constructed and implemented international law can do, not only for the whole world but for us as well. Common standards and aviation and maritime security are a win-win for us and our allies. There is a positive dimension to international law that we can recapture, apart from those elements that seem to make it into a kind of activism on steroids.

The bottom line is this: the problem is not the idea of international law, but an international law that has been captured by a very activist, extremist legal philosophy. It doesn't have to be that way. So, my challenge to you is to take overseas the same kind of intellectual vigor and intellectual argument that you brought to academia in the '70s, which over time changed the playing field, so that there was a voice heard for judicial modesty. I'm confident that, while this is not going to happen in a week or a month or a year, if you take some of the ideas that you've developed into the legal-philosophical salons in Europe, you will eventually start to persuade them on the merits.



PROFESSIONAL RESPONSIBILITY & LEGAL EDUCATION:  
ABA ACCREDITATION STANDARDS FOR LAW SCHOOLS

*John S. Baker, Saul Levmore, Thomas D. Morgan, John A. Sebert; Moderator: Douglas W. Kmiec*

**PROFESSOR KMIEC:** Good afternoon, ladies and gentlemen. My name is Doug Kmiec from the Pepperdine Law School in Malibu, California. You may be asking yourself what is this topic, the accreditation of law schools, doing in a symposium on limited government. After all, the ABA is not a government, and it is not limited. Indeed, some opponents of ABA accreditation would say look up “regulatory monopoly” in the dictionary, and that’s where you’ll find it. And, of course, therein lies the rub. The ABA may not be a government or state actor, but in practical reality it exercises extensive authority over the nature of legal education and derivatively the provision of legal services. The debate this afternoon is a debate over whether ABA accreditation standards serve or disserve the primary purposes of legal education.

And so we begin, what is the primary purpose of legal education? In true, multiple-choice bar examiner fashion: Is it (a) the provision of competent legal services to the general public; (b) an opportunity to take on massive student debt, which in turn necessitates finding a professional position which precludes all meaningful social engagement; (c) a chance to become a member of the Federalist Society and thereby defend the Constitution as written, while simultaneously ending your career for the judiciary; or (d) none of the above, and simply opportunity to devote significant monetary resources to the study of catching foxes on wild and uninhabited lands, the rule against perpetuities, the shooting of spring guns, and the unfortunate lot of children with thin skulls.

More seriously, do accreditation standards ensure legal competence, or are they barriers to entry that simply raise the cost of legal education and, in turn, the delivery of legal services? We have four excellent scholars this afternoon to present several different

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aspects of this debate. From the more positive side toward regulation, but by no means totally endorsing of every jot and tittle of it, are professor Thomas Morgan, the Oppenheimer Professor of Antitrust and Trade Regulation of the George Washington University, and Dean John Sebert, who until recently had served as the consultant on legal education for the American Bar Association. John’s role in that context was as primary administrator and coordinator of the ABA accreditation process.

Aligned against regulation, or at least more skeptical of it, is Professor John Baker, the Bennett Professor of Law at Louisiana State University. John is well-known to the Federalist Society, but it may not be as well-known that recently he was also the co-director of a study on accreditation standards for liberal education. And finally, Dean Saul Levmore, from the University of Chicago Law School, whose research focuses on behavioral effects of legal rules, and who has characterized the ABA accreditation standards as... I think the kind way he put it was misguided and excessive.

I want to just set the table very briefly with four arguments that are made in behalf of regulation, and the four counterpoints one most frequently finds in the literature on this subject; then turn it over to the distinguished panel. The arguments in favor of regulation go something like this:

First, That ABA accreditation is needed to protect the public from inadequately prepared graduates; Second, that ABA accreditation standards are necessary in order to promote legal scholarship of the highest quality—invaluable to the long-term health of the American Republic; Third, that ABA accreditation standards support the rule of law and are invaluable to it; And fourth, that ABA accreditation standards supply valuable consumer information to students and employers alike about the comparative qualities of legal institutions.

The counterpoints: With respect to the first, protecting the public from inadequately prepared law graduates, most critics of ABA standards would point out that from their vantage point, the standards are largely focused on inputs rather than outputs, and by virtue of that, there is considerable (and impliedly



unnecessary) expense associated with accreditation standards—whether that expense be for the library research facilities, presentation technology, or the money associated with attracting and retaining high-priced legal talent for the faculty, or various tenure requirements—but very little in terms of the evaluation of the actual effectiveness of the graduates that are leaving these programs.

The second argument in favor of accreditation standards, as you remember, was the promotion of quality of legal scholarship. Most of the counterpoints here are not particularly complimentary of legal scholarship. There's a sentiment that says much of what is written in the law reviews is of no help to the courts, of little help to practitioners, and is mostly devoted to commentary on divisive social issues that could just as easily be resolved by Chris Matthews.

The third argument in favor of accreditation standards was promotion of the rule of law. The most telling counterpoint is one that merely cites the ABA's regulation on diversity, which was reenacted in February 2006. Many people contend this diversity standard actually mandates racial preference, and mandates racial preference in a way that actually purports to trump state law. I will quote, so that you don't think I'm making this up, "Standard 211 provides that the requirements of a constitutional provision or a statute that purports to prohibit consideration of race in admission or employment is not justification for a law school's noncompliance with Standard 211." So, the fact that the people in California or Michigan, for example, have enacted explicit constitutional limits on the employ of racial preferences is apparently to the ABA of no consequence. It is hard to see how this promotes the rule of law.

And lastly, the issue of whether or not ABA accreditation standards provide information to employers and students—as a former dean of a law school—I can say that we treated the information we generated in the accreditation process as nothing short of classified information; it was the equivalent of a state secret in a terrorist prosecution, not something that we were about to release.

So, why is there not a public outcry, if there's so much criticism of these accreditation standards? What didn't it dominate the midterm elections, rather than Iraq? Part of it, I suppose, is that when we vote in judicial retention elections it is not uppermost in our minds that in roughly 45 states, it is these judges who

have required graduation from an ABA-accredited law school in order to enter the profession. While we may have great dissatisfaction with the existing accreditation standards, it just doesn't come to mind to register a no-vote because of that particular issue, or at least it doesn't for most of us. So perhaps we need to stir some creative thinking, and notwithstanding Patrick Leahy's assessment of the Federalist Society, this is the best place to do that in America. So let's stir our creative faculties, fire the rest of them, and begin with Professor Tom Morgan.

Tom.

**PROFESSOR MORGAN:** Thank you, Doug. With all respect to the way Doug set up the problem, I'm going to try to set it up just a little differently. One can imagine a world without lawyers; that is, a world without a group of people who are licensed and certified to have a special skill and who have certain jobs reserved to them. I think there's good reason to believe that in the future, there may be less need for certified lawyers. Non-lawyers will do many things that lawyers do today. And yet, disappearance of lawyers or people designated as lawyers does not seem to be on the near horizon.

Once we concede the existence of a category of people called lawyers and distinguish them in significant part by the special education they receive, it becomes necessary to define what constitutes that special education and who is certified to provide it. In our system, the responsibility for licensing lawyers and certifying that they've received the appropriate training has fallen to supreme courts, of all the jurisdictions in the country (which is now more than 50 if you include D.C. and federal districts, courts of appeals, and so on). I believe, and I suspect many members of the Federalist Society believe, that it is a good thing that power over such an important aspect of American life has devolved to state agencies and remains at that level. Some state courts, most notably California, have set up their own bodies to define what constitutes a legal education and what is sufficient for that purpose and they certify or accredit state law schools located in their jurisdiction. One of the problems with state accreditation, however, is that other states don't necessarily trust each other's educational judgment, and indeed, almost nobody trusts California's educational judgment in terms of state accreditation other than California.

That presents a real collective action problem. How do we create a world in which lawyers trained in one jurisdiction can be admitted to the bar in other jurisdictions? Largely by accident, historically each of the state supreme courts has concluded that a law school accredited by the American Bar Association qualifies a graduate to take the bar examination in their state, and thus to become a lawyer in that state. No federal authority compelled the state supreme courts to do this. No one at the ABA had any authority or responsibility to tell states to do this. Whatever many of us might think about the ABA generally, or whatever our particular fights with the organization in other areas, the fact is that 50 state supreme courts, and other jurisdictions as well, have concluded independently that graduates of schools accredited by the ABA are appropriate for admission to the bar and indeed that the quality of those graduates is quite good.

That doesn't mean that we should accept everything in the current accreditation standards as appropriate. Indeed, I'd suggest that two significant questions ought to be applied to the standards that we have. First, is there a correspondence between the standard and the quality of legal training, the background that we believe lawyers should have? Second, do the standards provide enough flexibility for schools to differentiate themselves and to find new, more effective ways to deliver what they see as a quality legal education?

In fairness, in recent years the ABA accreditation standards have allowed schools greater flexibility than they once did. Perhaps the best illustration of this is the requirement that graduates from an ABA accredited law school must have 58,000 minutes of legal instruction. That is a most bizarre standard to anybody reading them for the first time. It sounds like the strangest, most arbitrary requirement of all. And yet, when you think about it, that turns out to be approximately the 80 to 85 hours of credit that most schools require and have required for many years. And by stating it in terms of minutes, it allows the school to have the freedom to design many different lengths of classes, lengths of semesters, indeed numbers of semesters, than they formerly did. So that's one area in which the ABA has performed well. I suspect John Seibert will suggest others.

I think there are three main areas of concern, and to some extent Doug Kmiec foreshadowed these. First is the requirement that each law school

demonstrate a commitment to having a faculty and student body that is diverse with respect to gender, race, and ethnicity—and to do so even in the face of state law that prohibits consideration of those matters in hiring and admission. I don't have time to get into that now, but later I will be prepared to defend that standard, at least in part on the basis that any given state can have any rule they want, but if they certify people in other states as candidates for admission to their bar, they should not be entitled to impose their judgments on others. The second area of concern deals with requirements of tenure or tenure-like status for all faculty, including clinical, legal writing faculty, deans, regular faculty, librarians, etc. without an obvious link as to how that status relates to the performance of the job they're assigned to do. And the last category are some very specific requirements as to curriculum in ABA-accredited law schools. One of them, for example, is the use of live-client training in clinics, as opposed to simulation or other kinds of training. Another is a requirement of specific training in the American Bar Association's Model Rules of Professional Conduct. The Model Rules is the only book that is specifically required that everybody use as a basis for a particular kind of education.

But, the bottom line of my presentation is that the ABA accreditation process is likely here to stay because it meets the needs of a decentralized system of actual lawyer regulation. Something better could come along, but the switching costs would be enormous. This system contributes to a free flow of lawyer licensing that has become central to lawyer mobility. Until we find some replacement for the ABA, however, our effort should be to try to identify standards that can be improved, and then to get to work on changing them.

Thank you.

**JOHN S. BAKER:** Last night, Justice Alito quoted President Reagan about the impact of the Federalist Society on the legal culture of law schools. The Justice went on to say that, unfortunately, President Reagan may have been wrong in this area; that really the legal culture of law schools has not significantly changed. The reason for the lack of change is the lock that the ABA has on accreditation.

The first thing I want to do is to distinguish between the Section on Legal Education and the ABA more generally. Some in this room may find this difficult to believe, but generally the ABA is

more open to diversity of opinion and to different intellectual approaches today than it was some years ago—I would add, the change is due largely to the Federalist Society. I say that based on my experience with the ABA. Although I have spoken at the ABA events a number of times, most recently I did so when the specific request went out for someone from the Federalist Society to address the group. After the address, many people said, “This was wonderful, to have a different opinion. It was the best program.” Now, don’t get me wrong. I do not want to exaggerate the openness of the ABA generally. At the event just mentioned, I was outgunned three to one on the subject of Guantanamo, whereas at this convention this morning, we had a much more balanced panel on that subject. Indeed, this present panel is more balanced. But still we should give credit to the ABA for moving in a more open direction. The Section on Legal Education needs the same kind of competitive challenge in order to open it to the intellectual diversity that is available. Competition is good. The fact is that the Section on Legal Education has responded not to the power of ideas, but to the power of interest groups and more importantly, to the power of the Antitrust Division of the Justice Department. Justice has overseen the ABA Section for the last ten years, during which the changes you heard about have been made.

I want quickly to cover three points: (1) the structure of accreditation, (2) problems with how accreditation actually works, and (3) some possible solutions. State supreme court involvement in accreditation has already been mentioned and is well known. Many of you may not know, however, about the role of the U.S. Department of Education. DOE, through a federal statute, authorizes certain private accrediting agencies to monitor compliance with educational standards for those institutions that receive federal funding in some form—e.g., student aid. I happen to have worked for an accrediting agency that serves as a DOE-approved accrediting agency at the undergraduate level. Although DOE-accreditation is more important at the undergraduate level, the DOE-approved accreditation of the ABA has a bearing on its professional accrediting function. At the undergraduate level, there is not much competition in accreditation. Nevertheless having some alternative competing agency available gives undergraduate institutions an option for obtaining federal funding

without regional accreditation and thus provides leverage against being forced to conform to regional accrediting standards based on notions of political correctness. In my view, law schools need competition in accreditation in order to make it possible to distinguish between competence and character on the one hand and ideology on the other. Just imagine if The Federalist Society were given sole authority to accredit law schools. There would be yelling and screaming from the legal establishment about bias. The Federalist Society would not and should not be in that position. Why? Clearly, The Federalist Society is a group of conservative and libertarian lawyers and its membership does not reflect the views of the entire spectrum of the Bar. Those who do not care to join The Federalist Society should be able to attend or operate law schools that meet basic standards of legal education. Their ability to practice law should not depend on having to attend a law school which adheres to either a conservative/libertarian or a liberal viewpoint. The fact is that the ABA is an ideological organization forcing its ideology into the standards on accreditation.

It is no answer to say that the standards of accreditation are left to state supreme courts and that accreditation is a matter of state autonomy. A national accrediting body serves a coordinating function, so that one state knows the standards for a lawyer education in other states. Suppose a state supreme court filled with Federalist judges decides that it wants to replace the ABA as the accrediting body for law schools in that state, or at least that they wish to have another, alternative accreditor. Say you are the dean of a law school in that state. At present, you cannot afford to lose ABA accreditation because your students would be unable to go to other states which require graduation from an ABA-accredited law school in order to take its bar exam. The ABA, operating under the benefit of the antitrust exception for state entities, has been able to suppress competition in accreditation nationwide. If it were not acting under the umbrella of state supreme courts, this cartel would be called what it is.

John Sebert says that there is great flexibility in these new standards. I disagree. The lack of flexibility applies not just to Standard 212. John has addressed criticisms about Standard 212. He says there is no requirement for quotas, no critical mass required, and no violation of state law is required. But all litiga-

tors know one very important thing: the outcome often turns on which party has the burden of proof. The key here is that the school has to demonstrate its commitment to diversity. In other words, the law school bears the burden of proof, which means that without quotas, it may not be able to carry its burden.

Let's consider how, in practice, this process works with respect to another requirement about which you have also heard, the requirement of live-client contact. The standard says a law school should provide either clinical or live-client experience. Our law faculty has chosen to offer live-client experience, but not clinical courses. The ABA does not accept this. We report to the ABA our "live client" and simulation offerings. Every time we do, the committee comes back and points to the numbers and concludes that we "do not meet the standard." As far as the objective criteria is concerned, we are in compliance. But we are told otherwise. In fact, the process is simply a numbers game. The ABA will say it is not a numbers game. But I have copies of the letters from the ABA to show it is a numbers game.

So, whatever the standards say, the reality is evident in the enforcement. The outgoing head of the Section, Steven Smith, has recognized that there are real problems with the ABA's process. He has written the following: "The current system is a victim of its own success. The ability to enforce meaningful standards has led groups to seek to use the accreditation process for their own narrow purposes. Such claims are made, for example, about deans, faculties, clinicians, legal writing instructors, and librarians." In other words, the whole process has become very politicized. It results from the lack of adequate competition.

So, what is a possible solution? Well, the ABA is up for reauthorization before the U.S. Department of Education. There is a hearing on December 4. Gail Herriot and Roger Clegg have been involved in this. The issue for decision is whether the Department should reauthorize the ABA as the federally-approved accrediting agency for law schools. It is unlikely that the ABA will be denied reauthorization. But there are other options to simple reauthorization. The Department could look for and encourage a competitor. Or maybe, the Department could extract from the ABA some kind of concession that there would be an A track and a B track of accreditation. On the

A track—we might call it the Gold Star track—law schools could choose to comply with all of these controversial standards. But on the B track, law schools might be able to choose simply to be judged in terms of technical competence and leave to the state's supreme court and local bar associations the issue of character.

Ultimately, however, the best hope of forcing competition may lie with the *Washington Post*. Maybe the *Post* will take up the cause of competition in law school accreditation. Why? The ABA will not accredit Concord Law School, an online law school operating in California, and therefore, its graduates cannot take the bar exam in other states. Concord is owned by a subsidiary of the *Washington Post*. If the Bush administration would move for competition in accreditation, this Administration might finally win praise from the *Washington Post*.

**SAUL LEVMORE:** Thank you. I agree, I think, with most of what John Baker has said. I will expand on some of these ideas and offer several examples. The message I hope to impart is that after you deal with the outrageous quality of our current institutions, you might well conclude that it is an open question whether the world could really look other than the way it does. Regulatory capture comes to seem inevitable.

It is unsurprising that most people in law, along with consumers and perhaps even today's audience, are uncomfortable with the idea of anybody being able to call himself or herself a lawyer, engineer, doctor, or nurse with no formal training or licensing. And this list could be expanded to include many more professions. One can imagine a competitive marketplace, with many well-informed consumers, where there was no expectation of licensing, and where the development of brand names as a means of conveying information was the order of the day. In this world, we might find no licensing or other certification, but it is a world remote from our own.

The question, then, is how do we regulate? One possibility is to measure output. We could have state or national exams. That might be the case for drivers' licenses and perhaps air conditioning engineers and some other professions. But even these examples generate political coalitions and interest group pressures. Consider, for example, the University

of Chicago, where I teach. We have great students. I like to think we add enormous value with their education. But, much as I resist sounding like Stanley Kaplan, I do not think any state bar can come up with an exam that our students could not pass at a 98 or 99 percent rate, so long as the intention is for well-equipped graduates of local law schools to pass as well.. Our students are simply smart and selected, in part, for their ability to do well at examinations. The students at elite law schools have a great many skills, and one of those skills is being very, very good at taking exams. We might think that some elite law schools could do a much better job training lawyers and educating students. But it is unlikely or even impossible for a bar exam to have much affect on the legal education at these elite schools, because any exam that works for the mass of applicants will be easily passed by those masters of exam taking. As a result, regulators, if empowered, will naturally seek to affect (even) the elite law schools through direct regulation of their inputs. There will develop rules about what ought to be taught and for how many hours, and so forth. I call this “natural” because when well-meaning people get together to certify members of a profession, it is inevitable that they will try to improve the profession in the process. Each regulator has a view of what the profession requires, and those views will be reflected in instructions to the law schools and applicants.

We might imagine a world where they did not do that. The potential regulators might assemble and say:, “Well, okay, let us solve this collective action, or potential consumer fraud, problem, by having the ABA or some national quasi-accrediting agency certify lawyers.” But then, it will be the case that at some schools everybody will pass the bar exam, without any outside influence over the content or form of instruction. That is unrealistic because it is too juicy an opportunity for influence..

And then the influence turns to micromanagement. Potential regulators and certifiers, and the organizations with which they are affiliated, begin to think how they might have been better educated, or how they might ensure that lawyers are trustworthy and reputable. They begin by agreeing that not everyone ought to be able to self-identify as a lawyer, and they move to a scene in which there is an ABA and a Section on Legal Education with frequent meetings and proposals and requests from

interest groups. They come to require 3.1 linear feet of bookshelf space per x, and blackboards of certain size in order to have a program in y, and on and on. Each step seems reasonable, or at least responsive to some particular concern, and each is a testament to process. But the overall product is a regulatory code that is long, subjective, open to constant lobbying, and capable of disparate and strategic interpretation. In turn, the regulated entities, which are the law schools for the most part, must prepare mountains of paperwork—in anticipation and then in response to each site visit. It is an enormous regulatory apparatus, all done, presumably, in order to seem evenhanded in saying to a few start-up schools, “You know, you look a little too much like some guy in his living room trying to turn out lawyers left and right.” I do not know that we will find an easy solution to this problem, but you have to understand that what I describe is reality, and a perfectly predictable though unpleasant picture.

I am currently, or at least at the time of this meeting, the President of an entity called the American Law Deans Association, which might also sound like an interest group. When we meet, there are 150 people (all deans) in the room, carrying on about the need to send letters to the Department of Education and the Department of Justice in order to complain about regulations and the burdens they create. Students of regulatory capture will not be surprised to hear that at these meetings there are occasionally deans who stand and say, “No, no, I love the regulatory system. It has been good for me as a dean of five law schools over my career. Sometimes it has helped me convince my university’s president to authorize funds for construction; sometimes it has helped by barring an incompetent new law school from starting up down the road from me, after all the hard work we put in.” These, of course, are the words of anti-competitiveness. They are the complaints of someone who has leaped over the regulatory barrier and resents the idea or unfairness that the next institution in line might face a lower barrier. One you have a library of the “right” size, diversity of the right kind and degree, a legal writing program that meets someone else’s (normally extant, very senior legal writing instructors themselves) idea of minimum standards, and an “appropriate” clinical program, you do not want that new fellow opening up a law school that could compete without having to meet

all of these requirements. Suddenly, those who were burdened by input regulation in the past become the biggest fans of regulation. The deans of secure, major law schools with 95 percent bar passage rates have no interest in this regulatory apparatus. But they do suffer the consequences of regulation. I think I have described a prototypical anti-competitive system.

As a matter of regulation theory, the only surprise is that the regulation of law schools greatly exceeds that of other professional schools. In the medical and engineering areas, for example, there are accreditation standards but nothing like the regulatory burden and insistence on conformity that we find in law. By and large a pediatrician needs to pass an exam that is focused on outputs, and this focus seems to work well. In law, as in medicine, we might count on insurance carriers to provide an extra degree of monitoring and certification. That law schools are the most burdened by their centralized organizations, and often even self-appointed regulators, is a red flag. It signals the presence of a bureaucracy that is out-of-control, though instituted by well-meaning people. It has become bogged down by a series of interest group pressures and well-meaning actions.

I encourage you to attend a meeting of the ABA Section on Legal Education. The room is circled with interest group representatives all getting together and conveying the message that they know what is good for America and the profession. What is good is to have more X, and so X is legislated for everyone. Good luck in the attempt at deregulation.

**JOHN S. SEBERT:** Thank you. First, I want to make clear that my remarks today represent my personal views and not the views of the Section of Legal Education and Admissions to the Bar. Let me begin by agreeing with some of the comments made by previous speakers. I very much agree with Tom Morgan, for example, as to the two primary tests for the validity of a particular standard or standards as a whole; Ideally, standards should both (1) establish appropriate minimum standards for high-quality legal education, and (2) give schools as much flexibility as possible to design and create their own programs within the general parameters of the standards. Getting to that ideal is neither easy nor simple.

I also agree with Saul Levmore that there are in the current standards a number that are unnecessarily

detailed and prescriptive, and a number that attempt to regulate matters best left to the judgment of law school faculty and deans. Each of us has a laundry list of which are the problematic standards, but I won't go into my personal list here. But let me help you understand the dynamics of the standards revision process.

When the standards initially were promulgated in 1921, they were very bare-bones. Then there was a major revision of the standards in the 1970s. The standards that resulted from that revision were very detailed and prescriptive, in part for the purpose of providing guidance to the many new law schools developing at that time to meet the huge increase in applications to law school. Others may attribute different or additional motivations to the regulatory system that developed in the 1970s.

By the mid-1990s, a great deal of criticism of the standards had mounted from wide-ranging sources, charging that the standards were too detailed and prescriptive, and that they interfered with creativity and innovation. I think it is fair to say that over the past ten years, the ABA has attempted to respond, with some albeit modest success, to those criticisms. In addition to things others have mentioned, the requirements concerning the format and nature of a law library collection are very much more general now. I think they've made good progress there. The revised library standards give law schools great discretion in how to design and implement a law library. The gravamen of the test now, as the accreditation committee has applied it, is whether the collection and the library services adequately meet the needs of the school's faculty and students. I think that is basically as it ought to be.

Schools also have much more latitude now than they previously had in using distance education. No, a law school that delivers essentially its whole educational program by distance technology cannot yet apply for ABA approval, but in 2002 there were major relaxations of the restrictions on the use of distance learning technology. Since those revisions, I actually have been very surprised that so few law schools are using the flexibility they presently have to the maximum, to use distance education to reduce costs and work in collaboration with other law schools. There is only one ABA-approved law school in the country—that has indicated that the distance education standards bind them. That school

is presently being considered for a variance that, if granted, would allow for an experiment that would provide the basis for evaluating the efficacy of using distance education more broadly in the curriculum. [Note: The requested variance was granted by the Council.]

In the early 1990s, the Council adopted a very detailed set of standards that govern externships. Unfortunately, they did so because law schools were just abdicating their responsibility as legal educators. There were a huge number of law schools with externship programs run without adequate supervision, with highly uneven quality; they were giving away credits, basically. But what has happened because of the last two revisions is that those externship standards have been significantly relaxed, leaving much more discretion to the law schools to control the quality of their externship programs. This happened in part because the law schools developed good methods for quality control of externships, convincing the Council that it could rely more substantially on the law schools themselves to control the quality of externships.

Restrictions on academic calendars have been lessened, not only in the way that Tom Morgan mentioned, but in a manner such that schools like Dayton can do an experimental program in which students get the JD in five fairly intensive semesters over a maximum of two years, rather than what is the usually required three years. People will be looking to see whether the Dayton experiment works, and I think it will. They have a well-designed program that they could not have implemented before the standards had been changed.

The Council has also provided a lot more guidance on variances. I'm hoping that the Council will be willing, in a reasonable number of circumstances, to grant variances to schools that come forward with well thought out experimental programs that do not meet the current standards so that we can test new models of legal education.

Nonetheless, I think all of us will agree that there are still too many unnecessary and unnecessarily detailed standards that stifle the creativity in law schools, and that may unnecessarily increase the cost of legal education. Later on I will be mentioning some of these. But let me remind you of some of the additional factors and pressures in the standards revision process, in addition to the interest groups

within the academy, that, if not barriers to change, at least are forces that may put change farther off than we might like.

The Council has to pay careful attention to the views of the supreme courts and the bar admission committees that implement the supreme courts' requirements. Practitioners, bar administrators and judges are all represented, as they should be, on the decision-making bodies of the Section. And while the deans often argue for less regulation, some of those other constituencies get very concerned when there is discussion of significant deregulation; they fear that reduced regulation will create problems with respect to assuring appropriate minimum quality of law school programs and those they graduate..

It also must be remembered that not all law schools are as good as those represented on this panel. One of the things Council has to think about is whether it has standards that allow it appropriate oversight over that relatively small number of law schools that have particularly serious problems in bar admission and attrition. They have to design the standards so that they can deal with those problems, and they have to apply those standards consistently to every law school; not only because the Council believes that it ought to have a unitary set of standards, but also because the Department of Education will require the Council to apply its standards consistently to all law schools.

Thus there are a lot of forces that can be barriers to simplifying and reducing the amount of regulation contained in the standards... Actually, I think the problems in this regard are very similar to those faced when seeking simplification of the tax code.



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## INTELLECTUAL PROPERTY:

### DOES IP HARM OR HELP DEVELOPING COUNTRIES?

*Alex M. Azar II, Graeme B. Dinwoodie, Jerome H. Reichman, Robert Sherwood;*

*Moderator: Bruce A. Lehman*

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**HON. MR. LEHMAN:** My name is Bruce Lehman. I'm at Akin Gump Strauss Hauer & Feld. I'm also the chairman of the International Intellectual Property Institute, an organization that works with developing countries to help them develop an intellectual property system for their own economic growth and development. I've been involved in this business in one way or another for about 30 years; probably my biggest claim to fame is that during the 1990s I was Assistant Secretary of Commerce and the Commissioner of Patents and Trademarks. During that time, my office really oversaw the intellectual property diplomacy that led to the treaties now in existence requiring, for the most part, all countries of the world, including developing countries, to have patent, trademark, and copyright systems virtually identical to what we have known for many years in the United States and other developing countries. This continues to be a very controversial topic in trade negotiations and in other contexts.

We have a distinguished panel of speakers who know all about this subject. Our first speaker is our Deputy Secretary of Commerce, Alex Azar, who has an extremely distinguished resume. In addition to holding the high post he currently maintains, among other things of course, but at least for my purposes, what stands out is that he was law clerk to Justice Scalia and a distinguished practitioner here in Washington.

I'll introduce the other people briefly, and then we'll start with Secretary Azar. Jerry Reichman, who I've known for a long period of time, is a professor of law at Duke University, before that at Vanderbilt, author of numerous books and articles relevant to the subject, and a very creative thinker in the area.

Bob Sherwood, who I've also known for many years, is really, I suppose, one of the longest standing intellectual property diplomats working in this field. He is a graduate of Harvard Law School, and worked in the global pharmaceutical industry for many years. My dealings with him go back many, many years. He has been trying to get developing countries to recognize the value of intellectual property rights, particularly patent systems, often working in a

very lonely manner without a lot of help from other people. He has spent a lot of time in Brazil, particularly working with that country—which continues to need that kind of help, I must say.

Finally, we have Dean Graeme Dinwoodie, a professor of law, Associate Dean, and Director of the intellectual property program at Chicago-Kent College of Law. He holds a Chair in Intellectual Property Law at Queen Mary College in London. Both of those schools have very strong intellectual property programs, and he has a distinguished academic career.

I'll turn it over to Secretary Azar.

**DEPUTY SECRETARY AZAR:** Bruce, thank you very much. We live in a world in which advances in medicine are being made that can improve human health, cure or mitigate disease or suffering, and even prevent disease. We have new understandings of the molecular causes of disease, and are really on the verge of a new era in personalized medicine, involving safe, targeted therapies designed for each individual receiving them. But with new technology and innovation comes new costs, and these are becoming harder to bear as populations age. People want the best medical care that money can buy, but they want someone else to pay for it.

I believe the issue that we're discussing today was best described by Ugandan President Yoweri Museveni, quoting an African tribal proverb: "You can't be so hungry as to eat the seeds." Contrast that with the observation of his countryman, one of the kings of Uganda. "In my country, sometimes the farmers are very, very poor, and when they become hungry, the seed that is there for the land, they eat it to stay alive." These two perspectives I think illuminate the role of intellectual property in drug development: how can we both eat today and eat tomorrow? How do we achieve the delicate balance between immediate consumption and the sustainable scientific progress? We have to be careful that our desire to drive down prices today does not sacrifice investment for tomorrow.



For the past several years, I have been meeting with health, trade, and finance ministers and other senior officials from most of the wealthy nations around the world to discuss this challenge. I have sought to build a consensus around the need for all of us to ensure that our reimbursement regimes and pricing systems foster long-term innovation for the health of our people and for all the people of the world. We need to share ideas on how we can accomplish these goals, given our different healthcare systems, because right now many governments have taken a regrettable approach when it comes to intellectual property rights. Many countries have laws that technically support intellectual property, but their monopsonistic means of implementing their health financing regime effectively undercuts any commitment they may claim to respecting intellectual property in many circumstances.

The case for supporting intellectual property is compelling. Let me give you just a few examples of innovation that has relied on the support of IP protections. Of the last 40 years, early infancy diseases have declined by 80 percent worldwide. New treatments have received reduced ischemic heart disease by 68 percent and hypertensive heart disease by 67 percent. Today, relatively inexpensive ulcer pills have replaced expensive major surgery, and new medicines have led to shorter hospital stays, fewer complications, and better quality of life for the chronically ill. Over the past 40 years, the use of medicines has helped halve the number of hospital admissions for 12 major diseases, including mental illness, infectious disease, and ulcers. Antiretrovirals and cocktail therapies have largely shifted HIV and AIDS from an assumed death sentence into a chronic condition.

Of course, the development of new drugs and new technologies is an expensive, complicated, time-consuming, and very risky process. Fewer than one in 1,000 new molecules created by researchers survive clinical trials and make it to market. Today it costs on average, by some estimates, between 800 million and 1.3 billion American dollars of private investment on average, and in the United States between eight and twelve years to develop a new drug—between eight and twelve years to demonstrate its safety and efficacy, and comply with regulations, just to bring it on the market. The cost of developing new treatments has more than doubled in the last ten years, while success

rates in developing new products remain as low as ever. A great portion of these are the amortized costs of all of the thousands of product failures needed for the one drug that actually makes it to market. In fact, only 20 to 30 percent of drugs in the final stages of testing actually end up receiving market approval.

Without a strong intellectual property system, businesses would not have the confidence to invest billions of dollars in research and development. Without a strong intellectual property system, new and essential medicines would not prosper. These high research and development costs, of course, naturally lead to higher prices for consumers, and the tension between meeting these costs while still investing in innovation is one of the most intractable political questions of our day. Unfortunately, far too often in trying to strike this balance, governments lean too much toward short-term savings and succumb to the temptation to control expenditures through direct price controls, cuts in reimbursement rates, delayed market access, and disregarding intellectual property rights.

The question posed here is: Does IP harm or help developing countries? I believe the answer is emphatically that it does help developing countries. If IP regimes were abolished today, drug development as we know it would cease and all of us, both in developed and undeveloped countries, would be left only with the drugs that we currently have on market. Clearly, nobody would want this, especially as there are still many existing and emerging diseases and conditions for which we would like treatments and cures. Many in the developing world do not have sufficient access to the fruits of innovation. However, this is not a problem caused by intellectual property rights. Without those rights and protections, there would be far fewer medicines to distribute in the first place. The problem is simply a matter of pricing.

Developed countries must respect IP. As I have said, drug research and development is very expensive. Because drug development is funded by consumers in developed countries, it is problematic when developed countries shirk their share of the cost. But what about people in developing countries who cannot afford the high price of supporting innovation? It is reasonable for market prices to vary in different conditions, and the United States has supported initiatives to create differential pricing structures with the DOHA Declaration on the

agreement of Trade-Related aspects of Intellectual Property rights, known as TRIPS. The TRIPS agreement, originally negotiated in 1994, sets down international minimum standards for forms of intellectual property regulation. The DOHA Declaration, negotiated in 2001, is an important political statement that clarifies certain flexibilities that already existed in the TRIPS Agreement. The DOHA Declaration itself recognizes the importance of intellectual property rights for the development of new medicines.

Among the causes primarily responsible for the treatment access problems in the developing world are a shortage of qualified nurses and physicians, underdeveloped healthcare systems, tariffs, and poor distribution and transport. The DOHA Declaration affirms that the TRIPS accord does not, and should not prevent members from taking measures to protect public health. It refers to several aspects of TRIPS, including the right to grant compulsory licenses and the freedom to determine the grounds upon which licenses are granted; the right to determine what constitutes a national emergency and the circumstances of extreme emergency under which compulsory licenses in a developing country can be used; and the freedom to establish the regime of exhaustion of intellectual property rights. Also, it provides a procedure by which WTO members can issue a compulsory license for the purpose of exporting pharmaceuticals to countries that otherwise meet the requirements for compulsory license under TRIPS but have insufficient manufacturing capacities to make effective use of the compulsory licensing provisions under TRIPS.

The fundament point beneath all of this is that countries benefiting from the DOHA Declaration cannot then permit or support the export of these humanitarian drugs to countries that could otherwise afford to pay for them—countries that should be shouldering more of a burden in stimulating innovation. Also, I think it is very important to remember that many pharmaceutical companies do not even register their patents and many countries in the developing world recognize the importance of access to their products there. In addition, the marginal cost of production of many pharmaceuticals is very low, so differential pricing regimes, if they can be enforced, can be highly effective in ensuring an effective return on innovation and access to

these products in the developing world with fewer resources. Another solution of course would be for developed world countries to provide aid and charitable funding, such as we do, through PEPFAR the Global AIDS Fund in order to purchase drugs consistent with the intellectual property regimes.

In sum, I don't think the question is a binary choice between how do we eat today and eat tomorrow. There is a way to thread the needle between the two polar ends of intellectual property and access. And a vigorous and profitable drug industry is not a problem to be solved but a goal to be encouraged for the health of all the world.

**JEROME H. REICHMAN:** Thank you very much for the opportunity to be here today. The topic is will intellectual property law help or hurt developing countries, in ten minutes, or less. You see the challenge. It's a very big topic. One has to ask which IP laws we are talking about, whose version of them is on the table, which countries are the focus of inquiry, what do we mean by "help or hurt," how do we measure the social benefits or and costs, to whom, and over what time frame? We might also nudge the organizers to ask whether ever-increasing intellectual property rights will help or hurt the developed countries in the long run, because plenty of reputable economists and legal scholars have serious doubts about how far we can push this envelope.

There's abundant evidence that IP as an institution can help every country. But it's also true that intellectual property laws are public goods; and like all public goods, they must be wisely managed [See *generally*, INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME (Keith E. Maskus & Jerome H. Reichman, eds., Cambridge U. Press 2005)]. The same copyright laws that can promote the music industry in Africa, a project with which I have been associated, can also make access to textbooks and scientific knowledge unaffordable for most students in Africa, unless they're managed properly. When the United States was a developing country, we didn't protect foreign authors, and we didn't participate in international copyright conventions. Things are much more difficult now. If we look at industrial property, we can surely say that trade secret laws, unfair competition laws, trademark laws, and the like, benefit every country, because you can't

innovate without them. Keith Maskus has shown that even patent laws can help developing countries just by enabling them to import up-to-date, high-tech products that would not otherwise be available; not to mention licensing and the possibilities of foreign direct investment.

At the same time, intellectual property rights can hurt if the foreign sellers impose terms that undermine the ability of entrepreneurs in developing countries to enter and compete in the global marketplace. These countries also need room to reverse-engineer unpatentable know-how, to add value by adapting foreign goods to local conditions. In doing so, they have to blaze new trails, because historically no poor country—no country that is developed at present—ever had to formulate their development strategies in the presence of the high international intellectual property standards we have today. That doesn't necessarily mean they're bad, but it means they're very challenging.

From a broader perspective, the economist Keith Maskus and I recently published our view that what the TRIPS agreement has actually given birth to is an incipient transnational system of innovation, which could produce very powerful incentives to innovate for the benefit of all mankind [See KEITH E. MASKUS & JEROME H. REICHMAN, "The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods," *in* INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME]. Someone working in a garage in Bangladesh can now reach the world market for knowledge goods. The question is, what norms are best for that system as a whole? There is a serious governance problem at the international level, a tendency to promote international IP standards that lock in rents from existing innovation while making future innovation more difficult. There are pressures on the ability of states to provide essential public goods—public health, education, food security, environmental safety, etc.—because many of the inputs are covered by intellectual property rights. And there are even problems in fostering healthy free enterprise economies, which I'm sure everyone here is in favor of, against the imposition, the regulatory obligations, of these ever-expanding intellectual property standards.

In estimating the social cost and benefits of this

emerging transnational system of innovation, we have to differentiate among many groups of countries at different levels of development. The poorest of the poor, the thirty or more poorest countries, known as the Least-Developed Countries, (LDCs), don't have to shoulder these problems because they're exempt from these obligations until 2013. At the other extreme, middle-income countries such as India, China, and Brazil are struggling to maximize the benefits and minimize the costs of these intellectual property regimes. They have cultural industries and high-tech industries that are profiting. But they also have problems in their public health sector, and other sectors that are trying to catch up. So, they have a mix. Nevertheless, innovators in these countries have all begun to obtain significant numbers of patents abroad, which points in a positive direction.

But then, there are all the other developing countries at much lower levels of income; they have more serious problems. The different national and regional capabilities and endowments of the WTO Members limit their absorptive capacities and reduce the potential benefits of open markets for knowledge goods. There is, in short, a technology divide; and that divide is widened by the high rents that must now be paid to technology exporters and by the absence of any provisions in these international agreements that would confer differential and more favorable treatment on developing countries. This is the first time in history that we have negotiated a trade agreement without such differential or more favorable provisions.

All of these countries must accordingly compete in markets for knowledge goods on roughly the same normative terms and conditions that govern advanced industrialized countries. All of them have to struggle and cope with the enormous challenges and burdens (including financial burdens) that a universal set of relatively high IP norms thrusts upon them. Even those countries that are not engaged in the knowledge-good-producing tournament still have the costs and the problems of organizing and maintaining the defense of foreign intellectual property owners, with serious implications for their exchequer. In other words, even developing countries that opt out of the innovation system must engage with the social costs of intellectual property norms, both as defensive measures and because they have to continue to provide other essential public goods that

depend in part on access to knowledge. They have to master all of these legal flexibilities with varying degrees of success.

They're having a lot of problems, and we're trying to help them. But I think if they did a better job they would be able to do more of what you want. Of course, it would help if the developed countries would ease off on the pressures on developing countries for still higher levels of intellectual property protection, but that's another problem. When developing countries opt in to the production of knowledge goods for local consumption or export purposes, they encounter really big problems. They have to provide incentives for their own industries without discriminating against foreigners because we have a national treatment requirement. And then they are also under pressure, as you just heard, for political reasons, among others, to address their public health and education problems. Here, in short, even the economically dynamic developing countries must resolve tensions between calibrating TRIPS-compliant domestic norms to stimulate innovation and adjusting the same set of norms to provide access to knowledge and medicines on affordable terms and conditions. This is a really hard task.

More generally, the TRIPS agreement has obliged all developing countries to engage in this delicate balancing act between private and public goods. The international system does not offer any guidance to these countries in this regard. We have no trusted governance mechanism for balancing public and private interest in this emerging transnational system of innovation. Think about that for a moment. Here, in the United States, we are always talking about the balance between public and private interests; thrashing it out in committees, in hearings, in legislation. On the whole, I think we do a pretty good job of it. But they don't have any solid basis for doing this at the international level at all; and they have relatively primitive means of doing this balancing in their own countries. We lack proven theoretical premises and empirical evidence to determine which IP standards would best promote the diverse goals of this transnational system over time. We have generated few ideas and little discussion about how to maintain the supply of other global public goods under the supranational IP regime, and we have hardly begun to acknowledge the distributional problems involved.

Maskus and I expressed the view that we really don't need any more IPR standard-setting exercises for the moment. We've called for a moratorium. We think the developing countries need a breathing space to accommodate the social costs of the TRIPS agreement and posterior TRIPS-plus, and also TRIPS-minus, measures. They must particularly master the nuances of existing international standards of protection, including these built-in and subsequently added flexibilities, with a view to adapting this legal infrastructure to their own assets, capabilities, and needs. We need a timeout.

We also need more reliable information about how IPRs are helping developing countries, especially in certain fields and at certain levels of per capita GDP. We need to encourage them to embrace a pro-competitive ethos. They need to experiment with new intellectual property models, including those based on open-source solutions and the strategic use of liability rules; the latter option is beginning to get quite a bit of play because liability rules can cure market failures without impeding follow-on innovation, without creating barriers to entry, and without necessarily creating blocking effects. Developing countries need to formulate suitable competition laws, rules, and policies. They also need to be testing different approaches to stimulating and disseminating innovation in their own national and regional systems of innovation, which could give us valid experiments that might lead to new bottom-up proposals. For example, one of the things that we ought to be thinking about, in line with Secretary Azar's remarks, is how to coordinate global contributions to the cost of clinical trials; because that is a global public good, and while there shouldn't be any free riding in that area, we ought to think about treating clinical trials as a public good here at home [See Tracy R. Lewis, Jerome H. Reichman, and Anthony So, *The Case for Public Funding and Public Oversight of Clinical Trials*, *ECONOMISTS VOICE*, Jan. 2007, available at [www.bepress.com/eu](http://www.bepress.com/eu)].

We must particularly ensure that developing countries are connected to the worldwide flow of scientific and technical information, in what UNESCO has called "the drive for knowledge societies." We need better research exemptions in all intellectual property regimes. We need to ensure that government-funded and government-generated scientific research results are widely disseminated at

affordable cost. We need to encourage the developing countries to start working on variants of our Bayh-Dole Act—maybe even improvements on our Bayh-Dole Act—to start public-private partnerships between their research universities and the private sector.

Looking beyond innovation, we must also find ways to ensure that progress in stimulating the production of private knowledge goods does not undermine those responsible for supplying other public goods, such as public health, agriculture, the environment, education, and scientific research. In other words, we should be working to reverse the trend that makes the globalization of private knowledge goods increasingly at odds with the provision of global public goods, including knowledge as a public good. Instead, we should be taking steps to ensure that this emerging transnational system of innovation adequately fosters and supports the supply of both private and public goods, in an environment that remains responsive to basic human needs and fundamental human rights.

**ROBERT SHERWOOD:** I like to start a talk like this by reporting my observation, in probably 25 or so developing countries around the world, that in every country there are inventive, creative minds. And whether this natural resource is utilized to grow those economies or becomes a wasted asset is largely dependent on the local intellectual property system. One of my favorite stories comes from Nicaragua, hardly an advanced developing country. I was there for the World Bank, and after I'd completed an interview with one of the local intellectual property attorneys, he asked me to wait a minute and then reached in his desk drawer. He pulled out this strange-looking plastic thing that he called a melon saver, an oversized golf tee sort of thing, with supplemental legs. He explained that melons in the tropics grow on the ground; as they reach maturity, the microbes emerge from the soil and tend to induce rot and other pathogens in the melons. This melon saver is used to prop the melon off the ground as it reaches that precarious stage. When I got back to my hotel that evening, I told my fellow on the World Bank Mission about it. He had been involved in agriculture around the world for a long career, and said, "My goodness, I wish I had thought of that. That is a major jump forward for agriculture in a lot

of developing countries."

The moral of the story is that the farmer who came up with the invention understood patents just enough to apply for one. The patent law in Nicaragua was pretty primitive but good enough to handle that one. He also got a patent in the United States, and, on the strength of those two patents, was able to go forward into production. I haven't been back to Nicaragua. I don't know the sequel to the story in terms of how it's changed things. But I use the example to illustrate the fact that there are bright minds in every country.

In contrast, in Brazil, Petrobras, the national oil company, in the early '90s, was struggling with the nation's lack of oil reserves. They commissioned some professors at the Federal University of Rio de Janeiro to work on deep-ocean platform drilling technology. They were conscious of patents held by other oil companies, went to work and came up with some very excellent platform technology. As quickly as they could, they published their findings in academic journals, which of course voided the opportunity to seek patents. The result of that failure was that the Brazilian taxpayers who had paid for the research made a gift of this technology to Exxon, British Petroleum, and the other major oil companies of the world, for which I'm sure they were quite grateful.

I've spent a great deal of time in Brazil in the last 35 years. Many inventions have been made there, including important ones in the pharmaceutical area. Many were made by university researchers in federal universities. Knowing that Brazil's intellectual property system has been very weak, some of these inventors have flown to Brussels or London over the years to seek patents, then negotiated licenses there and banked their royalties abroad. Brazil's IP system was bypassed, and Brazil received no benefit from these inventions.

I'll also mention the interesting example of a German fellow who came to Brazil in the '30s. He made lenses for binoculars, telescopes, and the like, and he alone knew the secret of polishing the lenses at the finishing stage. He was afraid to teach this to anybody else because he was afraid that the trade secret would slip out of his company to competitors. That worked fine for a number of years, until the old fellow died. At that point, the company dissolved; since he was the only one who knew the technology.

In Ecuador, I happened to stumble upon a group of young fellows working with the export of cut flowers. They decided that baby's breath had the possibility of genetic improvement, and worked so that the number of petals was increased threefold—something florists very much sought. I happened to meet with these fellows the morning after they learned that the fence around this first crop of genetically improved flowers, way up in the Andes in a hidden valley, had been breached. About half of the new plants had been stolen. They knew, because of the lack of intellectual property protection in Ecuador at the time, that all of their work in improving baby's breath had been lost to competitors.

In Pakistan a few years ago, I asked to talk with the Chamber of Commerce in Islamabad. This was arranged and I met with a rather rough-looking group of men. I began my talk and the president interrupted me. "I know about intellectual property," he said. "My family has been making rugs for a long time, and our particular rugs are distinguished by a vivid blue dye. Only I and my oldest son know where to get the roots up in the mountains and how to process these to produce the vivid blue dye." He went on in a strong voice to say that everyone in this area knows that if they steal this technology he would have them killed. He had a very good understanding of trade secret protection. You use all necessary means under the circumstances to affect a protection.

I'm constantly struck by this example: the Oswaldo Cruz Foundation, a very prestigious and distinguished research institute in Brazil for over a hundred years, produced a yellow fever vaccine. They sought and obtained patents in a number of countries where yellow fever is a problem. This vaccine was quite a breakthrough to the world's medical community. They are manufacturing it in Brazil but exporting the finished product elsewhere. Brazil requires that intellectual property be protected within Brazil with the manufacturer locally. What's good for the goose is not good for the gander.

Now, to address the question the Federalist Society has posed for us this afternoon, I want to really stress the fact that an intellectual property system is highly discretionary. A tariff system is easy in the sense that as of some fixed date the tariff is to be reduced from, say 15 to 10 percent. If you say that as of a certain date the intellectual property system is

to work, and those responsible for administering the intellectual property system in that country still do not understand what it is or believe in it, it isn't going to work, precisely because it is so highly discretionary. This means that the Patent and Trademark Office needs to work, and work well. The judicial system needs to understand what's involved. And in most of these countries, they don't.

And so, while our discussion here in this country is very sophisticated and intricate, the conditions in most of the developing countries are still very crude. Beyond this, an understanding of the many ways in which robust intellectual property protection—(and I want to stress that this needs to be well above the level of the TRIPS Agreement)—stands to release a great deal of energy in those countries is not yet sufficiently appreciated.

Carlos Primo Braga, a Brazilian economist at the World Bank was fond of saying that intellectual property is like sex. You can talk about it, but until you've tried it you really don't know what's going on. To that I would add that an intellectual property system, without the support of a well-functioning judicial system, results not in sex, but in a poor kind of fantasy. The judicial system is where the focus needs to be in a lot of developing countries, in order to turn the promise of robust intellectual property into something that has strong positive effects for growing those economies.

**GRAEME DINWOODIE:** With regard to the question with which the panel was presented, yes, IP can help developing countries. But, as suggested by the remarks by each of the previous speakers, the more appropriate question is "what are the conditions that need to exist in order for it to help developing countries?" That inquiry involves at least two separate but related sets of questions. First, we need to consider what infrastructure must exist in any particular developing country for IP protection to be a net positive. The infrastructure in different developing countries can vary widely. But, second, we need to consider what form the international intellectual property system must take to facilitate a positive answer to the first question, because the international system is one of the main drivers of domestic protection. There is often very little domestic pressure or impulse to create effective forms of protection. We have to think about the role of the international system in shaping domestic conditions.

As an initial matter, I agree with the previous three speakers that stronger intellectual property protection (or effective intellectual property protection at certain levels) is going to facilitate the import of goods into developing countries and indeed encourage foreign investment in those countries. That's especially true if there is effective enforcement, which I think explains in many ways the focus on enforcement one sees in a lot of the discussions in the TRIPS Council. But simply having some level of intellectual property protection will not of itself stimulate vast, new local creativity and innovation. It will most clearly protect that which already exists. As Bob has highlighted in his remarks, there are plenty of developing country inventors or creators with innovative ideas who can benefit from intellectual property protection. But the short-term benefit from a country simply enacting IP protection is going to be greater for current intellectual property owners who obtain a new stable market from which to obtain returns. The full benefits of intellectual property rights for developing countries are really only going to be realized when the local industries also become competitive enough to take advantage of the rights that the system will afford them.

Getting to that situation in fact has substantial benefits for the developed world. It allows for local buy-in to the concept and importance of intellectual property, and an appreciation of the ability to maximize and generate wealth through innovation. This buy-in is particularly important in those industries where, to some extent, extracting the value of intellectual property rights depends on some level of voluntary compliance. We see a variant of that problem in the United States, for example, with respect to downloaded music. If you don't get the buy-in on the cultural level, it becomes very hard through legal rights simply to ensure enforcement.

So, to make that happen, to get the buy-in, what do we need? Well, I think to some extent the TRIPS Agreement already contains some of the tools. For example, the TRIPS Agreement recognizes the importance not only of strong intellectual property rights but also of technology transfer to the developing countries. We can take the contemporary trade philosophy of comparative advantage a little bit too far. It's easy to understand in a non-IP context the idea that each country focus its efforts and talents on areas where it has superior abilities

to produce a particular product. In comparative terms, it doesn't make much sense to try and grow bananas in Scotland, which is cold but has substantial reserves of oil, or to spend money looking for oil in the Caribbean, which has a greater ability to export bananas but less oil. Through free trade, we should enable the export of bananas from the Caribbean and oil from Scotland. But that argument of comparative advantage doesn't play with the same moral force in intellectual property. It's harder to argue, "Why don't you keep providing cheap labor and we'll keep extracting super-rents through the provision of information-rich technology."

So technology transfer is very important if developing countries are to be helped by IP protection. But so is the capacity and infrastructure within the countries to which the technology is transferred to absorb that technology. Countries vary very widely in their capacity to absorb technology, for reasons that include the state of the education system, basic national infrastructure, the existence of particular skill sets, the availability of health care, etc. These are issues on which intellectual property requires the help of policymaking initiatives in other areas. So, to make intellectual property rights work in a developing country we need to get the local industries to buy in. We need, therefore, to make them competitive enough to want to take advantage of intellectual property rights. And that involves more than just core intellectual property policy.

Moreover, it may be the case that in the initial stages of this shift there is a need to offer developing countries some latitude regarding how they grow the industrial base from which they can obtain and benefit from IP rights. The publishing industry in the United States took advantage of such latitude with respect to its exploitation of pirated works from Britain when the US publishing industry was in its infancy. The likely eventual success of India in the pharmaceutical field, under its new patent regime, will to some extent be dependent upon the fact that India already has a generic drug industry that has come about by close to nonexistent, patent rights.

This last observation points us to two further issues that I want to identify as particularly important. The first is the speed of implementation; the second is the need to recognize that not all developing countries should be treated alike in thinking through the role of intellectual property

law. Again, the question of the speed with which developing countries must come into compliance with international standards is something that the TRIPS Agreement itself recognized through the inclusion of transitional provisions and grace periods. The conclusion of the TRIPS Agreement is still relatively recent. It has only been 13 years. There are some least developed countries that don't require to implement all provisions of the TRIPS Agreement until 2013. As Jerry said, we need to give countries time to ensure that they're able to comply with international standards.

There's also a real danger of elevating a norm to the status of an international standard too quickly. For example, look at Article 31 of TRIPS and the compulsory licensing mechanisms that the Agreement contemplated in 1994. The assumption in the conditions set out in Article 31 (though probably not all that explicit in the discussion from the early 1990s) was that compulsory licensing would be an adequate safety valve against overbroad patent rights because there was some degree of manufacturing capacity in countries that needed to impose a compulsory license. I think the experience of the 1990s showed us that was not the case, causing problems in the provision of drugs in Africa such that we had to have the DOHA declaration that Alex referenced. But securing the Doha Declaration took time. International obligations, when entrenched, are very, very difficult to change.

The old way the international intellectual property system took care of that danger was by ensuring that there were plenty of spots for flexibility in the implementation of international norms. It also allowed some degree of latitude in enforcement. So, for example, the United States could join the Berne Convention and adopt a relatively generous interpretation of its moral rights obligations under Article Six. Now to be sure, TRIPS was intended in some ways to shore up enforcement gaps and in fact consciously take away some of the latitude available. But TRIPS took a different position on the flexibility question. For example, Article One. One clearly recognizes a sort of international federalism, or member state autonomy. Member States of the WTO are given the ability to implement the general principles of the various agreements in accordance with the legal culture that persists in their particular country. I don't think we should lose sight of that

flexibility. There is recognition, even within the current system, of the fact that respect for national sovereignty is an efficient way of implementing more general international norms.

This provision also speaks to the need to recognize that not all developing countries should be treated alike. But let me conclude by adding one last point on the importance of treating different things differently. A lot of the debate about the role of intellectual property law in developing countries, particularly in the controversial areas, is really about patents. But it's important to recognize that there are other forms of intellectual property. In particular, the arguments for trademark protection and protection against counterfeiting are very strong as a short-term approach that developing countries should have to take because the social welfare and public health concerns implicated by counterfeits are such that there is little reason not to comply very quickly with the general trademark obligations. We need to understand and treat some of the intellectual property rights differently from others.

The short answer is, yes, intellectual property rights can help developing countries, but the ability of intellectual property rights to do that is heavily dependent upon the speed with which we require implementation and the latitude and flexibility that we give developing countries to implement the obligations in ways that are tailored to their particular circumstances.





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BARBARA K. OLSON MEMORIAL LECTURE:  
VICE PRESIDENT OF THE UNITED STATES DICK CHENEY

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**INTRODUCTION:** Good evening. I'm Eugene Meyer, President of the Federalist Society. And welcome to the sixth annual Barbara Olson Lecture. Despite its brief history, this has been quite an illustrious lecture series. It started with an unforgettable talk by Ted Olson on his late wife and what it means to be an American. We are honored to have here tonight Ted and Lady Olsen. Last year, Judge Randolph delivered a truly memorable lecture on Judge Friendly's never-published draft opinion on abortion two years before *Roe*. In between were lectures by Judge Kenneth Starr, Judge Bork, and Justice Scalia. All those who preceded the Vice President to this platform had known Barbara well, personally. The Vice President did not know her as well, yet it would be hard to find a more appropriate person to deliver the Barbara Olson lecture.

Why? This lecture series began because of the horrific events that have dominated our guest speaker's thoughts and efforts ever since. While leadership is always an enormous challenge for the world's greatest power, there is no question that the attack of September 11, 2001 left our country's leaders with a thankless task. The next attack will be blamed on you. Whatever procedures you adopt to increase security will likely be denounced as too strict and going much too far if there is no such attack. What do we want of leaders in such a situation? The usual. Wisdom and judgment and some luck and courage.

Vice President Cheney has played a critical role in our leadership during this period. After many years in public service, as chief of staff under President Ford, Congressman from Wyoming for over a decade, and secretary of defense under the first President Bush, he knew the task he was undertaking. He has addressed his duties with a seriousness appropriate to that task. He's been direct and forceful in advocating and defending the position of this Administration that terrorism must be faced and debated, that it will be a long battle, and that we cannot hide from it. He and the President have been equally forthright and direct in saying that Iraq policy is a vital component of long-term success.

It is interesting to reflect on J.R.R. Tolkien's line, spoken through Gandolf from "Even more perilous times" in *The Lord of the Rings*. "It is not our part here

to take thought only for a season or for a few lives of men or for a passing age of the world. We should seek a final end to this menace, even if we don't hope to make one." I think this Administration has in mind a shorter timeframe than Gandolf, but that passage captures some of the spirit of their thoughts.

I do not know how that policy will turn out or how history will judge them, except to say that history favors success. Nor do I know how the woman this series is named after would react to their policy, although I suspect she would favor it. I do know that she would admire enormously the way this Administration and Vice President Cheney have had the courage to do what they believe is in the long-term interest of our country, without regard to whether it's good or bad politics.

In closing, let us return to the initial talk by Ted Olson for just one second. He said, "I know, and she, Barbara, knows that her government and the people of America will win this war, however long it takes, whatever we have to do. We will never, ever forget or flinch. We will prevail for Barbara and for all the other Americans we lost on September 11, and for the American spirit for which they stood and their lives embodied. And most of all, we will defeat these terrorists because Barbara and those other Americans casuality of September 11th and our forebears and our children would never forgive us if we did not." I believe it is in this spirit that this Administration and Vice President Cheney pursued the war on terror in their policy in Iraq. To offer the 2006 Barbara Olson Memorial Lecture, it is my honor to introduce the Vice President of the United States, the Honorable Richard Cheney.

**DICK CHENEY:** Thank you. Thank you very much. Well, a warm welcome like that is almost enough to make a guy want to run for office again. Almost. Let me thank the board, the officers, and the staff of the Federalist Society for the invitation to be here this afternoon. I especially want to thank Gene Meyer for his kind introduction and for the outstanding leadership he provides the Federalist Society. I've spoken at a number of your events over the years, and I appreciate the contribution that you've made to the debate on vital questions of policy.

In many law schools the Federalist Society is the primary, if not the only, forum for authentic dialogue carried out in the spirit of civility and good will. Your goal is for law schools to be places of active, well-reasoned debate instead of echo chambers of accepted opinion. You have the respect of people across the ideological spectrum for the simple reason that you've earned it, and I congratulate you for nearly a quarter-century of leadership and accomplishment. No modern organization has been so effective in promoting respect for the separation of powers, federalism, and the topic of this conference, limited government. The Federalist Society stands firm, as well, for the principle that courts exist to exercise not the will of man but the judgment of law. Federal judges are appointed for life and serve outside the democratic process; therefore, they have a duty to pursue no agenda or platform and to leave to politics those who run for office and answer to the people. As a great American put it, "Judges are to be servants of the law, not the other way around." Those are the words of Chief Justice John Roberts, one of the many superb nominees chosen by President George W. Bush.

One of the President's most recent nominees happens to be a founding member of this organization, and we look forward to the confirmation of Peter Kaiser as a judge on the D.C. Circuit. Throughout our time in office, the President has selected judges who understand their role in the constitutional system, and I assure you that nothing that has happened in the last two weeks will change his commitment to nominating first-rate talent like John Roberts and Sam Alito.

It's a privilege today to be in the company of my friend Ted Olson. Ted, of course, is a lawyer of high scholarship and persuasiveness. To this day, I'm still impressed with his effective performance in a case called *Bush v. Gore*. Ted, of course, has had a brilliant career both in the public sector and private practice. He did a tremendous job for the nation as Solicitor General of the United States. But there's so much more to be said about the man. I don't know of a single public servant who has ever faced heavier professional demands or greater personal sorrow, all at the same time. That's the burden that fell on Ted, and we admire so very much his example of dignity and character. I hope those of you who don't know Ted will have the chance to shake his hand during

this conference because he's the kind of person that every lawyer should hope to be.

I'm happy to relate, also, that Ted is a newly married man, so I want to congratulate him and Lady on their wedding last month.

For many years, one of the most familiar faces at Federalist Society gatherings with Ted's late wife Barbara. Going back to her days as a law student at Cardozo, and throughout her fine career as a practicing attorney, prosecutor and author, Barbara always made time to help this organization. It's most fitting that a lecture series should bear her name, and I consider it an honor to participate. Lynn and I knew Barbara as many of you did. When we think of Barbara, we see her smiling, speaking her mind, sharing great warmth and humor, and being surrounded by loving friends and family. This beautiful and kind-hearted woman was taken away in a moment of cruelty that shocked our nation and moves us still. Those who knew Barbara miss her. We're grateful for her good life, and the United States of America honors her memory.

The passing of another five years has not managed to dim the outrage of September 11, 2001, and as our nation wages the War on Terror, we'll never lack for inspiration when we think of the innocent men, women, and children who were the first to fall in this war, nor will those of us in positions of responsibility lose sight of the urgent, ongoing duty to find and hold to account the people who wanted to kill innocent Americans.

It's natural to feel fortunate that our country has come this far without another attack like that of 9/11. But it's really not just luck, and it's not because the terrorists have not been trying to hit us. The relative safety of the last five years is the result of focused, determined, necessary efforts to track down these enemies, to understand their ambitions, to stop them before they strike again, and to deny them safe havens and access to even deadlier weapons.

When you're dealing with hidden adversaries, you have to spend a lot of time speculating on what their next movements or next targets might be. But when it comes to their beliefs and to their long term objectives, we have no need to speculate. They have laid it out in detail for the entire world to see. The terrorists have adopted the pretense of an aggrieved party, claiming to represent the powerless against modern imperialists. The fact is, however, they're at

war with every development of classical liberalism in the past 12 centuries. They serve an ideology that rejects tolerance and denies freedom of conscience. They would condemn women to servitude, gays to death, and minority religions to persecution. An ideology so backward, so violent, so hateful, can take hold only by force or intimidation, and so those who refuse to bow to the tyrants face brutalization or murder, and no group or person is exempt.

And it is they, the terrorists, who have ambitions of empire. Their goal in the broader Middle East is to seize control of the country so they have a base from which to launch attacks against governments that refuse to meet their demands. Their ultimate aim--again, one that they boldly proclaim--is to establish a caliphate covering a region from Spain across North Africa through the Middle East and South Asia all the way around to Indonesia. They have proclaimed, as well, the goal of arming themselves with chemical, biological, or nuclear weapons to destroy Israel, to intimidate all western countries, and to cause mass death in the United States. One of the terrorists believed to plan the 9/11 attacks said he hoped the event would signal the beginning of the end of America. They hate us, they hate our country, they hate the liberties for which we stand, and they hit us first. And we will not sit back and wait to be hit again.

Since the morning of 9/11, we have assumed correctly that more strikes would be attempted against us. So, we've made a tremendous number of changes to harden the target and to better prepare the nation to face this kind of emergency. We established the Department of Homeland Security to give us a comprehensive approach instead of a patchwork effort among diffuse and duplicative agencies. We created the position of the Director of National Intelligence to better coordinate the government's sixteen different intelligence components. We've reformed the FBI to make fighting terrorism its primary mission. We've made unprecedented improvements in port security and major public health investments to ensure early warning and rapid response to any attack with biological agencies agents.

To guard against the proliferation of weapons of mass destruction, we've created a domestic nuclear detection office and worked with other governments in the most intensive counter-proliferation effort the world has ever known. And we've already seen

results. Some years ago, the AQCON network was operating internationally to dispense weapons parts, uranium feedstocks, centrifuges for enrichment, weapons designs, and nuclear technology. We tracked and exposed the activities of that network, and it has now been shut down.

These years have also been a period of reform at the Pentagon. We have a new Northern Command to guard the American people, a new Strategic Command to counter long-range strikes, and a Special Operations Command redesigned to wage a new kind of war. At the same time, we've kept at the work of military transformation. We began, the day we arrived here, the retooling of the entire military, to make it faster, more agile, and more lethal in action. This vital work has been carried out under the steady hand of one of the great public servants of the age, Secretary Donald Rumsfeld.

Shortly after 9/11, by an overwhelming bipartisan vote, Congress also passed the PATRIOT Act. This law removed an unnecessary wall between law enforcement and intelligence personnel. They can now talk with one another, share information that could well prevent future attacks inside the country. The PATRIOT Act also gives federal agents investigating terrorism the same tools they use in fighting street crime and fraud. The PATRIOT Act was written and it is enforced with careful regard for the civil liberties of the American people.

The President signed a renewal of the Act that contains no fewer than thirty additional protections of civil liberties. He created, by executive order, the President's Board on Safeguarding American Civil Liberties, and working with Congress, he has created the Privacy and Civil Liberties Oversight Board, of which Ted Olson is now a member. The President has made very clear that as we fight for our principles, our first responsibility is to live by them. And no country in the world takes civil liberties more seriously than the United States of America.

We take with equal seriousness the requirements of justice and due process, and even before 9/11, federal agents and prosecutors were acting aggressively to hold terrorists to account. The record buildup over more than a decade is exemplary. Superb public servants have marshaled the evidence to convict the men who bombed the World Trade Center in 1993 and the shoe bomber, Richard Reid, and the 9/11 co-conspirator Moussaoui, and groups of terror suspects

from Buffalo, New York, and all the way to Portland, Oregon. The work goes on. From the FBI to the U.S. Attorney's Office to the military commissions created by Congress, the many skilled investigators and attorneys engaged in these efforts, together with Homeland Security and intelligence personnel, have made this country safer. We're grateful to each and every one of them.

On the morning of September 11, we saw that the terrorists need to get only one break, need to be right only once, to carry out an attack. We have to be right every time if we're going to stop them. To adopt a purely defensive posture, to simply brace for attacks and react to them, is to play against lengthening odds and to leave the nation permanently vulnerable. To protect America, we must understand that the fight against terror is not primarily a law enforcement operation. It is a war. Wars have winners and they have losers, and this is a war the United States is determined to win.

We'll win this war by staying on the offensive, carrying the fight to the enemy, and going after them one by one if necessary, and going after those who could equip them with even more dangerous technologies. In these five years, we've broken up terror cells, tracked down terrorist operatives, and put heavy pressure on their ability to organize and to plan attacks. We have applied the Bush doctrine that any person or government supporting, protecting, or harboring terrorists is complicit in the murder of the innocent and will be held to account. And we have acted vigorously to keep the deadliest weapons out of the hands of killers. In the post-9/11 world, we have to confront such dangers before they fully materialize. President Bush has put it very well: Terrorists and terrorist states do not reveal these threats with fair notice, in formal declarations, and responding to such enemies only after they have struck us first is not self-defense; it's suicide.

The United States has also carried out our commitment to deny the terrorists control of any nation. That's why we continue to fight Taliban remnants and Al Qaeda forces in Afghanistan, and that's why we're working with President Musharraf to oppose and isolate the terrorist element in Pakistan, and that's why we are fighting the Saddam remnants and terrorists in Iraq. September 11 taught us that threats can gather across oceans and continents and find us here at home. The notion that we can turn

our backs on what happens in places like Afghanistan, Iraq, or any other possible state haven for terrorists is an option that we can never again indulge after 9/11.

I know some have suggested that by liberating Iraq from Saddam Hussein we simply stirred up a hornet's nest. They overlook a fundamental fact. We were not in Iraq on September 11, 2001, and the terrorists hit us anyway. The fact is that they regard the entire world as a battlefield. That's why Al Qaeda has operatives in Iraq right now. They're making a stand in that country because they believe they can frighten and intimidate America into a policy of retreat.

Some in our country may believe in good faith that retreating from Iraq would make America safer. Recent experience teaches the opposite lesson. Time and time again, over the last generation, terrorists have targeted nations whose behavior they believe they can change through violence. To get out before the job is done would convince the terrorists once again that we free nations will change our policies, forsake our friends, and abandon our interests whenever we are confronted with violence and blackmail. They would simply draw up another set of demands and instruct Americans to act as they direct or face further acts of murder.

Retreat would also send a message to everyone in that part of the world who trusted us, to the millions of Iraqis and Afghans who have voted in free elections despite threats from car bombers and assassins, to the hundreds of thousands who have signed on for the security forces, and to leaders like Musharraf and Karzai, who risk their lives every day just by going to work. They know what is at stake, and so do we. Defeating the terrorists in Iraq is essential to overcoming the advance of extremism in the broader Middle East. As we help Iraqi's Unity Government to defeat common enemies, we build the peace and stability that will help make our own country more secure.

There's still tough work ahead, and as the enemy switches tactics, we will do the same. As General Pace has put it, from the military standpoint, every day is reassessment day. We will be flexible. We'll do all we can to adapt to conditions on the ground. We'll make every change needed to do the job. The key is to get Iraqis into the fight, and we'll continue training local forces so they can take the lead in defending

their own country. America is going to complete our mission. We're going to get it done right, and then we'll bring our troops home with victory.

As we persevere in the central front on the war on terror, Americans need to know that our government is bringing the same focus to every other front in the war, and there is, of course, a special urgency to our efforts to figure out the intentions of the enemy. We live in a free and open society, and the terrorists want to use those very qualities against us. So we must act in dead earnest to learn who they are and what they are doing and stop them before they can act.

To this end, in the days following 9/11 the President authorized the National Security Agency to intercept a certain category of terrorist-linked international communications. On occasion, you would hear this called a domestic surveillance program. That is more than a misnomer; it's a flat-out falsehood. We are talking about international communications, one end of which we have reason to believe is related to Al Qaeda and to terrorist networks. And in a post-9/11 world, it's hard to think of any category of information that could be more important to the safety of the United States. The activities conducted under this authorization have, without any doubt, helped to detect and prevent terrorist attacks against Americans and saved American lives.

I note, as well, that leaders of Congress from both parties have been briefed more than a dozen times on the President's authorization and on activities conducted under it. I have personally presided over those briefings. In addition, the entire program undergoes a thorough review approximately every forty-five days. After each review, the President personally has to determine whether to reauthorize the program, and he has done so more than thirty times since September 11. He's indicated his intent to continue doing so as long as our nation faces a threat from Al Qaeda and related organizations.

Yet none of these considerations was persuasive to a federal district court in the state of Michigan, which ruled three months ago that the NSA program violated the Constitution and the Foreign Intelligence Surveillance Act. The court found, among other factors, that warrantless surveillance of terrorist-related communications would cause irreparable injury to the American Civil Liberties Union and

other players. As a remedy, the district court granted a permanent injunction—in other words, ordered the President of the United States—to seize all activities under the terrorist surveillance program. The Sixth Circuit Court of Appeals has stayed that injunction, and the government is now waging a forceful appeal on the merits.

President Bush and I have complete confidence that the district court's ruling will be reversed. We're confident because the terrorist surveillance program rests on firm legal ground. The joint authorization to use military force, passed by Congress after 9/11, provides more than enough latitude for these activities. Therefore, the warrant requirements of the FISA law do not apply to this wartime measure, and the program falls squarely within the constitutional powers of the president. Every appellate court to rule on this issue has recognized inherent presidential authority to conduct warrantless surveillance, to counter threats directly directed at the country from abroad.

The district court's opinion, which the *New York Times* called "careful and thoroughly grounded", did not distinguish any of those prior federal decisions, nor indeed did the district court even cite those decisions. The district court also held that the terrorist surveillance program violates the doctrine of separation of powers. We, of course, disagree and expect to prevail on that issue as well. But since we're on the subject of separation of powers, one conclusion is hard to escape; the one the Michigan District Court's decision is an indefensible act of judicial overreaching.

As law students and lawyers, of course, all of you understand that a given point of view isn't necessarily correct or even persuasive merely because it's been handed down by a judge. There's a reason these things are called opinions. But the Michigan decision is something altogether different, and it's very troubling. It is a court order tying the hands of the President of the United States in the conduct of a war, and this is a matter entirely outside the competence of the Judiciary.

I'm not saying that courts should have no say in matters that touch on international affairs. Some kinds of cases are inevitably going to have an impact on foreign policy. For instance, when the Supreme Court found Harry Truman had gone too far in seizing the steel mills, the decision had clear

implications for the Korean War effort. But the Court saw Truman's action as mainly legislative in nature, too loosely connected to the core functions of the Commander-in-Chief, and therefore beyond the exclusive authority of the President.

Yet the justice whose opinion in that case has become a standard for measuring executive authority, Justice Robert Jackson, pointed out in an earlier opinion the kind of situations that would counsel wide deference to the executive. Justice Jackson's words deserve quoting at length. "It would be intolerable," he wrote, "that courts without the relevant information should review, and perhaps nullify, actions of the Executive taken on information properly held secret. The very nature of executive decisions as to foreign policy is political, not judicial. They are decisions of a kind for which the judiciary has neither aptitude, facilities, nor responsibility, and have long been held to the long in the domain of political power, not subject to judicial intrusion or inquiry." If ever a situation for the kind of deference Justice Jackson envisioned, it would be the terrorist surveillance program.

We have here a highly classified measure to gain intelligence about an enemy that has already attacked us, with whom we are at war, and with whom the United States Armed Forces are in combat at this very hour. It is one thing to have an academic discussion about the best way to defeat an enemy that uses sophisticated technology and that very likely has combatants inside this country. It is quite another matter for a federal court to suddenly close off an entire avenue of defense for the United States.

If an additional reason is needed for courts to show exceeding caution in national security affairs, it is this: they are unaccountable for the consequences of getting it wrong. The security of the country and the strategies for its defense are the province of the American people themselves. They exercise that control at the ballot box, by voting us in or throwing us out. For courts to assert themselves into defense and security matters is to weaken the bond of accountability where it should be the strongest, in the area of national self-preservation.

All of this has been sorted out before, not in our own era but at the time of the Framers themselves. What was true in 1789 is equally true in 2006. The federal government has coordinate branches, but that these branches do not have coequal responsibilities.

The Executive, for example, has no business telling the Court how to find facts or dictating the result of a constitutional case, and the judicial branch has no business directing national security policy for this country.

When you're facing adversaries that operate in the shadows, that have no territory to defend, and that have no standing armies or navies that you can monitor, one small piece of data might very well make it possible to crack open a plot and save thousands of lives. The term that's used is "connecting the dots." It is hard, painstaking work, and in a time of asymmetric threats an awful lot depends on getting it right.

In the decade prior to 9/11, our country spent more than \$2 trillion on national security, yet we lost 3,000 Americans that morning at the hands of nineteen terrorists armed with box cutters and airplane tickets. We don't know for certain if better intelligence-gathering might have saved all those lives. We do know, however, that intelligence work is saving lives today. The ultimate threat here isn't nineteen men on airplanes; it's nineteen men in the middle of one of our cities with a nuclear weapon. As long as that danger is real, our duty and our objective could not be more clear. This nation must not, and will not, relent in tracking terrorist activity with every legitimate pool at our command.

Ladies and gentlemen, the national imperative that arrived five years ago will still be with us five years from today. This Administration, this Congress, and those who win the next set of elections will have to conduct the war on terror as their prime responsibility. It will go on until the threat is dealt with symmetrically, systematically and permanently. But this war, though lengthy, is not endless. We know that our cause is right and we know, as Ronald Reagan did, that no weapon in the arsenals of the world is so formidable as the will and moral courage of free men and women. It is a weapon our adversaries in today's world do not have. It is a weapon that we as Americans do have. Armed with that courage, confident in the ideals that gave life to America itself, we go forward to serve and to guard the greatest nation on earth.

Thank you.

SHOWCASE PANEL III:

ARE CONSTITUTIONAL CHANGES NECESSARY TO LIMIT GOVERNMENT?

Frank H. Easterbrook, William N. Eskridge, Jr., Daniel H. Lowenstein, Richard D. Parker; Moderator: David B. Sentelle

DEAN REUTER: Good morning, and welcome to the third day of the Federalist Society National Lawyers Convention. This is, I don't mind telling you since you're here, the single best day of the Convention. Now, I know what you're thinking; if you were here yesterday, I announced that yesterday. But I was only kidding then. And of course, when I said that yesterday, I had no idea how long the metal detector line would be to see the Vice President. So, this offers me an opportunity to issue an official Federalist Society apology for that inconvenience. We were very excited to have the Vice President as our guest at the Convention, but we were just as troubled and distressed by the complications as you. So, we are sorry for that. All that having been said, today is the best day of the convention, so I'm glad you're here.

We have two showcase panels today on limited government; the first, a panel on whether constitutional changes are needed to limit government. To lead our discussion, we've enlisted the help of Judge David Sentelle. I believe that he's so well known to this group that he truly needs no introduction. Most of you have clerked for him or argued cases before him or shared time and meals with him; so there isn't much that I can tell you in three or four minutes time that you don't already know about him. So, without using any more of this panel's time, please help me welcome Judge David Sentelle.

DAVID B. SENTELLE: Good morning. Not too much more than 200 years ago, our ancestors and forebears adopted a constitution and a bill of rights designed in large part to limit government. Fewer than a dozen and a half times since then has it been necessary in the public view to amend that constitution, and two of those canceled each other out. Nonetheless, we

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still have, perhaps, if not the most limited, certainly one of the most limited governments in the world and in history.

It would be foolish, however, to deny that that limited government has been churning against its limits for decades, really going back to the Civil War. Sometimes those limits have come back; sometimes they haven't. The question is now raised whether there we should amend the Constitution to limit government to what we see as the proper role and size. We have four distinguished panelists who are going to comment on that question.

Following Mr. Reuter, I'm not going to offer them introductions. There are bios at the end of the book. I can think of nothing sillier than standing here reading to you that which you could read for yourself. I would feel like a lawyer again if I were doing that. So, without further ado, coming to us from Yale University Law School will be Professor William Eskridge, who will then be followed in the order that I will announce as we go along.

WILLIAM N. ESKRIDGE, JR.: So, I start with the question: why is the national government so large? Or, perhaps, why did we have that long security line? They might be related questions. Well, there are three possible explanations. One reason might be that problems are big and getting bigger; problems of international terror, nuclear proliferation, a complex economy, threats to the environment, etc. If the problems are big and complex, that's probably going to call forth a bigger government. A second possible reason is that we the people want bigger government, perhaps for the first reason, and we're willing to accept long lines, etc., because we want government regulating more. A third possible reason, maybe in combination with the other two, is that we have big government because of dysfunction. In other words, we might have big government because of log-rolling and compromising in the Legislature, because of special interests, as in the Smoot-Hawley tariff and a number of other pieces of legislation, trading off with one another so that the overall size of government gets bigger and bigger as each group is paid off in its

own rent-seeking way. Another dysfunctional reason to consider is turf-grabbing by federal government agencies. That might be one reason why we have so many security lines. These are possible reasons for our big government, and some of them are alright, some lamentable.

Following the Framers of the 1789 Philadelphia Convention, the Society has asked us this question: Can we make structural or constitutional changes that will shrink the national government in appropriate ways, in ways that will not derogate what we the people want or our ability to address genuine problems, while also addressing issues of special interest logrolling and turf protection? Some of the items we been asked to address are the line-item veto, term limits, and the national initiative.

Now, these mechanisms have been tested, at least two of them, and we have data. I have some thoughts on the third one. I go in surprisingly different directions on the three. I'm most pessimistic, I think, about the line-item veto, which we've tried briefly at a federal level. It didn't produce a lot of shrinkage in government. At the state level, we have a lot of experience with line-item vetoes. An overwhelming majority of states have, and have had, line-item vetoes, and these have been studied relentlessly by political scientists using comparative data regression analyses and other sophisticated treatments to determine whether this variable contributes to the shrinkage of government. And the studies, on the whole, by political scientists of all political stripes, have found either no effect or a small effect at the state level.

There is I think virtually no persuasive evidence that the line-item veto reduces the size of government. The main effect the political scientists have found is that the line-item veto, which gives more power to the governor, energizes the governor's bargaining power, which might be used for bigger or smaller government. It benefits the constituencies of the governor in a way that is unpredictable as to its ultimate effect. So, at least based upon the studies and the unimpressive performance in the Clinton administration, I would not be optimistic on the line-item veto.

On term limits, we don't have a lot of political science data. We certainly don't have experience at the federal level, except voluntary term limitations. In my opinion, term limits are not likely to head off

the main dysfunctions I would be concerned about—(rent-seeking, logrolling on the part of special-interest groups and turf protection by agencies)—because, of course, the term limits don't apply to the agencies. Maybe it would be a good idea generally, but you don't need a constitutional amendment for that. You could do that by statute. Term-limiting your representatives will not address the agency problem. And I'm not sure that it solves the special-interest problem. Even recently elected representatives, such as the Democrats who've been elected in substantial numbers to the new Congress, are not going to waddle into Capitol Hill in January naïve lambs. They're going to waddle in stoked to the gills with special interest money and influence. Don't laugh, because the Republicans did the same in 1995. This cuts both ways. So, at least as a theoretical matter, I'm not all that optimistic even about term limits.

Now, as to the initiative or the referendum at the national level, here again we have a lot of experience at the municipal and the state level since the early part of the 20th century. Most academics, certainly in law school, are quite hostile to this proposal. But of course, most academics don't look at the evidence systematically. My colleague and former student at USC, John Matsusaka, however, has looked at the evidence much more systematically in his excellent book, *For the Many or the Few* (2004). We have a number of political science studies, but this is the best one I've read. What Matsusaka finds is that in states and municipalities, particularly states with the initiative, in the period from 1970 to about 2000 had substantially lower taxes, substantially lower spending, and substantially greater localization of government—(and this is controlling for a number of variables). Does it control for all variables? Of course not. It's very complicated, but it controls for a lot.

Matsusaka also found that the initiative in the early 20th century—(not the late but in the early 20th century, when you first had it)—actually helped increase the size of government because urban interests in the early 20th century were underrepresented in legislatures. They wanted more government. And so, the initiative actually fueled their desire for more and larger government. According to Matsusaka, as a theoretical matter, initiatives don't inherently produce government in the direction of less or more government; it produces government in the direction of electoral preferences. Now, that might be good



from the limited government perspective, if you think that the preferences of the electorate will remain in favor of limited government. I don't exactly know what the preferences are today or what they'll be tomorrow; so, it's quite possible.

Now, if you think that the national government is too big because of special interest log-rolls and turf-grabbing, and not because it represents popular preferences, then you might want to consider the national initiatives as your device for constitutional change. I don't think you'd ever get this through the constitutional amendment process, but that's another matter. I'm also not sure the national initiative would ultimately diminish the size of government at the national level. There might be some workability problems. Moreover, some political scientists, such as Harvard's Paul Peterson, argue that issues of redistribution—which are often rent-seeking issues—in a political system such as our, of Federalism, do naturally gravitate toward the national level and away from the local and state level where people can vote with their feet. If that's the case, if Peterson's hypothesis is correct, you might see the national initiative subjected to the same kind of rent-seeking and logrolling you've already seen.

Moreover, you might think—and this is interesting—that the U.S. Senate, which disproportionately represents the small-population states of the sagebrush West, might be a brake on big government, and that brake might actually be diminished with the national initiative, because the larger population states such as California would play a larger role. Ultimately, I'm somewhat pessimistic that structural constitutional change will necessarily limit the size of the federal government.

You might also consider—and this is going outside what the Society asked us to discuss—but you might also consider an individual rights kind of amendment. Depending on where you are coming from, you might want to redo the Fourth Amendment, the home of a privacy right that includes protections not only of the body but of the home. That might shrink government in some ways. Maybe more attractive to more of you would be to redo the Fifth Amendment. That's the Takings Clause, which is almost never enforced by the U.S. Supreme Court. You might redo the Fifth Amendment to regulate what we call regulatory takings, one way in which national, state and local governments often

grow at the expense of small businesses. Don't ask me to suggest the language for such amendments. Judge Sentelle, who's a learned jurist, can draft them. But whatever amendment you come up with, even if written by someone as learned and excellent as Judge Sentelle, you can bet your bottom dollar that you attorneys would litigate the hell out of it. Although litigation, particularly for a revised Fifth Amendment, actually might discourage aggressive government regulation in several arenas. Government would be scared off by the prospect of litigation, and not just by the actual constitutional language.

The problem with a revised Fifth Amendment, or even a revised Fourth Amendment, is that it might disable government from doing the things that we need the government to do—aside from whether it would actually stop the government from doing things that we think are dysfunctional.

Thank you.

**DANIEL H. LOWENSTEIN:** Thank you very much. I've only been living in California since 1968. I'm still a New York boy. I'm going to be even more skeptical about this general notion of attempting to limit government through constitutional change. In fact, we had a bit of a caucus over the telephone a week ago, and I'm afraid that's probably going to be a theme running through this panel. But I will limit myself primarily to the electoral proposals.

When I first got a letter asking me to be on this panel I was confused. I thought maybe they had either sent it to the wrong person or sent me the wrong panel, until I read the description and saw that they were talking about these devices. My primary field has been election law. But my guess is, the skepticism would go over to other devices too.

Just to tell you where I'm coming from, ultimately I think that we actually do live in a democracy, despite the skepticism a lot of people have about the political process. Ultimately, major matters are decided by the public. It's a debate of ideas. So, if you want to limit government, what you need to do is persuade the public that it's a good idea to limit government.

So, to begin, I'll talk about briefly about term limits, initiatives, and an extra item (redistricting), and why I'm skeptical about all three of them.

*Term limits.* We do have some experience with term limits in California. Other states do as well. Any

of you who think that term limits are likely to lead to a legislature more to your liking, I invite you to visit California. You can observe the California legislature. And if you go home with the same opinion, I will be deeply shocked. I believe that the California legislature is probably the most liberal legislature that we've ever had in this country. I don't know; I haven't looked at the Massachusetts legislature. Maybe they would give us some competition.

But you know, I think what term limits do is make legislatures less effective than they would be otherwise, whatever it is that they're trying to do by way of public policy. If legislators came to office with a little label on their forehead that said either "leadership" or "backbencher" and you could apply limits only to the backbenchers, I still wouldn't favor term limits.

I used to live in Sacramento. I knew something about what was going on in the Legislature. Now I rely more on secondhand accounts. But all the secondhand accounts I get from across the political spectrum tell me that the Legislature, especially the assembly which has been most affected by term limits, has just become a dysfunctional organization.

*Initiatives.* I haven't read John Matsusaka's book yet. But John and I think highly of him, and I have no doubt that his conclusions are well-founded. So let's take it as given that some experience with initiatives shows that there is a statistical tendency to reduce state budgets. There are still two problems with that, however. First of all, John is a social scientist. He's not a constitutional designer, and he doesn't purport to be. He's properly studying what has happened and perhaps extrapolating to what tends to happen under the current circumstances. But these are not laws of physics, and what has happened is not bound to continue under different political circumstances. So, even assuming his thesis is correct, I don't think you can project it into the indefinite future. Nor, if you're thinking about initiatives at the federal level, as Bill said and I agree, can you assume that the dynamics of it are going to be the same at the federal level as they are at the state level.

But there's another question, and that is, what do you mean by limiting government? Is it simply a matter of how much money the government spends? Let me just give you an example from California. We had Proposition 13. We also had a less well-known initiative shortly after that limiting spending by the

state government. Maybe those have a tendency to control spending to some extent in California. But this is leaving aside side-effects such as the shift of power from local government to state government, which may be good or bad, depending on your view. And there are other things besides spending money.

One major initiative passed in California not too many years after I moved there was Proposition 20, which created the State Coastal Commission, which was, I believe at the time, an enormous advance in land use regulation over an enormous area, the California coastline. Now, I'm wont argue for or against that law, but it seems to me that the California Coastal Commission, so far as public spending is concerned, is not a particularly major item. It's probably a very small item in the state budget. And is that limited government, when the initiative is used to extend regulation in that dramatic way? If the initiative can be used for that purpose and also has the effect to marginally decrease federal and state spending? Would you say that's a net? Would you say that's a limitation or an expansion of government?

I think everybody who studied the initiative will agree with this, if you look at it over time, the initiative does not belong to liberals. It does not belong to conservatives. It's been used by both sides quite effectively, and by all kinds of other groups that cut across the liberal-conservative divide. It should be considered on its own merits, but not as something that's going to benefit one side of the political spectrum or the other. We can say that, I think, based on experience.

Let me also just say word about redistricting, because I spent the 1980s defending the California redistricting plan, both in court and in public, against Republican charges that this was the greatest crime in the history of mankind. The *Wall Street Journal* editorial page certainly seemed to think so, and I think many Republicans at the time thought that redistricting change would be the key to Republican electoral success. Now, in the current decade, it's interesting because a different ox was gored by redistricting after the 2000 Census, and Democrats have been very upset by it. The main push for redistricting change has been from the Democrats, not in California but in other states, and many Republicans have been resisting it.

For example, Mike Carvin, whom some of you may have heard yesterday give a stirring address on his view of civil rights, has been defending Republican plans around the country with effectiveness against Democratic challenges. Here again, I think both groups are mistaken. I don't have time to go into all the details here; it's a very complicated subject. But redistricting has very little effect, I think, on the general thrust of partisan or policy politics in this country. It can be of great importance to individual politicians, which is why they care about it so much, but I think that the press and many politically active people greatly exaggerate the significance of it.

So, I just want to conclude with the point again that if you want limited government, the way to get it is not to rely on gimmicks. The way to get it is the old-fashioned way: to convince the public that is a good idea. My first flight out of Burbank on Wednesday, when I was coming over here, got canceled, so I had more time than I expected sitting in airports, and I spent at least a little bit of that profitably reading an article in what I think is the current issue of *National Review* by Ramesh Pannuru-- a rather astute political analyst, I think. He was writing about the crisis of conservatism at the present juncture -- although I think he wrote the piece before the election. Let me just read you a sentence or two from his conclusion. He says, "That crisis can be boiled down to two propositions. The first is that, as least as the American electorate is presently constituted, there is no imaginable political coalition in America capable of sustaining a majority that takes a reduction of the scope of the federal government as one of its central tasks." That's bad news for those of you who want limited government. "The second is that modern American conservatism is incapable of organizing itself without taking that as a central mission."

What he's saying is that the conservative movement can't stand without a wing pushing for limited government, but it cannot possibly succeed if that wing leads. So, I think you have a burden of persuasion, and a tricky but not unmanageable political task to make sure you get your share of what you want without seeking so much that you undermine the entire movement. Whether that's the right analysis or not, I'm convinced you're not going to win by gimmicks. You're going to have to do it by hard political work.

**RICHARD PARKER:** Thanks very much. I want to pick up where Dan left off but come back to Bill's three hypotheses about the steady expansion of government. If you believe that there is such a thing as historical logic—if you're a Marxist, in other words—(and you believe that the first or third explanation, or the two in combination, are the key, big problems and institutional dysfunction, then this is hopeless and there's nothing very much to talk about except at the margins.

The key, as Dan suggested, is what people actually want. That was Bill's second explanation. Now on Election Day, less than two weeks ago, a polling group called McLaughlin and Associates polled actual voters, and found these results: 59 percent favor smaller government with fewer services; 28 percent favor larger government with many services. Among people who voted Republican: 74 percent favor smaller government; 13 percent, larger government. Among Democrats—(and this is more surprising—(41 percent favor smaller government; and only four percent more, 45 percent, favor larger government. Among Independents —(of course, most important—(68 percent favor smaller government with fewer services; 20 percent, less than a third of the first number, favor larger government with many services. If this is in fact any kind of accurate representation of public opinion now and of the recent past, it poses a strategic question, and that is how to make use of that feeling, how to appeal to that body of opinion, and by what strategy to mobilize to produce actual change.

Now, of course the classic strategy would be to elect candidates or members of a political party committed to a particular approach to this matter: smaller government. That was tried, of course, most recently in the mid-1990s. I think we know at least what the most recent result has been. I don't have much hope on that score. Perhaps some of you do. It can always change. But, at least for the moment, I think it's best to be pessimistic on that front.

A second approach is to interpret the Constitution we have. People in the Federalist Society have been creative and assiduous in pushing this strategy. Talk of the "Constitution in exile" was hot for a while. The effort was to persuade judges to interpret the Constitution so as to impose stricter limits on government, and to select judges who could be subject to such persuasion. I guess my answer to

that approach at this point would be: Blackman, Stevens, O'Connor, Kennedy, and Souter. It's much like the 1994 electoral victory. It's too unreliable as a strategy. Moreover, for people who favor smaller government, whether they're Republicans, Democrats, or Independents, to rely on the courts would be to fall into the same trap that the feminists fell into when they relied on the courts to protect reproductive freedom. It wound up being a somewhat unreliable victory, and it certainly did harm to their movement.

So, how better to think about this problem? It seems to me that we might start with two concepts of what government is. What is it that the American people overwhelmingly want to limit? On one hand, you could define government in the terms of our pamphlet for this panel, in terms of its power and reach, the sum total of laws and regulations promulgated and enforced. On the other hand, one could think of the government "that the American people want to limit" not in terms of its power and reach but rather as the governing class, by which I mean not just the bureaucracy and the interest groups but more importantly the individuals who believe or who come to believe once in office that they know better than the American people, that they are entitled to rule the American people. I'm talking about individuals whose main characteristic is a fancy education but whose main psychological characteristic is a sort of narcissism and grandiosity that leads them to believe that detachment from public opinion is in principle a good thing, i.e., the governing class is the class that hates democracy. That, it seems to me, is the government that the American people want to limit, and if we can limit the governing class, we may wind up in the end limiting the power and reach of government. But it seems, to me in any event, that the first task is the more important one.

Now, how to go about that structural reform Dan and Bill have discussed? Redistricting, term limits, initiative and referendum all, it seems to me, are valuable as tactical strikes. I'm sure many of you know, there are powerful counterattacks underway now that have been underway for some time, meant to cut the guts out of initiative and referendum, out of term limits and redistricting reform. Those fights are always worth fighting, and I have great admiration for the people who have engaged in them. But I want to suggest something different.

The panel was asked whether constitutional changes might make a difference. I think it was Bill who responded, "Well, you put in some fancy new amendment limiting government, and Blackmun, Stevens, O'Connor, Kennedy, and Souter will interpret it as they please." I would like to reword the question just a little bit—(not constitutional changes, but constitutional change, for its own sake; that's the strategy I want to recommend. This would take us back to basics.

What's basic? Basic is popular sovereignty, and the Constitution is the embodiment of popular sovereignty both at the national and state level. Constitutional change *per se* is a muscle that has to be exercised to be maintained. But the muscle that we have allowed to atrophy at the national level for 35 years, we must continue to use at the state level and start using again at the national level.

Let me say a word more about this. Yesterday in the *New York Times* there was an op-ed piece by a couple of people who, for all I know, are here today, David Rivkin and Lee Casey, criticizing the rising number of constitutional amendments at the state level. I'll read you two sentences. They say, "To enshrine the definition of marriage in a state's constitution removes the issue from the give and take of normal political process. That process rarely produces an absolute victory for any side, but it also really results in absolute defeat. The defeated party can rally, regroup, and try again." This argument is based on a simple mistake, and that is, that at the state level, the process of constitutional amendment is a part of the ordinary political process. Sometimes the Legislature is involved; sometimes initiative kicks off a state constitutional amendment. Always, in 49 out of the 50 states, a vote of the people is required to amend the Constitution. Whenever a state constitution is amended, whether it's marriage or the Michigan Affirmative Action Amendment or the Arizona English as Official Language Amendment, what's most important, in my opinion, is not the substance of the amendment but the fact that the Constitution was amended. Popular sovereignty was reasserted. The governing class was given a swift kick.

I've been involved for 12 years in an effort to amend the U.S. Constitution. In the last 35 years in which there has been no amendment, one cause has maintained overwhelming support of the American people for half of that period. That's the

Flag Amendment, giving Congress the power again, as it used to have, to punish physical desecration of the flag. This is an amendment that would have expanded the power and reach of government a tiny bit, but in terms of my second concept of government, challenging the governing class, would have limited government in an important way. My experience talking with senators about this issue, over 12 years, is that their narcissism and arrogance is virtually boundless, and that some bounds need to be imposed. And there's nothing better than amending the Constitution.

**FRANK EASTERBROOK:** Well, like other members of the Federalist Society's libertarian wing, I would really like to see a government limited to genuine public goods like defense and basic education, a government that keeps its fingers off both the economy and personal life. Is constitutional change necessary to achieve this? Yes and no. Yes, because the current constitution is not one of a limited government. No, because not even with constitutional change can those forms of limits be created.

The national government grew for social and political reasons that can't be called back with words. People chose larger national government, and they chose it through constitutional amendment. Just think of a few of them. There's Section Five of the 14th Amendment, allowing the national government to regulate the states. There's universal suffrage. There's the 16th Amendment on the income tax. There was the direct election of senators. Those are the principal causes for the size of the national government. No one, not even Richard Epstein, proposes to limit suffrage to property holders today. So if you're not planning to repeal those constitutional amendments or change them, you have to live with that.

It seems necessary to me to go back and think about the sources of modern constitutional power at the federal level and ask what could be done about them, even with creative judicial interpretations? Let's start with the commerce power. The commerce power was limited at the outset because commerce was local in this nation. It was really very expensive to put your goods on a cart and ship them a thousand miles from one part of the country to another. Today, shipping is cheap; communication is cheap. The division of labor means that the whole economy depends on goods from other states and goods from

other nations. Thus, national power expands. The Constitution has stayed what it was; it is the world that has changed. Power has shifted to the national level; no doctrinal change can offset that.

Suppose tomorrow morning we woke up and learned that *Wickard v. Filburn* had been overruled, and that *E. C. Knight* had become the accepted doctrine again. You may remember *E. C. Knight*, a holding by Chief Justice Melville Fuller that the only thing Congress could regulate as commerce was something that physically crossed state borders. There was no power to regulate mere effects on commerce. Suppose *E. C. Knight* is reinstated. What happens? As a first approximation, nothing happens, because you have to remember how the commerce power was used in the period between *E. C. Knight* and *Wickard v. Filburn*.

What Congress did was start enacting statutes that said, unless people do X, the goods they make are not going to be allowed to cross state borders. That is, border closing statutes were enacted; hot cargo statutes. And so, the minimum wage was created. Child labor laws were created. Lotteries were abolished through the mechanism of closing the borders to goods that had not been made in conformity with those rules. That form of power could be reasserted. There's nothing that prevents it under the Constitution.

And oh, by the way, you have to remember that what went with *E. C. Knight* and is actually still with us is a deodand's version of commerce power. You remember *Lopez*? The Supreme Court held that Congress had no power to enact a rule saying that there can't be any guns within a thousand feet of schools. No commerce, the Supreme Court said. Remember what happened? Congress reenacted the statute to say that you cannot have within a thousand feet of the school any gun that has ever crossed the state border. The gun became a form of deodand. The commerce power clung to it as it moved around, and no one has even bothered challenging that law because it's so obviously effective under settled doctrine. Now, one might doubt that this was sensible, but that's what went with the old *E. C. Knight* version of thinking about the nature of the commerce power.

Then of course, there's the Necessary and Proper Clause. When the commerce power wasn't enough, there is this ancillary clause that says Congress can

make all laws necessary and proper to carry out the foregoing powers. Think way, way back to the Bank of the United States. Congress charters the bank. There's no banking power. But it may be related to the taxing and currency powers. That power could have been trimmed by saying that only really necessary laws are permissible. And who would decide what was necessary? Why, the judges, of course. And that was Maryland's argument in *McCulloch v. Maryland*, that the power had to be trimmed back by emphasizing the word "necessary." Chief Justice Marshall said, "But look, think of the consequences of that. That really would put the Judiciary in charge of the whole United States because the judges would define what's necessary, and now you've moved the legislative power to the judicial branch." The Federalist Society surely knows that well, rightly condemning judges who write into the Constitution their own views of wise social policy on the death penalty, on abortion, or on religion. Well, that's equally true of economic matters. The judicial role has to be modest. It has to allow the Legislature to set policy because otherwise you deliver the government into the hands of people you can't fire. And of course, the consequence of that, as we know from the upshot of *McCulloch*, is that you wind up with an uncomfortably large federal government.

Then of course, there's the taxing power. By abolishing the apportionment requirement, the 16th Amendment gave the federal government the power to control 100 percent of the economy. It can tax income. Or it can achieve its goals by tax expenditures; that is, by encouraging those things that aren't taxed. It can tax and then subsidize using the dollars that it has just collected from you, or it can grant the dollars back on condition. So that combination of powers are a logical consequence of the 16th Amendment, which gives the federal government control over almost anything it chooses to control. One just has to get over it. There is nothing one can do by creative interpretation of the existing Constitution.

So, what changes might work? Well, I think much has been said about the line-item veto. If you study what happens in the states that use it, the answer is not very much of interest. Here's one that didn't make the program, but used to be thought of a lot - a balanced budget constitutional amendment? Insist that the national government have a balanced

budget. You might remember why that went off the agenda, but it's always worth a reminder. Somebody came up with the proposition that if the government had to balance its budget, and therefore would spend less, why, what could it do? It could just enact more laws requiring people to spend on their own; that is, more regulations in lieu of a budget. And the off-budget regulations could be even more expensive than the on-budget regulations. So the balanced budget amendment vanished.

Term limits. Much has been said about that, but, well, not quite enough. I would point out that we have constitutional term limits in the United States for the President. The President of the United States cannot serve more than eight years or two terms. Technically, if you came in with less than two years left to go, you can serve up to 10, but there's a 10-year max limit on the president of the United States. I don't know anybody who says that has had the effect of diminishing executive power, *vis-à-vis* other sources of power in the national government. What term limits could do, of course, is make the government prone to the "yes, Minister" phenomenon. The short-termers are controlled by the permanent government. That is, the bureaucracy pats the short-termers on the head and says, "Yes, Minister," and then goes off and does exactly what it wants.

Now, as for the referendum and initiative, there is some evidence that the existence of these devices slightly reduces spending. But I do think it worthwhile, if only to earn my reputation as the arrogant minister of the perpetual federal government, to point out that Madison, the guy whose silhouette is everywhere, thought long and hard about this in the design of our government. Direct democracy was considered and found wanting at the time our Constitution was established precisely because it was so prone to dominance by majority faction. The majority factions would run roughshod over minority interests, and the design of a representative democracy was one in which there would be some agency space, in which the representatives, arrogant or not, could make decisions that might represent some aspect of the public interest—the whole public, not just the majority.

Now, of course, it turns out that form of government is highly prone to minority coalitions. The dairy farmers get together with the steel industry

and they come up with programs that are beneficial to them at the expense of the rest of us. But the alternative, the direct democracy alternative, is one in which decisions are prone to majority faction and are made by the most ignorant people you can imagine—(us. You may notice, when you hear your representatives in Washington, or even Cabinet officers, talk about public policy that they usually talk at a pretty shallow level. That's because, even if you're a full-time policymaker, you do nothing but serve in the Cabinet or serve in Congress. The choices that need to be made are so complex that you couldn't possibly keep up with all of them. Members of Congress are doomed to be shallow.

Now, move that decision to the level of the electorate, who are not full-time policymakers, but presumably doing whatever it is they do for a living. Is it worth their while to learn all this in detail? No, it's not. Because everybody knows that your chance of influencing the outcome of any election is much smaller than your chance of being run down by a truck on the way to the polling place, and therefore people are rationally ignorant. So, handing very complex choices to the rationally ignorant doesn't seem to me a very constructive solution.

What we do know, by the way, is that referenda have cut the expenditures of government by a small amount. Much of that cut has come in the area of education. Education is one of those public goods that even limited government people generally tend to favor because there are many benefits to outsiders. But you see local communities using referenda to cut back on the old school board budgets because the benefits of education are felt elsewhere in the country and the costs are paid locally. It may be rational behavior locally but it is bad all around.

So, bottom line: Should we be unhappy about this? I'm very much of Churchill's view, that government by democracy is the worst form of government ever invented, except for every other form. The United States has done pretty well. We have a small government relative to the EU and China. We can keep that up by promoting competition among governmental units and kinds of government, and we should be happy with what we have and not have pie-in-the-sky hopes for something better.

Thank you very much.



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## ADMINISTRATIVE LAW & REGULATION:

### AGENCY PREEMPTION: SPEAK SOFTLY, BUT CARRY A BIG STICK?

Ronald A. Cass, Thomas W. Merrill, Catherine M. Sharkey, Daniel E. Troy;

Moderator: Diarmuid F. O'Scannlain

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**DIARMUID F. O'SCANNLAIN:** It is a great pleasure for me to welcome you to our panel today, entitled "Agency Preemption: Speak Softly, but Carry a Big Stick?" As moderator, my task is twofold. First, I hope to frame the panel discussion by reference to preemption law generally, as well as recent events and developments in agency preemption. Secondly, I hope to convince you of the enormous importance of this otherwise arcane topic, because, while it may sound esoteric, it goes to the heart of the constitutional order, in my view. As one scholar explained, the extent to which a federal statute displaces state law affects both the substantive legal rules under which we live and the distribution of authority between the states and the federal government.

Speaking generally, there are three types of preemption: expressive preemption, applied field preemption, and implied conflict preemption. This panel will focus on implied conflict preemption, which courts find either where it is impossible for a private party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment and execution of the federal purposes and objectives of Congress. Given that we have a former official of the Food and Drug Administration on a panel today, I thought I would set the stage for today's panel debate by discussing a recent state court case dealing with agency preemption.

The case is *Levine v. Wyeth*, by decision of the Vermont Supreme Court. The facts of the case are simple, yet sympathetic. Levine brought a tort action alleging negligence and failure to warn against the drug company, and was awarded \$6.8 million in damages by a jury. Her claim was that the warning accompanying the drug was insufficient to alert her and her doctors to the dangers of intravenous injection. The primary question on appeal was whether Levine's failure to warn claims was preempted by the FDA's approval of the particular label that accompanied the drug.

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\* *Diarmuid F. O'Scannlain sits on the U.S. Court of Appeals in the Ninth Circuit.*

The Vermont Supreme Court essentially held that the FDA's approval of the drug label constituted a warning floor and not a ceiling. In other words, the court thought Wyeth could have, and should have, done more to warn Levine of the dangers associated with intravenous injection of Phenergan. In dissent, the Vermont Chief Justice argued that, by approving Phenergan for marketing and distribution, the FDA concluded that the drug, with its approved methods of administration label, was both safe and effective. He continued, "In finding defendant liable for failure to warn, a Vermont jury concluded that the same drug, with its FDA-approved methods of administration and as labeled, was unreasonably dangerous. These two conclusions are in direct conflict." In the Chief Justice's view, the FDA's approval of the warning label constituted both a floor and a ceiling, and Levine's claims were preempted.

Such competing views raise important legal questions. In *Levine*, the drug company's position was bolstered by a statement of the FDA that cases rejecting preemption of failure to warn claims pose an obstacle to the Agency's enforcement of the labeling requirements. So, what sort of deference, if any, is due to an agency statement about the preemptive scope of its regulations? Most broadly, in promulgating preemptive regulations and adopting statements regarding preemption, can and do agencies adequately protect the values of federalism? How should the traditional presumption against preemption operate in this realm? Finally, what is the best way to protect citizens like Ms. Levine?

The U.S. Supreme Court has the opportunity to enlighten us on the proper resolution of some of these difficult questions when it considers the case *Waters v. Wachovia Bank* later this month. At issue in that case is a regulation promulgated by the Office of the Comptroller of the Currency, which states that, unless otherwise provided by federal law or OCC regulation, state laws apply to national bank operating subsidiaries to the same extent that they apply to the parent national bank. The Sixth Circuit, following both the Second Circuit and my court, the Ninth Circuit, applying *Chevron* deference,



took the view that the Commissioner's regulations preempted Michigan banking laws in their entirety, as applied to the operating subsidiaries. Perhaps one of the panelists will comment on why it is that the Supreme Court took *Waters*, given the fact that the three prominent cases all came out the same way.

In any event, to help us think about the many important issues and lead-up to *Waters* and beyond, the Federalist Society has gathered a distinguished group of scholars who will speak with us today. We will be hearing first from Daniel Troy, who is a partner in the Washington office of Sidley Austin, and immediately prior to that served as the Chief Counsel of the Food and Drug Administration, after being appointed to the position by President George W. Bush. In that role, Mr. Troy was an active player in the FDA's generally successful assertion of preemption in selected product liability cases. Mr. Troy is a graduate of Columbia Law school and served as a clerk for D.C. Circuit Judge Robert Bork from 1983 to 1984.

Next, we'll be hearing from Ronald Cass, who currently serves as the President of Cass & Associates. He previously served as the Dean of the Boston University School of Law, from 1990 to 2004, and was a commissioner, and then later vice chairman, of the U.S. International Trade Commission under Presidents Reagan and Bush I. Dean Cass is a graduate of the University of Virginia and of the University of Chicago Law Review, with honors. After graduation, he served as law clerk to the Honorable Collins Seitz, Chief Judge of the U.S. Court of Appeals for the Third Circuit.

We will then hear from Professor Catherine Sharkey, newly minted professor of law at Columbia Law School and currently visiting professor at NYU Law School. Since joining the Columbia faculty, professors Sharkey has come to be recognized as a leading voice in the legal academy on both punitive damages and products liability preemption. Professor Sharkey is a graduate of Yale University, as well as Oxford, which she attended as a Rhodes Scholar. She is a graduate of Yale Law School and served as law clerk for Judge Guido Calabrese of the Second Circuit and Justice David Souter of the Supreme Court.

Finally, we will hear from Professor Thomas Merrill, the Charles Keller Beekman Professor of Law, also at Columbia Law School. Professor Merrill recently filed an *amicus* brief on behalf of the Center

for State Enforcement of Antitrust and Consumer Protection Laws in the *Waters* case that will be argued shortly. He is a graduate of Brunel College and also attended Oxford as a Rhodes Scholar. After graduation from the University of Chicago Law School, he served as law clerk to Judge David Bazelon of the U.S. Court of Appeals for the D.C. Circuit and to Justice Harry Blackman of the Supreme Court of the United States.

We will hear first from Mr. Troy.

**DANIEL TROY:** Thank you, Judge for the introduction. It's a pleasure to be here. Often those of us who are members of this Society and in favor of preemption in appropriate circumstances are accused of being hypocrites. Everybody says, "Well, it's the Federalist Society," confusing Federalists and federalism. I want to make clear that there is difference between the Federalist Society and being reflexively in favor of federalism. Madison was selected as the icon for our group not because of his much later states right's positions but because he was the father of the Constitution. Sometimes I think we should have selected both Madison and Hamilton, because it is, of course, the Federalist Papers after which the Society is named, and those Papers are in favor of a strong, albeit limited, central government.

It's important in the context of this conference, which is about limited government, to focus on the importance of preemption to limiting government. What do I mean? Well, in the case of food and drugs, if you have very strong federal regulation, but not preemption, you end up with perhaps 51 levels of government, 51 different systems that people need to navigate. Now, one can imagine a world with no federal regulation of drugs at all, with every state regulating. You might have competitive federalism, in that case, and you might not. But when you have the system that we have, at least in the realm of drugs and medical products, you cannot begin to test a product in humans without getting the federal government to approve it in advance, you cannot market the product without the federal government approving it in advance, you cannot manufacture the product without the government approving it in advance. People hear the words "new drug application" and think, "Oh, college application." In fact, a new drug application normally has as much data, as many boxes of documents, as would literally fill this room.

These applications are delivered to the Agency by the truckload. The Agency looks at that data and, for the purposes of this panel, comprehensively determines what may and may not be said about the drug product through labeling. Labeling is not merely a floor, notwithstanding what the Vermont Supreme Court said.

What the FDA said in its most recent preemption preamble is that it is a floor and a ceiling. I want to illustrate that by talking about some specific cases, because the devil is in the details and, on the one hand, this stuff can be esoteric and arcane, but on the other, if you really look at the public health of the matter—and, I'd like to suggest, the common sense of the matter—I think the case for preemption becomes very powerful.

Let me talk about the case called *Dowhal*, the California Supreme Court case. As many of you know, California has something called Proposition 65, which requires warnings if there's any substance in a product that can either be carcinogenic or can cause harm in a pregnancy. The issue in the case involved nicotine replacement therapy products. These are products that somebody takes if they're trying to quit smoking. The FDA said, "We want the warning to say, 'Try to stop smoking without this product, This product can be useful, but talk to your doctor. Nicotine can have adverse impacts.'" There was a lawsuit filed under Prop 65--which, to his credit, the California Attorney General did not join. The gravaman was that they wanted the nicotine replacement therapy product to say "Nicotine can harm your baby." That was all. But the FDA rejected this warning in a series of letters and in more formal responses to citizens' petitions. It said, "We don't want that warning." That warning might cause a woman to misunderstand that, actually, nicotine replacement products are a good thing."

Well, the California Court of Appeals said, as the Vermont Supreme Court did, that it's always better to have more warnings, and the FDA got involved. One thing the federal career officials believe is that when they decide a matter, when they have, in the language of *Chevron*, directly spoken to the precise question at issue, they should get to win. So they thought in this case. Fortunately, we went to the California Supreme Court, and the California Supreme Court." Actually, more warnings are not always better."

Perhaps the most controversial case involved something called SSRIs (antidepressants). It is a tragic fact that people who are depressed tend to commit suicide. So, it's hard to tease out whether there's a connection between antidepressants and suicide. At the time these products were first approved, the question to the FDA Expert Advisory Committee was: Should there be a warning that these products might cause suicide? They said no because they didn't think there was data to support that. Secondly, they thought it might dissuade people who were depressed from taking the drug. There are many people concerned about antidepressants. So, for example, the Scientologists and Public Citizen came back to the FDA time and again asking the Agency to put this warning on, and the FDA kept saying, "We're sorry, but we don't think that's the right thing to do. It will over-warn. It's not just a floor; more warnings are not always better."

Well, a lawsuit was brought in the Ninth Circuit, the thrust of which was that, in this case, Pfizer should have labeled its antidepressant product Zoloft to say, "This product can cause suicide." It was brought by someone who survived a relative who had taken the product and six days later committed suicide, tragically. The district court said that more warnings are always better, the suit can go forward. Again, the FDA got involved, and said, "Excuse me, we think that would have misbranded the product."

So, in talking about conflict preemption, it certainly begs the question, if the FDA thinks a product would be misbranded, how a state law requirement can compel product labeling that would be technically misbranded and illegal under federal law? If that's not an implied conflict preemption, I don't know what is.

FDA has continued to intervene, but it's important to note that the Agency itself does not have litigating authority. The FDA does intervene through the HHS General Counsel's Office and the Justice Department. It is the final backstop. This is, I think, one of the things that has caused this controversy and caused this panel. Instead of intervening with individual *amicus* briefs, the FDA issued this broad statement on preemption that basically said, "Our regulations are not just a floor, they're also a ceiling. More warnings are not always better. And when we make a decision, we are not looking at the benefits

and risks of a product in the context of an individual. We're making a societal decision. We understand that all drugs have risks. There are no drugs that are risk-free; people often forget this. And so, we understand when we put the product on the market that there will be some adverse events. That is an unhappy fact that comes from having therapeutic products. But we're making a broad risk-benefit calculation, and so that calculation must necessarily displace state suits that would have the effect of undercutting the FDA's definitive determination about the warning label."

And so, to close, this is part of what is sometimes called the "stealth tort reform" by the Bush administration. But it seems to me that if you're going to have a very powerful regulatory scheme that there is naturally going to be some state regulation imposed through the product liability system that has to be set aside. Thank you.

**RONALD A. CASS:** Before I start, I have to say I had a phone conversation with my colleagues here, and I misunderstood the topic. I thought that they said talk softly and do shtick. So I'm going to begin with a brief anecdote. This is actually a story my wife told me, involving a friend of hers who one day saw a funeral procession in the suburbs of Washington. It was a very unusual procession. In New Orleans, you're used to seeing that but not in Washington. It consisted of a Hearse followed by a second Hearse, followed by a woman dressed in black walking a dog, followed by a thousand women in single file. My wife's friend went up to the woman walking the dog and said, "You know, I have to ask you. This is the most unusual funeral procession I've seen. Who's in the Hearse?" The woman said, "It's my husband." "How did he die?" The woman pointed and said, "My dog attacked him. We were having an argument. The dog took it seriously, went berserk, and killed my husband." Her friend apologized and said, "Who's in the second Hearse?" And the woman said, "It's my mother-in-law. She tried to intervene and the dog killed her too." Susie's friend thought for a minute and said, "Can I borrow your dog?" At which point, the woman said, "Get in line."

There are some ideas that seem like good ideas, and appeal to a lot of people. We're really not dealing with one idea here but three: the idea of limited government, the question of the level of government appropriate to make a particular decision, and the

question of which organ of government should make that decision. What's the right competence? Is it the courts? Is it the agencies? Is it the Legislature?

For me, the ultimate test is not: Do these get us a particular amount of government? It's a combination of quantity and quality of government. If you look to the Framing, the concern wasn't just to limit government. After all, the Constitution expanded the national government in very significant ways over the Articles of Confederation. The goal was to preserve and protect liberty and security, which is done by having not the minimal government but the right sort of government, delivered in the right way.

The Constitution gives the national government control over interstate commerce. It also has a provision decreeing that the national government should not tax or lay particular impediments to the trade coming out of any one state. It says to the states that they shouldn't lay taxes on the trade coming out of their states unless they're so directed by Congress; and the tax goes to the Treasury. What the Framers were quite clearly trying to do was to facilitate the free flow of goods among states. They were cognizant of the fact that if you don't give the national government the control over the flow of goods within states, you will have a lot of impediments to trade, because states have an incentive to internalize benefits and externalize costs.

We see this all the time when you look at how state attorneys general deal with companies doing business in their state. They try to impose special burdens on the business that can bring benefits into their state; they try to localize regulation of what is a national or international enterprise; and they frequently do this using very ham-handed means, because if they were more transparent about what they were doing, it would be more difficult to get where they want to go.

The distinction Dan Troy drew between those who are Federalists, believing in a system with different levels of government, and those who believe this automatically means that all decisions should be made by the state or local level, is a very important one. There are certain decisions that should be made at the state or local level because they deal with state and local problems. That is most congruent with protecting the liberty and the values of the people in those states or localities. When you deal with something that has national or international

scope, giving states the right to speak to those issues can be counterproductive to liberty, security, and efficiency.

When we are trying to determine who ought to be making these decisions, we are often dealing with statutes that most of us might not like. We think the area of regulation may not be a good thing. We think the national government is excessively regulating. But to then say that the way to deal with this problem is to allow states to also regulate may impose additional duplicative and conflicting burdens on businesses. Those are the things we ought to disfavor and avoid whenever possible.

A lot of the cases we're dealing with here deal with the question, When an agency is regulating, what presumption should attach? Should the presumption be that an agency regulation ousts state regulation? Should we be relatively inclined or relatively disinclined to find conflicts? Historically, the rule has been that we are relatively disinclined to find conflicts.

The next level of argument is: Who ought to be making that determination? Here is where things have gotten more contentious. The courts have said that the agencies at the national level issuing regulations are given deference in interpreting the law because Congress intended, in creating this particular regulatory scheme, to authorize the agency to be the first place ambiguities are resolved. This is a matter of statutory interpretation. That interpretation logically extends to the interference or noninterference with the schemes of state and local governments.

Judge O'Scannlain asked, "Why, when all of the courts—the Ninth Circuit, the Second Circuit, the Sixth Circuit—came out the same way on this, did the Supreme Court take *cert*?" I think they were confused. They saw the six upside down and thought it was a nine. You know, the Supreme Court took cases from the Ninth Circuit to reverse your colleagues, not you. I also noticed that at the dinner the other night that there was a place for Judge O'Scannlain, but they did not put the usual "reserved" sign. They were afraid he would think it said "reversed".

**CATHERINE SHARKEY:** Good afternoon. I want to talk about what I call an "agency reference" model—as distinct from an "agency deference" model—to be used in a court's determination of implied preemption, particularly in the products liability context.

First, to set the stage, consider that the FDA and other agencies have recently enacted "preemption preambles"—statements included in preambles to final regulatory rules indicating the agency's belief that the federal regulatory standard preempts common law tort actions. As Dan Troy has pointed out, the FDA included a statement of preemptive intent in its recent rule governing the format and content of prescription drug labels. NHTSA's preemption preamble appears in a recent notice of proposed rulemaking about roof safety standards. The Consumer Products Safety Commission, for the first time in its thirty-three-year history, proposed a preemption preamble in a 2006 regulation addressing flammability standards for mattresses. (The FDA and NHTSA had done so previously.) Given the flurry of recent federal agency activity here in Washington, D.C., this topic has real currency.

The agency reference model is a middle course approach to guide courts in making implied preemption determinations. Were Congress clear about its intent to preempt or displace state law, its intent would govern. It turns out, however, that when Congress enacts piecemeal legislation concerning specific products, such as the Motor Vehicle Safety Act or the Federal Boat Safety Act, Congress has been anything but clear. Typically, these product statutes include very broad preemption clauses that expressly preempt any conflicting state requirement. Congress usually says that state "requirements" or "standards" are preempted, using broad language that has been read to include common law state tort actions. These broad preemption clauses are coupled with very broad savings clauses that purport to leave common law actions intact. In these instances, Congress seems to be saying everything. In other instances, such as the Food Drug and Cosmetic Act, it is all but silent. In the provisions that deal with medical products, there is a preemption clause, but in the provisions dealing with drugs there is not. As Congress does not expressly answer the preemption questions that products liability cases implicate, there is ample room for other decision-makers—namely, courts and agencies—to step in.

Congress' failure to weigh in on the issue of preemption of common law actions, which cannot realistically be ascribed to inadvertent omission, is puzzling. For example, associated with the Federal Insecticide, Fungicide and Rodenticide Act, at issue

in the recent Supreme Court case of *Bates v. Dow Agrosciences, LLC*, there are over a thousand pages of legislative history and yet not a word about the fate of state common law tort actions. But when this Act was amended in 1972, such actions were quite common. The interesting question is an institutional one: Does Congress punt the preemption determination to courts or to agencies? How should this interplay work? The agency reference model that I advocate would leave the decision-making power in courts but not allow them either to give mandatory deference to the agency position or to ignore the agency's position.

Contrast the present situation where courts are taking extreme positions when faced with the issue of whether the FDCA and regulations promulgated thereunder by the FDA preempt common law failure to warn claims. In his remarks today, Judge O'Scannlain mentioned the *Levine v. Wyeth* case, which exemplifies one extreme pole, where courts say that there's a presumption against preemption and that the purpose of the FDCA is to protect health and safety, so how could any state tort action ever be preempted? The idea that more regulation is always better seems clearly wrong in the context of drugs or any product situation where the determination rests upon risk-risk tradeoffs. If you add warnings, you're not just warning consumers of certain risks, you are inevitably creating alternative risks insofar as individuals, or their physicians, are scared off from these drugs. That's one extreme.

At the other extreme lie courts that defer unconditionally to the FDA's "misbranding" argument in favor of preemption of common law claims: that a manufacturer can never unilaterally strengthen or alter a label warning, lest it risk being prosecuted by the FDA for misbranding the drug. The upshot is that the FDA's pre-market new drug approval process would grant the drug manufacturers immunity from state common law tort actions (most often failure to warn claims). And this safe harbor would protect drug manufacturers even in situations where new risks (or which the manufacturer was aware) come to light in the post-approval period.

But between these extreme positions lies a middle course approach, whereby courts would be able to look specifically at the risk-risk determination by the Agency—not just at the time of approval, but during the post-approval period, too. Most of these

cases deal with situations where new risks allegedly came to light in the post-approval process. The manufacturer then has an opportunity to go back to the FDA.

In *Levine*, the manufacturer went back to the FDA (during the post-approval period) to try to strengthen a warning for a different variety of the drug and was told to keep the current verbiage in the warning label. The court nonetheless held—erroneously, in my view—that a state law failure to warn claim was not impliedly preempted by the FDA's regulatory action pursuant to the FDCA.

*Perry v. Novartis* embodies the middle course approach that I am advocating here. The federal district court starts with the idea that the FDA's preemption preamble should neither be rejected nor accorded mandatory *Chevron* deference. Instead, the court decides that the preamble should get *Skidmore*, or "power to persuade," deference. I think that's actually the right approach.

Moreover, it comports with the U.S. Supreme Court's jurisprudence. I unearthed an interesting positive empirical observation when doing a study of products liability preemption. If you look at the U.S. Supreme Court's product liability preemption cases, which span from *Cipollone v. Liggett Group, Inc.* to *Bates*, in every case (save *Bates*), the Court's ultimate decision, whether pro-preemption or anti-preemption, aligns with the position urged by the relevant agency. Thus, the FDA had argued in favor of preemption in *Buckman v. Plaintiffs' Legal Committee*, and the Court went that way; it argued against preemption in *Medtronic v. Lohr*, and the Court went that way. NHTSA argued in favor of preemption in *Geir v. American Honda Motor Company* and against in *Freightliner Corp. v. Myrick*, and the Court followed suit. The Court's anti-preemption holding in *Sprietsma v. Mercury Marine* likewise follows the agency's position. The Coast Guard, having done a risk-risk analysis, came to the conclusion that no uniform propeller guard design was suitable, given the variety of recreational boats and motors in existence; and thus, a state law design defect claim in no way interfered with any federal policy reflected in its decision not to regulate.

The Supreme Court has been very cryptic. It has never said, "We are applying *Chevron* (or *Skidmore*) deference here." Most often in dissent, Justices try to force the issue by saying, "Look, the majority is giving

deference by saying things like ‘We give significant weight to the Agency’s determination,’ but they never come out and say they’re giving *Chevron* deference.” If you look carefully at what the majorities in those cases do, though, I think they apply something that looks like *Skidmore* deference, and in general provide a model for courts to follow.

One last observation: if you look at the dozen or so cases that post-date the issuance of the FDA’s preemption preamble, some have been decided by federal courts, some by state courts. The state courts have, over the past quarter century, consistently rebuffed the regulatory compliance defense to state common law tort actions; it is hardly surprising, then, to find that state courts, on the whole, seem predisposed to resist the idea of federal preemption of state law, which after all, is essentially an even more forceful immunity-conferring mechanism. The federal courts seem more likely to listen to what the FDA says, and the FDA is much more likely to intervene in federal cases, either on its own or when the Court asks for its views. That will be a very interesting dynamic to observe over time.

Thank you.

**THOMAS MERRILL:** Thank you very much. I notice that the room’s a little crowded in the back, so in the effort to clear things out, let me announce in advance that I’m going to be talking about administrative law doctrine for the next eight minutes. In case you want leave quickly, now’s your chance to do that.

I’m going to approach this from the perspective of ad law rather than tort law or ordinary preemption law. I think when you approach it from a perspective of ad law, you discover that the range of disagreement here is actually quite narrow; that a number of propositions which you might think would be contestable in fact have been resolved, more or less, by express holdings of the Supreme Court or by settled propositions (or at least what I regard as several propositions, of administrative law). So, let me mention three things that I at least regard as settled propositions, which have the effect, I think, of compressing the area of disagreement down to a fairly small point.

First, it’s well established that agency legislative regulations have preemptive effects. If an agency has been delegated power to act with the force of law, to issue legislative regulations, where those

legislative regulation are deemed inconsistent with state law—by the court, at least—there’s no question that the federal regulation trumps or preempts state law. This was held back in 1961 in *United States v. Scheimer* and reaffirmed in the *De la Questa* case in 1982. The issue is off the table.

Second, if Congress expressly delegates authority to an agency to issue preemptive regulations—not just legislative regulations but regulations that say, “We deem state law in Area X to be preempted”—that is permissible as well. There are a number of examples in federal law where Congress has given express preemptive authority to agencies, whose exercise of that authority have been upheld by courts. The Supreme Court’s authority at this point is a little sketchier. If I had my way, the Court would insist a bit more on the need for express delegated authority to preempt, rather than finding it in some kind of clearly implied fashion. There’s a case called *New York v. FCC* from 1988, in which the Supreme Court found express authority to issue preemptive regulations based on congressional ratification of prior practice by the agency, which I think is pushing it a little far. But the basic proposition that Congress can express expressly delegate preemptive authority to an agency, I think, is off the table as well.

Thirdly, an agency’s statement of its opinion about the preemptive effect of either the federal statutory scheme or a combination of the federal statutes and federal regulations is not entitled to *Chevron* deference. The reason for this follows from recently established principles about when *Chevron* does and does not apply. The infamous *Mead* case that Ron tried to make me promise not to mention, holds, well, who knows exactly what it holds? I think it holds that agencies are entitled to *Chevron* deference only if they act with the force of law; meaning that they’re issuing something like a legislative regulation which is within their delegated jurisdiction. If they issue an interpretive of rule or some kind of opinion letter, that’s not entitled to *Chevron* deference.

Now, with respect to these preambles, the issue is a little bit trickier. I take it that a statement in a preamble about the preemptive effect of a federal regulation being adopted pursuant to whatever perambulatory statement does not itself have the force of law. Administrative lawyers distinguish all the time between what’s called the Statement of Basis and Purpose required by Section 553 of the APA

and the regulation itself. The regulation itself is a thing that goes into the Code of Federal Regulations. That's what has the force of law. The statement in the preamble is the explanation for the regulation. It does not of its own effect have the force of law.

If an agency has to interpret federal statutory authority in order to reach a particular legislative regulation, and the explanation for its statutory authority is in the preamble, it is entitled to *Chevron* deference, because the explanation is the condition precedent for the regulation itself. But if you have something like a regulation dealing with drug labeling and the FDA says in the preamble, "By the way, it's our opinion that any state court action inconsistent with this labeling would be preempted," that's just a statement of agency opinion; it's not a necessary condition of finding authority on the part of the agency to issue that regulation. It would not be entitled to *Chevron* deference.

So, I think those propositions are pretty much settled. What is not settled is the issue presented by the *Waters* case, which is going to be argued on November 29. The issue is: What happens if an agency that has legislative rulemaking authority but has not been given express authority to issue preemptive regulations uses its general rulemaking authority to issue what purports to be a legislative regulation, which regulation then states if the agency's determination that state law in a particular area is preempted? Is that sort of legislative regulation pursuant to a general delegation of authority rather than to an authority to preempt, also entitled to *Chevron* deference or to some lesser degree of deference (presumably *Skidmore*)?

In answering this question, I think we have to revert to more general principles, not simple case law and settled principles of administrative law. Several propositions are relevant here in sorting things out. First of all, I do not agree with Ron's statement that determinations of preemption are simply a species of statutory interpretation. In preemption cases, there are three determinations to be made, not just one. The first determination is that somebody, be it a court or an agency, has to decide what the federal law means or requires. That's an exercise in straightforward interpretation. Then, the decision-maker, be it a court or agency, has to decide what the state law means or requires. That's another exercise in interpretation. The third step is critically different;

that is, the decision-maker has to decide how much tension there is between the federal and the state law, if any; and, given the degree of tension, whether it's necessary to displace or nullify state law in order to effectuate the general purposes of the federal statutory regime.

Now, in some instances that third step is not necessary. You've got an express preemption clause which is squarely on point; that would not be a contested case. In all other cases, if there's a dispute about the scope of an express preemption clause, something about obstacle or frustration of purpose preemption or field preemption—even, in most cases, of conflict preemption where there's not a square X or -X type of conflict—somebody has to decide whether a displacement of state law is necessary. So, the question is really one of institutional choice, as several of the other speakers mentioned. Who is going to make this determination of displacement? I think an argument can be made that the agencies ought to be given significant say-so in this exercise. The agencies, after all, have great expertise about the nature of the statutory scheme. They probably have unique understanding about how state law is or is not going to interfere with the way the federal statutory scheme is carried out. But let me give you some quick reasons why I think strong *Chevron* deference probably is not the way to go in making this displacement determination. I'll just mention these quickly.

First of all, and Cathy mentioned this briefly, preemption is an issue that comes up in state court almost as often as it comes up in federal court. I have trouble imagining exactly how the U.S. Supreme Court is going to enforce a duty upon state courts to give *Chevron* deference to federal administrative agencies on the question of preemption. The Supreme Court just does not have the institutional capacity, I think, to change state court behavior in that radical direction. Something like a *Skidmore* doctrine, which allows agencies to submit their views in various ways and instructs courts to give them effect insofar as they are persuasive, would I think be something more reasonably workable in the state court system.

Secondly, I think there are systemic considerations here. Most of our panelists are interested in explaining how Madison was really in favor of powerful federal government. But there are systemic interests here in terms of maintaining

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a balance between the federal government and the states; that is, not having the federal regulatory juggernaut completely take over our system. I'm concerned that if each federal agency which has a little individual regulatory slice of the world is given *Chevron* deference for its determinations, we're going to see a lot more displacement of state law. There will be a tendency for each agency individual to push the limits of federal law in isolation. We need some kind of judicial counterweight to that. I think the federal judiciary, the Supreme Court in particular, which has a broad-brush picture about the need for state and federal balance in the system, is a better institution to maintain that balance than are individual agencies.

Lastly, and I'll close with this point, the question of whether agencies can preempt or be given strong *Chevron* deference for preempting state law is another one of these issues that implicate the scope of an agency's authority. All sorts of scope issues come up about whether agencies can regulate with the force of law or not. But there are reasons to be concerned about giving that issue to states to decide under a strong deference doctrine like *Chevron*. Agencies would have a tendency to view state regulators as rivals, to see state courts as rivals and try to expand their authority. We need federal courts to discipline the boundaries of agency action. *Skidmore* is better suited to doing that than *Chevron*.

Thank you.





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## CORPORATIONS, SECURITIES & ANTITRUST:

### REGULATORY DOUBLE-DIPPING

*Paul S. Atkins, Michael S. Greve, Deborah Platt Majoras, Eugene Scalia; Moderator: Jerry E. Smith*

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**JERRY E. SMITH:** Good morning. I'm Jerry Smith, a judge in the Circuit Court of Appeals. It's my privilege to moderate today's panel discussion entitled, "Regulatory Double-Dipping," a panel sponsored by the Federalist Society's Corporations, Antitrust, and Securities Practice Group. I'll introduce our distinguished panelists in just a minute.

First, just a moment of discussion on what we'll be covering today. In a world of globalization, whether we like it or not, businesses and individuals operate in a regional and international environment. Once able to operate exclusively under a single locally imposed regulatory regime, they must now comply oftentimes not only with that regime but must also with a statewide regime, a national regime, and an international regime of regulation. Of course, there are typically 50 statewide regimes, often more than one national regime with competing agencies, and predictably several international regulatory regimes as well.

In this environment, individuals and businesses are in the first instance faced with the challenge of determining who is regulating their proposed activity. Once those regulators are identified, only then can individuals and corporations begin the labor-intensive and time-consuming process of sorting through the applicable treatises, laws, regulations, guidelines, etc., to which they're subject. It's become a very complicated world with multiple layers of regulation and enforcement and, I might add, permanent employment for lots of attorneys.

So, what is the effect of these multiple layers of regulation on businesses? Does or should the answer differ from one field to the next, from antitrust, to securities regulation, to labor issues? Do these multiple layers of regulation result in what we might call a race to the bottom, whereby the most restrictive regulatory regime, for all practical purposes, becomes the one that's effective? If so, does that create an incentive to over-regulation? And are there some helpful principles that can be illuminated to try to resolve this situation? These and other questions will be addressed by our distinguished group of panelists, whom I will now introduce to you briefly in the order in which they'll appear.

Paul Atkins was appointed by President George W. Bush to be Commissioner of the Securities and Exchange Commission in 2002, with a term expiring in 2008. Commissioner Atkins' 22-year career has focused on the financial services industry in securities regulation. Before his appointment as Commissioner he assisted financial services firms in improving their compliance with SEC regulations and worked with law enforcement agencies to investigate and rectify situations where investors had been harmed. He began his career in New York, focusing on a wide range of corporate transactions for U.S. and foreign clients, including public and private securities offerings and mergers and acquisitions. He's a member of the New York and Florida bar, received his J.D. from Vanderbilt, and was a senior student writing editor of the *Vanderbilt Law Review*. He received his A.B. from Walford College and was a member of Phi Beta Kappa.

Deborah Majoras is Chairman of the Federal Trade Commission. She was sworn in in 2004, and her tenure has been marked by strong efforts to protect consumers from emerging frauds such as identity theft, spyware, and spam, with increased focus on business failure to implement adequate information security safeguards. In May 2006, she was appointed by the President to be Co-Chair of the Federal Identity Theft Taskforce. She joined the FTC after having been with the Jones Day firm here in Washington, where she served as a partner in the firm's antitrust section and worked on a variety of antitrust counseling in civil and criminal litigation matters. In 2001, she was appointed Deputy Assistant Attorney General in the Antitrust Division and was named Principal Deputy in 2002. She's a graduate of Westminster College in Pennsylvania and of the University of Virginia Law School.

Eugene Scalia, a partner in the D.C. office of Gibson Dunn & Crutcher, Co-Chair of the firm's labor and employment practice group and Chair of the administrative law and regulatory practice group. He's a member of the firm's appellate and constitutional law practice group. He returned to Gibson Dunn in 2003 after a distinguished service as Solicitor of the U.S. Department of Labor. Matters

for which he had substantial responsibility there included investigation of the Enron Pension Plans, amendment of the white collar overtime regulations, and implementation of the whistleblower provisions of Sarbanes-Oxley. At Gibson Dunn, Mr. Scalia has a national labor and employment practice, and he's a leading authority on Sarbanes-Oxley. He's a graduate of the University of Chicago Law School, where he was editor-in-chief and got his undergraduate degree from the University of Virginia.

Finally, Michael Greve is the John G. Searle Scholar at the American Enterprise Institute in Washington, where he directs the AEI Federalism Project. His research and writing cover American federalism in its legal, political, and economic dimensions. He earned his Ph.D. in Government from Cornell and co-founded and directed the Center for Individual Rights. From 1989 to 2000, he served on the board of directors of the Competitive Enterprise Institute. He has written extensively on federalism and other aspects of American law. Dr. Greve's current project is a book on the constitutional foundations of competitive federalism.

It's my privilege to begin with Paul Atkins.

**PAUL S. ATKINS:** Thank you, Judge Smith, for that kind introduction. It's a pleasure to be here today to talk about this topic.

Globalization, of course, is an inescapable reality. As Judge Smith said, there are many causes: trade, better communications, the whole IT revolution, competition for investment, and the ending of exchange controls and many foreign ownership restrictions in the past couple of decades. Of course, too, the collapse of the Berlin Wall and the opening of China have all contributed to the globalization boom as well.

John Donne, a 17th century poet, wrote the famous *Meditation XVII*, that says, "No man is an island, entire of itself. Every man is a piece of the continent, a part of the main." That's an increasing realization around the world—not the least in Britain itself—among regulators, certainly. We've seen an international backlash against parts of the Sarbanes-Oxley Act, even though many countries have adopted large parts of the Act. Public securities markets are now looking abroad for merger partners. The New York Stock Exchange has demutualized and will team up with Euronext through an acquisition which will

be voted on next month, and NASDAQ is looking to acquire the London Stock Exchange.

The SEC experienced the ill-fated hedge fund rule, which required registration of hedge funds, only to see that encourage domestic hedge funds to flee abroad and foreign hedge funds to close themselves to U.S. investors to keep regulation away. Next month, the SEC will consider finalization of a long-standing proposal to make it easier for foreign companies to deregister from the United States. I think that might well operate in the future as a sort of safety valve. When regulations become too burdensome, we might see a flight of foreign companies abroad, and that might tell us when we have twisted the buttons a little bit too tightly.

In Europe, there is a similar sort of recognition that barriers to free movement of capital are problematic. There have been, over the past 15 to 20 years, moves to reduce barriers to competition in their own internal market. They have a number of different proposals outstanding, which will kick in next year.

Last, but not least, the United States needs to recognize International Financial Reporting Standards. It needs to recognize that U.S. GAAP is no longer the only game in town. If we don't recognize IFRS eventually (our goal is 2009), we may well find that we will have a trade war between the U.S. and Europe, with respect to our accounting standards. Europeans are a bit chafed that we don't recognize their standards and instead require companies to follow U.S. GAAP standards, even though they believe that IFRS has become a robust set of accounting principles.

The response to these challenges has been a call for increased harmonization. Compare the situation in the securities regulatory sphere to, say, the tax sphere, where you have the pariah status of various tax havens and the pressure on other low-tax regimes to conform. Even in Europe itself, some European politicians comment that jurisdictions like Ireland, for example, which have lower taxes than others, should harmonize their tax rates. In the securities regulatory world, we see similar comments. The International Organization of Securities Commissions—which has over the years come out with a number of high-level working papers, consultation reports, and model codes of ethics, with respect to some of these issues—threatens expulsion if its member regulatory regimes

do not adhere to these common standards. The SEC itself has entered into a number of memoranda of understanding with various countries to encourage co-operation. Fifteen years ago, insider trading was not necessarily illegal in many jurisdictions, including Switzerland and others. Now, virtually every major market in the world has insider trading prohibitions. The United States led the way in that realm. Countries adopted these standards with a view towards being part of what they view as the international developed-market club.

Nonetheless, despite the convergence, competition is an important element. The City of London, for example, has thrived on competition, and on setting itself apart from, for example, the United States. After World War II, the United States capital markets dwarfed all other markets. But, besides global economic and trade developments, a number of unilateral steps by the U.S. over the years have increased the ability of other folks to compete with us. The first was in the Kennedy administration back in 1963. There was what was called the Interest Equalization Tax, imposed on borrowing by U.S. companies and foreign companies in the U.S. The goal was to keep U.S. capital in this country and to equalize the costs between selling debt and equity securities. It basically backfired and resulted in a flight of offerings to London because of the differential in yields resulting from the tax. Likewise, the Federal Reserve had what were called “rate caps,” which placed a cap on the interest banks could pay on bank accounts. We had a high interest rate environment in the late ‘60s and early ‘70s. Banks responded by expanding operations and products abroad in order to be able to offer the higher interest rates that their customers were demanding on their money.

Now, we have Sarbanes-Oxley, which has itself, according to many people, resulted in some companies looking to list securities abroad and foreign companies looking to stay out of the United States. The London Stock Exchange, for example, is even trying to get smaller U.S. companies to list on their Alternative Investment Market with some success. We’ve seen the amount of initial public offerings in the United States relative to the rest of the world decline. Ten years ago, nine out of ten dollars worldwide raised through initial public offerings were raised in the United States. Today, nine out of ten dollars raised globally through IPOs are raised abroad, mostly in London.

Some people are saying, or charging, that this is a race to the bottom. I’d say not. In many cases, competition is good. And there are differences in markets between the United States and the rest of the world. Our market is essentially half-retail, half-institutional. Abroad, it’s about 85 percent institutional and only 15 percent retail. So, should we really say that investors ought to be able to decide what sort of regulatory regime they want to put their money into? The fear of regulatory arbitrage—of the race to the bottom—presupposes that government knows best, that investors cannot decide for themselves, that they’re just chumps in the game. I think investors will continue to invest abroad, absent any sorts of exchange controls or restrictions, and that’s probably a good thing. It will help to keep us honest. Consider our banking regulation, for example. It is a mixture of federal and state regulation. You have the Fed, the Comptroller of the Currency, the OTS for thrifts, and the states all competing to a certain extent over products. Much of the innovation—a lot of new products—developed through that competition, which I would call healthy.

Of course, regulatory competition can also be bad. Our aspiring governors, AGs, have overlapping jurisdiction, especially with respect to securities, and we see how that has been used—not, I think, always to the best effect. It has created market uncertainty. We have seen in some cases what I would term “regulation by press release,” a lack of due process in many cases. In fact, in some of these cases, a state has been able to impose substantive regulatory requirements on international market participants—securities firms, mutual funds, whatever they may be—even though at the same time the market itself was working to punish the offending firms. The miscreant firms were finding that they had huge capital outflows or were losing business in favor of funds that were not implicated in some of these scandals.

You also see, with respect to plaintiff’s attorneys at the trial bar, a bit of regulatory competition in a different sense. We have potentially overlapping jurisdiction between the antitrust regulatory regime and the securities laws. In fact, there’s a case pending before the Supreme Court, for which I hope they take *cert.*, called *Billing v. Credit Suisse*. The plaintiffs in this case are alleging that the IPO bubble of the late 1990s was caused by manipulation and other things, which, they charge, implicates antitrust

problems. If all of the allegations in their complaint be true, they also implicate the securities laws. So, there's this overlap, and how will that be resolved? Hopefully, the Court will take this case in hand and help resolve it. Essentially, it is an end run around the Public Securities Litigation Reform Act, which required high pleading standards in securities cases. It was passed by Congress over the President's veto in 1995.

Finally, I want to say that the SEC itself is being rather schizophrenic in respect to competition versus regulation. In some cases, we've followed a good disclosure policy: letting investors choose where they want to invest their money. In other cases, we have imposed a one-size-fits-all type of regime. Recently, with our mutual fund independent chair rule, our hedge fund registration rule, and our national market system rules, we have decided for the marketplace. But, the courts have stepped in, with help from some people on the panel here, to put us back in our place and vacate these rules, which I think were not productive. What this has shown—and how market participants have viewed these rules—is that, if your neighbor's townhouse is on fire, you had better help your neighbor put out his fire. We have seen the Chamber of Commerce step in to challenge the mutual fund independent chairman rule for fear that that approach might find its way eventually into corporate America, with the SEC or others imposing that one-size-fits-all regime. The National Venture Capital Association and private equity funds stepped in with respect to our hedge fund rule because that same philosophy underlying the rule, although not immediately applied, could be applied to them later. Foreigners and others have stepped in with respect to some of the statutory provisions of Sarbanes-Oxley, to help us learn how those provisions adversely affected them. Thankfully, we took steps to straighten that out. And with respect to some of the ongoing problems with Sarbanes-Oxley, particularly section 404, we are taking steps—I hope we will start next month—to make it better.

So, returning to John Donne, our 17th century firebrand poet, whose injunction is pertinent to today's capital markets—we need to be ever-vigilant to safeguard market freedoms and investor choice versus government fiat. Donne's meditation began, "No man is an island, entire of itself," and ended with, "therefore never send to know for whom the bell tolls; it tolls for thee." Likewise, we should realize

that when government usurps market freedoms, we all lose.

Thanks.

**DEBORAH MAJORAS:** Good morning, everyone. In antitrust, mere double-dipping would be wishful thinking. In the United States alone, we have two federal antitrust agencies. We have federal agencies that have responsibilities for competition issues, such as when the FCC reviews telecom mergers or the DOT reviews airline mergers. We have 56 states, territories and the District of Columbia, all with their own antitrust statutes. And we have an active system of private antitrust enforcement fostered by the prospect of treble damages. But while this domestic web of enforcement presents a lot of challenges, it is not even, I think, our greatest challenge today.

In 1990, there were roughly 25 competition agencies around the world, some of which were not particularly active. After the Berlin Wall came down, nations in Eastern Europe and other parts of the world began the arduous process of trying to convert from state-run to market economies. Aid organizations and financial institutions made it very clear to these countries that establishment of a competition agency was a prerequisite to their assistance. The European Union made it clear that countries which wished to be part of the Union must have an antitrust agency. And the developed countries made it clear to developing countries that this was important, too; that it would show that they were serious about moving to a market economy.

So, now, just over 15 years later, we have more than 100 competition agencies around the world. Russia recently passed a new competition law, and China has been working on one for about ten years. That law had its first reading in the National People's Congress. Unquestionably, this movement away from state-controlled economies is a victory. Nonetheless, we have to deal with the fact that we have competition enforcers with little or no experience with, or faith in, markets; few or no experienced staff, including economists. In fact, in some places, the staff from the old State Monopoly Office now is the competition staff, with no real supportive outside infrastructure, like a highly functioning judicial system.

Even with regards to developed nations and agencies with years of experience, some define the level playing field as one in which a successful multinational firm must share intellectual property

or other assets with weaker local firms—(maybe often weaker because in fact they have never had to compete before)—so that all have the chance to succeed, never mind the investments that the stronger firm has made. The greatest danger, of course, in this global regulatory maze is that it will deter precisely the type of aggressive competitive conduct on which markets thrive, the very competition that we enforcers are supposed to be protecting. Antitrust is an area in which over-enforcement and promotion of multiple divergent enforcement views and requirements can cause affirmative harm because, in fact, businesses may have to tailor their behavior so that they pass muster with the most restrictive of enforcers. It is no secret that even officials in developed nations often disdain what they refer to as our form of cowboy capitalism. I was reminded of this early in my tenure at the FTC when reading remarks by President Jacques Chirac of France. He was talking about the passage of a new law that was to benefit consumers. I believe actually it was some sort of a class action statute. And he said this: “Let us favor competition—not wild competition that destabilizes whole fields and endangers economic sectors, but rather regulated competition.”

The McKinsey Global Institute recently completed a 12-year study in which its researchers set out to determine the reasons for vast economic disparities between rich countries and poor, by studying the economic reforms of 13 nations including the United States. And in the book explaining the results, *The Power of Productivity*, by the Institute’s founding director William Lewis, Lewis dispels much of the sacred cow wisdom on the subject. He finds that productivity provides the answer. And the United States has such a high level of productivity, he says, because it has such a high level of competitive intensity. But, the study concludes, the United States was able to develop its economy without the heavy burdens of regulation that developing countries today are saddled with as a result of the OECD nations’ exporting regulation and big government. Mr. Lewis says, “The rich countries today have given the poor countries a curse. That curse is not globalization. It is big government.”

To give you a live example I heard about recently: U.S. companies in a dynamic industry proposed to merge. The Department of Justice’s Antitrust Division engaged an investigation, which

took less than two months, and cleared the deal. But the parties also had to file a merger notification in another foreign jurisdiction, because the buyer had a subsidiary in that jurisdiction—even though that subsidiary did not manufacture the only product that was of competitive significance, the only product with a competitive overlap. For the product, the two companies combined had less than \$10 million in sales in that particular country. But the parties had to file this notification, which they did. But the jurisdiction wanted more time. They requested that the parties pull the filing and restart the clock, which they did. They then received the equivalent of a second request issued by the FTC or DOJ. The parties made a number of divestiture offers, all of which were rejected by the jurisdiction, and after several months the deal cratered.

We and everyone else around the world will never know how that deal would have benefited our consumers because the market in the United States for these products was much larger. This unfortunately is not atypical today. The fact is that U.S. and other multinational firms routinely must make merger notification filings in a dozen or more jurisdictions even for relatively small deals. One large U.S. company has told us that it routinely makes merger filings in countries where the cost of the filing far exceeds the total sales and assets of the acquired entity in the jurisdiction. So, mergers provide easy examples, given their requisite regulatory filings, but an equally if not more serious problem that the proliferation of competition regimes may be producing is monopolization. Just ask Microsoft about its experience in dealing with divergences between the United States and Europe and Korea, and Microsoft is not the only one.

What are we doing about this? How are we preventing a complete disaster? Well, the FTC and the Antitrust Division have an agreement through which we allocate matters on the civil side of antitrust. It works well most of the time, but when it does not it can be costly. There is no recent experience I can think of in which one each agency has taken a crack, except in the 1990s. The FTC deadlocked two to two on whether to bring a case against Microsoft. Then the DOJ took it up. And the rest is history, of course. In addition, we in the Antitrust Division cooperate with the states. We have a 1998 protocol for coordination and merger,

and a federal-state working group that meets either by telephone or in person on a monthly basis to talk about issues and sort out any differences. This process works very well—most of the time. But again, consider the *Microsoft* case. The federal government ultimately settled that case. Ten states and the District of Columbia decided the settlement was not, in their view, adequate, went forward, continued in the district court at great cost, and ultimately lost on the remedy that they wanted.

As for private enforcement, the FTC and DOJ have been active before the Supreme Court to ensure that development of antitrust law does not take a wrong turn as a result of private antitrust litigation. This advocacy's been very important and effective, but there is no denying the fact that most companies will settle large private class-action antitrust lawsuits rather than face a jury with the prospect of treble damages. At the FTC, we have had a class action project in which we at times examined proposed antitrust class-action settlements and filed the occasional *amicus* brief to let the judge know that we think the lawyers are making out quite nicely, while consumers are getting absolutely nothing.

In the international arena, we have built very strong relationships with our major trading partners like Japan and Europe, Canada, Australia. Our staff, particularly with the Europeans, work on a daily basis on overlapping antitrust matters, mostly in the merger arena, and in the cartel arena for the Justice Department. We have been successful in avoiding divergences in that realm. The last major divergence we had was in 2001 in the GE-Honeywell matter. We also work directly with countries like India and China in the process of developing their competition laws, and we have had extensive discussions with these and other countries. We have a very active technical assistance program. In the last two years the FTC and the Antitrust Division have worked with competition agencies in 20 developing countries, including Vietnam, where the President has been this week, to explain how we do things in the United States. This is not easy, but it is very important. And we work, of course, with multilateral organizations, including one that two agencies helped start in 2001 called International Competition Network. The ICN started with 16 agencies and it now has 99 member agencies. We will see who is going to be number 100. We work on a project basis—no

bureaucracy, no secretariat. We just work within our agencies with some help from the outside, and build practices which officials can then implement back in their countries. That has really started to demonstrate success, particularly in the area of merger process, where many countries have taken the best practice principles back to their own countries and literally changed the way they are doing merger process. So we are making some progress there.

The problem, of course, is that you can never know the extent to which the global maze is chilling the aggressive competitive conduct that economies really need to thrive. I will leave you with two suggestions about how we can get help from the private community in this country. First: the line of complainants at the door of the European Commission is loaded with U.S. firms who are there to complain about the practices of U.S. firms that have significant market shares. They know that the EC's rules require it to open an investigation whenever a complaint is lodged. And, we are told, they believe that the EC will be more sympathetic to complaints from competitors. Some of those same companies do not bother to come into the FTC, or to the DOJ, even though they are U.S. companies, apparently because, while we welcome all antitrust complaints—we would like to hear about them—we do show a healthy skepticism toward complaints about competitors, given the clear incentives to seek rents if we allow it. So, while forum shopping is a fact of life, I wonder whether it is a wise move in the long run for U.S. companies to encourage the adoption of a more regulatory approach toward successful firms.

Second, I'm detecting some of the "I'm okay, you're okay" school of dealing with other jurisdictions on these issues is starting to creep into even our own antitrust bar, when dealing with other jurisdictions. When lawyers are representing clients, of course, they have to do this to the best of their ability. But suggestions that standing up for the U.S. system when you are in policy discussions and conferences abroad makes you an ugly American are complete nonsense, and all players would do well in the business community to support a system that holds companies to the rules but that does not preach undue intervention.

Thank you very much.



I'll mention two examples. First is the so-called anti-Wal-Mart law that Maryland enacted earlier this year, forcing Wal-Mart to spend more on employee health benefits. That was a law that my firm was involved in challenging, and that was invalidated on ERISA preemption grounds earlier this year by Judge Motz of the District Court for Maryland. The case is now on appeal in the Fourth Circuit. [Editor's note: After the date of this presentation, Judge Motz's decision was affirmed by the Fourth Circuit.] There are as many as 30 similar laws that have been introduced in other state legislatures, and at least two that have been enacted locally by counties or municipalities. A second prominent example of unions' recourse to state and local legislative bodies is laws enacted by California and other states that prohibit state contractors from using revenues derived from state contracts for purposes of opposing union organizing. These laws are being challenged on NLRA preemption grounds; the Ninth Circuit initially affirmed a ruling that the California law was preempted, but then—*en banc*, and by a fairly lopsided margin—held that the law was not preempted. Supreme Court review in this or a subsequent, similar case is certainly possible.

This, then, is how the problem is perceived by regulated entities in the labor and employment area and how it's manifesting itself to some extent in litigation today. Let me turn to the question of how to address the challenges presented by what this panel is calling regulatory double- or triple-dipping. I'm not going to attempt to propose a legislative solution, for two reasons. First, as I said, federal labor and employment law is fairly static and it's quite hard to make any significant changes—even through regulation, let alone through legislation. Second, the last panelist today is Dr. Greve, and I understand he's going to propose an overarching uniform resolution of the difficulties we're discussing, a solution that, at the same time, is consistent with the values that are important to members of the Federalist Society. So, out of respect, I will leave it to Dr. Greve to unveil a global resolution, and for my part will offer some thoughts on how federal regulators can go about their business with some of these difficulties in mind.

First, they can simply aim to bring clarity to their own programs. That was one of the reasons that, at the Solicitor's Office in the Labor Department, we thought the Department's program of filing

*amicus* briefs on important unsettled legal issues was valuable; ideally, it reduces administrative burdens by making the law more clear and uniform. Secretary Chao has similarly placed emphasis on what she calls "compliance assistance" intended to bring greater clarity to departmental positions and programs.

Second, federal litigators and regulators can stop and ask themselves, Where are our resources truly needed? When I was at the Labor Department, I thought that some of the smaller wage-hour cases—involving quite low-paid employees, and not necessarily large numbers of them—were often the most deserving of our attention because cases involving highly paid employees were more likely to attract capable plaintiffs' attorneys in light of the potentially substantial monetary returns involved. It seemed sensible to me to focus our resources on legal violations that we thought others might not address, and that influenced our choice of cases to pursue.

Federal regulators and prosecutors, then, should deploy their resources mindful of what other resources there are that may also be brought to bear. A related point for federal prosecutors, don't pile on. You can garner favorable publicity by bringing a lawsuit or charges against a widely vilified company or individual that already is subject to other litigation and prosecution. But at some point, if other enforcement authorities and private litigation appear to be providing remedies to those have been wronged and ensuring appropriate punishment, then the better use of resources is to focus efforts elsewhere—recognizing that this sometimes can be a hard decision to make and to defend to those who exercise political oversight.

Put differently, it is counterproductive when regulators view themselves as competing with one another. The fact that somebody else got there first is not a reason that you ought to get there too; on the contrary, in a federal system it's a sign of function rather than dysfunction that once one regulator is involved, another occasionally concludes, "The system's working, I don't have any need to go there as well." When now-former SEC Chairman William Donaldson came into office, the prevailing wisdom was that the SEC had been embarrassed by Eliot Spitzer's aggressive enforcement in the mutual fund area, among others. And the perception was that Chairman Donaldson felt that part of his mandate was to "redeem" the SEC's reputation by regulating



aggressively in areas where Spitzer had been active. Now, there may have been some failures there; there may have been gaps in the SEC's program to be filled and addressed. But what's become clear is that Chairman Donaldson over-reached: he overstepped the bounds of his authority and, I think to some extent, brought embarrassment on the agency by pushing through the new mutual fund rule and hedge fund regulation that were both thrown out by the D.C. Circuit. The mutual fund regulation was thrown out twice, as Commissioner Atkins knows—he was an extremely articulate dissenter in both of those rulemakings. But my point, again, is that if a particular form of misconduct is being vigorously prosecuted by another authority, in a federal system that's not necessarily a sign of dysfunction at all (assuming that other authority is acting within the bounds of its own legal mandate). The dysfunction, instead, can be in believing that the public interest is served by a competition among regulators to address a matter already being pursued by another regulatory authority.

The last thing I'll suggest that government actors can do to minimize the regulatory triple-dipping we've been discussing is, at least in some areas, to defer to private arbitration. When I was at the Labor Department, I issued a memorandum to the lawyers in the Solicitor's Office instructing them to defer to the arbitration process in certain instances where private individuals had entered arbitration agreements. The Supreme Court has ruled that the EEOC, the Labor Department, and other employment agencies can bring suit in federal court for the benefit of an individual even when the individual has signed a binding arbitration agreement. The fact that the government *can* do this, however, doesn't mean that it always *should*. As the Supreme Court has said elsewhere, federal policy favors arbitration, and deferring to legitimate binding pre-dispute arbitration agreements furthers that policy, reduces the burden on the federal courts, often can result in a more expeditious resolution of employment disputes, and of course respects private contractual commitments. So, the Labor Department has a program—on paper, at least—for deferring to arbitration in at least circumstances. It's a policy the EEOC and other agencies should consider as well.

I'll conclude with a couple thoughts on what can be done by those in the private sector who are

concerned about the issue we've been discussing. The Labor and Employment Practice Group of the Federalist Society had a panel last year where one of our speakers, Professor Amy Wax of the University of Pennsylvania Law School, discussed the literature on the degree to which employers take account of state employment laws in deciding where to locate their operations. There's a lot of sort of anecdotal surmise that aggressive state regulation the employment relationship will cause corporations to flee the state and locate elsewhere. But Amy found very little empirical examination of this purported phenomenon. This is something that it would be valuable to have those in the academy take a look at, and research that the private sector might be interested in sponsoring to a degree. If it is true, as one can reasonably expect, that excessive state regulation in the labor and employment area will drive out business, cost jobs, raise prices for consumers, deplete available services to residents, and the like, then these are things state legislators ought to know and consider when deciding how to vote on the laws put before them.

In addition to research of this nature, it would be useful to have a ranking of states according to the degree of regulation—worst-to-best states to locate your business, based on the labor and employment regulatory environment. I'm speaking specifically of labor and employment law, but of course the idea can be transposed to other areas as well. This is something that companies could use in making their decisions, and it's something that could discipline states as they consider what further laws to enact or—we should never forget—to repeal. That, at least, is one sort of market-based idea to address the difficulties in regulation we're discussing today.

Thank you.

**MICHAEL GREVE:** In some areas, the multiplication of regulatory regimes that hit a single firm result from the increased scale and scope of economic production. I think international antitrust is an example of that. You really don't want one worldwide regulator. At the same time, firms operate in many markets, and the price effects rattle all over the place. At the end of the day, if you want to sort this out, you'll have to talk to the Europeans. If you don't think that's a problem, you've never met a European.

Here at home, I think the opportunity for regulatory double-, triple-, or quadruple-dipping, the multiplication of regulatory agencies and access points, is a deliberate result of a political program. That program is commonly known as the New Deal. Prior to the New Deal, you had a regime of exclusive federal jurisdiction and exclusive state jurisdiction. Moreover, that regime made it very clear which of the individual states had authority over any given transaction or firm, under what circumstances. In those circumstances, regulatory double-dipping (or whatever you want to call it) was relatively rare.

The New Deal had three interlocking commitments that cut against that exclusive regime. First, the New Deal's overriding program was a cartel at every level—not just the national level but also in the states. The classic case in that area is *Parker v. Brown*. Second, a political program of cartels at every level demands concurrent state and federal powers over the entire range of economic transactions. Otherwise, regulated firms will sort themselves into one or the other regime. That's the last thing you want. Third, the New Deal ensured that the strictest regulator will always dominate the universe. So: cartels at every level; concurrent powers everywhere; make sure the strictest regulator always wins. Welcome to Felix Frankfurter's constitution. That is the system we have. That is the system we live with.

A system that is consciously made and designed can be consciously unmade and undesigned. The *New York Times* accuses me of wanting to overrule the New Deal. Actually, that is not my program. I want to undermine the New Deal by means of underhanded quasi-constitutional doctrines, and I yield to no one in my endorsement of such doctrines. There is any number of them, but the one I want to talk about today is preemption doctrine, which I think is actually quite instructive. Prior to the New Deal, the Supreme Court's doctrine was what we now call field preemption. As soon as Congress spoke at all, regardless of intent, states were completely blocked from that area. When the New Deal greatly expanded the scope of the Commerce Clause, the New Dealers asked themselves, What does that leave of the states? Nothing at all. So, the New Deal tried to compensate for the expansion of the Commerce Clause by throttling back on the preemptive effect of federal statutes. That is called the "presumption

against preemption." It is the core of preemption doctrine to this day.

The origin of that doctrine is a case called *Rice v. Santa Fe*, which said that the historic police powers of the states are not supposed to be preempted unless Congress has clearly indicated its intent to do so. Out of the case came the modern preemption doctrines. But it would be useful if people who cite *Rice v. Santa Fe* actually read it on occasion. I have done so, and it turns out it's not a preemption case all. The statute at issue in that case was the Federal Warehouse Act, (as in grain warehouses), which had to be regulated because they were a bottleneck between farms and food processors. They had been regulated at the state level. In 1931, Congress passed the Warehouse Act and said, "Dear warehouse operator, if you want a federal license, you can have on the following conditions. In that case, state regulation ends; federal regulation is exclusive. With respect to state-regulated warehouses, we don't preempt anything at all." The Act sought to establish a dual warehousing system, like the dual banking system we now have. The federal law operated only at the operator's own choice. Nothing at all was preempted. Look at what the Supreme Court did to that statute in this case: despite the fact that the statute said that the federal license would be exclusive, the Court ruled that the states can in some areas still regulate federally licensed operators. Felix Frankfurter, in dissent, would have granted states an even broader scope. His concern was not that Congress was trampling on the states; obviously, it wasn't. His concern was that the federal regulators had not created a rate-making regime—which is what he really wanted. A regulatory statute without rate-making can't be a real serious federal regime, and therefore the states had to be allowed to operate on top of the federal statute, even though it said it was exclusive. In short, *Rice* was a desperate attempt to squeeze a perfectly fine pre-New Deal statute into a curious powers framework.

If that's not the preemption doctrine you want—and I think it isn't—then what is it? I'll give you a few guideposts to what I think preemption law ought to look like, and then apply it to two cases. The first principle you want to start with is an anti-circumvention principle. If the direct offense of the statute is prohibited, states shouldn't be allowed to evade and regulate around it. Second, you want to construe preemption doctrine

consistent with the dormant Commerce Clause, or rather with the federalism risks against which the dormant Commerce Clause was supposed to guard. There are three of them. The first is balkanization of the economy. The second is the risk of state discrimination against out-of-state commerce. And the third is the states' tendency to export the costs of their regimes. If any of those risks are present, I think you ought to read the statute to imply preemption. And if none of these risks are present, you want to cut the states some slack. I think that's the good sense of this presumption against preemption in historic state powers areas.

I can't go into the details here, but I'll give you two quick examples of how I think this shakes out. My first example is antitrust. If you look at cases dealing with preemption in that area, the courts always say, "Well, the Sherman Act is supposed to be supplemental to state regulation." That's kind of true. But what the courts meant in the '20s when the supplemental language came up was that the Sherman Act regulates interstate conspiracies, and the states regulate conspiracies with only in-state effects. (How do I know that? Well, that's what the Sherman Act says.) What "supplemental" meant *after* the New Deal is that the states regulate the full range of private commerce and the feds regulate the full range of private conduct. At the end of the day, the feds noodle around with the local taxicab commission and the state of West Virginia regulates Microsoft. Isn't that a great regime?

Nothing in the statute commands that kind of outcome. If you take seriously the preemption regime of the federalism analysis I've sketched, it turns out *Parker v. Brown* is wrong—and that, I think, is the right result. It also turns out that *California v. ARC* is wrongly decided—and I think that's also true. My second example is securities regulation. The way I read the Securities Act—and I don't care what the Enforcement Division says—is that there's already plenty of authority to preempt Eliot Spitzer. Anything that interferes with the national markets, with functioning national capital markets ought to be preempted, I think, because otherwise the balkanization and cost exploitation risks are just too serious.

I could go on at length, but I won't. I just will end on this note. double-dipping in regulatory conflicts in the United States is not a force of nature.

It is a deliberate creation, and I think the obstacles to getting rid or curbing it are not at all legal; they're political. So, we have an Antitrust Modernization Commission which is supposed to study what's wrong with antitrust. The preemption issue is the big elephant in their lavish quarters, and they're just ignoring it. Similarly the SEC—and Paul Atkins knows much, much more about this than I do—in the early 1990s looked at the preemption of state Blue Sky laws. Richard Breeden thought that he had the authority to preempt those laws but then didn't do it. The SEC needlessly waited around until Congress mercifully got around to preempting the states as least in some respects.

My strong suspicion is that there are more things that federal agencies can and ought to preempt now. My advice is to say, once there's a regulatory crisis and Eliot Spitzer is on the warpath, it's too late. Under those circumstances, it's really hard to do. You really have to lay the groundwork for preemptive moves when there's a little quiet and nobody notices. But when there's quiet, by all means go ahead and do it.

Thank you.



INTERNATIONAL & NATIONAL SECURITY LAW:

ARE WE OVER-LAWYERING INTERNATIONAL AFFAIRS?

Phillip C. Bobbitt, John D. Hutson, John C. Yoo, Philip D. Zelikow; Moderator: Edwin D. Williamson

EDWIN D. WILLIAMSON: Good morning. Although this panel is entitled "Are We Over-Lawying in International Affairs?," I think the better way to describe it is: What is the role of lawyers in making legal policy? As you've heard from several of the panel discussions at this Convention, the global war on terror has raised not only serious and difficult legal questions but serious and difficult legal policy issues, such as whether terrorism should be addressed as a matter of criminal law or a matter of the laws of war, and whether it presents a new paradigm that must be addressed by a new set of rules, and what should those rules be.

This panel will discuss the role of lawyers, particularly government lawyers, in addressing questions of legal policy. We will discuss fundamental questions such as: Should lawyers decide legal policy? Or is that best left to the policymakers? Should lawyers give advice as to legal policy, or should they stick to providing answers as to what the law is? How should lawyers respond to what a policymaker thinks is the legal question but is really a question of legal policy? If lawyers find the law vague or lacking, should they fill in the gaps, advising as to what the law should be? Was Secretary of State Rice right when she warned the American Society of International Law that lawyers should not stretch laws, such as the Geneva conventions, to apply to circumstances they were not designed for? Did the Office of the Justice Department opinions on interrogation techniques stretch in the other direction when they held that laws did not restrict the President's authority? Should lawyers indicate the quality of the response to a question? For example, should they say how a court would or should decide, or is it just enough to say that this is a reasonable answer and others may differ? What should a government lawyer do after losing an intragovernmental policy argument on a legal issue? Is the answer different if the argument was over a legal policy issue?

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\* The Hon. Edwin D. Williamson works in the Washington, D.C. office of Sullivan & Cromwell LLP.

We have a distinguished panel to discuss these issues. Our first speaker will be Phil Zelikow. Phil is currently the Counselor of the State Department. This is not a legal position but a very serious policy position, from which he advises the Secretary of State on a wide range of issues. He was the Staff Director of the 9/11 Commission, and in the past he has been a trial and appellate lawyer. He's been a foreign service officer, and served on the NSC staff. Prior to becoming Counselor, he was the White Burkett Miller Professor of History and Director of the Miller Center of Public Affairs at the University of Virginia. He will provide the insight of a policymaker on the role of lawyers in making legal policy.

John Yoo will follow Phil. John needs no introduction to this group. His latest book, *War by Other Means*, has just been released, and John will be signing copies of this, this afternoon. Whether you agree with John, it's a great book. Just look at the table of contents: war, the Geneva Conventions, assassination, the Patriot Act, the NSA and wiretapping, Guantánamo Bay, interrogation, military commissions. It sounds almost like the agenda for this Convention. John is currently professor at the University of California at Berkeley Law School. From 2001 to 2003, he served as Deputy Assistant Attorney General in the office of Legal Counsel. He played a prominent role in the formulation of the legal opinions addressing many of the key issues that have arisen in the war on terror.

John will be followed by Admiral Dean John Hutson. John is President and Dean of the Franklin Pierce Law Center in New Hampshire. He is a career naval officer and in 1997 became the Judge Advocate General of the Navy. Dean Hutson can, I believe, present the views of the career (particularly the uniformed) government lawyer.

Our final speaker will be Philip Bobbitt, who holds the A. W. Walker Centennial Chair at the University of Texas Law School in Austin. Philip has served in the government in both policy and legal positions. He was in the White House Counsel's Office in the Carter administration. He served on the Senate Iran Contra Committee, and served as

Director for Intelligence, Senior Director for Critical Infrastructure, and Senior Director for Strategic Planning at the National Security Council during the Clinton administration. I had the good fortune of inheriting this lifelong Democrat as my counselor for international law when I served as legal adviser in the George H. W. Bush administration.

So, Phil, why don't you start things off.

**PHILIP D. ZELIKOW:** Thanks. I'm happy to have the opportunity to address this group today. I want to cover three major points: (1) the paradigm of armed conflict we're in now, (2) the challenge of making legal policy, and (3) the way in which we're adjusting our understanding of legal policy.

First: the paradigm of armed conflict as it applies to the conduct of the war on terror. I said in remarks to an ABA committee earlier this year that before 9/11 we had a criminal justice approach to combating terrorism. In 1998, we indicted Osama bin Laden, for example. But the criminal justice approach to fighting Al Qaeda was not effective. So, therefore, after 9/11 we shifted to an approach of conducting armed conflict. For a variety of reasons, I think that was a fundamental and necessary shift in approach. The paradigm of criminal justice is inadequate in dealing with a large transnational phenomenon like Al Qaeda, for a number of reasons—and armed conflict, I should mention, is not simply a metaphorical term. It's real. It's a real war in Afghanistan. It's a real war in Iraq. The government engages in actions under the law of armed conflict in other parts of the world that are effectively ungoverned. And it partners with local governments' antiterrorism efforts; for example in places like northern Pakistan. Of course, the law of armed conflict is supplemented by criminal justice procedures, when people are captured under the legal regimes of different states, and inside the United States. But the law of armed conflict has to be an essential part of the legal approach to the war on terror. That's an argument I made at greater length in my remarks. Frankly, I think that it will be hard for any administration, Democratic or Republican, that succeeds the Bush administration, to say, "We're going to discard this approach altogether and go back to criminal justice: Article 3 courts and indictments in the Southern District of New York." When people look back on this period, whatever the controversies, they will see the importance of this paradigm shift.

That said, you have to interpret and manage the law of armed conflict and make policy decisions in a way that allow that paradigm to be sustainable and effective. If you want other countries to accept that you're operating under the law of war, it helps that to interpret the law of war in a way they can understand and accept. If you choose to interpret the law of war in ways they can't live with, it's very difficult to get them out of the criminal justice paradigm with which they feel more comfortable—you can't build an international consensus around your new approach. That complicates the way you do business around the world.

I should note that this is not just a matter of deferring to world opinion. I know that is a red flag to some conservatives. But this is not a matter of scoring well in a world opinion poll. Getting the cooperation of other countries is actually quite important to the effectiveness of the war on terror, and if you want countries to cooperate with you in the international rendition of terrorist suspects, certain things need to be available; if you want them to make their airspace available for flights of government aircraft, certain things need to be true; if you want their police and soldiers to help you in a variety of ways, their governments have to be able to live with what you're doing. If the circle of cooperating governments gets narrower and narrower, the reach and effectiveness of our ability to conduct a global war shrinks commensurately.

So, it's a legitimate goal to build an international coalition that shares our basic principles, and our goal should be to persuade our international partners to understand that the law of armed conflict has to be an essential part of our approach to the war on terror. But this is fundamentally a policy argument, not a legal argument. I have not said, for example, that we are bound as a matter of law to apply a particular interpretation of the Geneva Convention or common Article Three. I said that it is prudential, as a matter of policy, to apply legal principles that other countries can understand and accept, whether or not you believe that you are bound to make that choice. In fact, this was one reason why the 9/11 Commission recommended that, as a matter of policy, the U.S. government apply common Article 3 as a floor on its behavior, without engaging the issue of whether we are bound by that principle. This position has now effectively been decided for the Administration and the United States by the Supreme Court.

Let me turn to my second point, then: legal policy. If I asked how many of you believe judges should make public policy from the bench, I doubt many would reply in the affirmative. That's my view too. In general, I'm reluctant to have judges make policy. Why is that? Because they're not trained to do it. They're not democratically empowered to do it. Thus, their legal reasoning seems forced when they're trying to achieve a public policy objective. Likewise, lawyers should not make public policy in the Executive Branch through interpretation of law. If they interpret the law in ways designed to make public policy, they are engaging in the same problematical behavior. (That is, unless the lawyers are explicitly acting as policymakers—using the criteria and approach policymakers use, considering the full range of prudential political and international considerations; as a policymaker would, from formal training or experience). We're not trained in policing and public order. A course in criminal procedure, even advanced criminal procedure, or mastery of Fourth Amendment law, is not the same as a course in policing and how to maintain public order in developing societies. Nor is it a course in how to practice effective counterterrorism or a course in how intelligence collection works in the counterterrorism or counterinsurgency world. Lawyers do not necessarily receive much formal training in the kind of political analysis of international policy issues that is likely to arise in this twilight war in which we are now engaged.

This is not a partisan comment. It was true in the Clinton administration; it's true in the Bush administration (to some degree). I'm just stating it as a matter of course. What happens, for one reason or another—either because someone asked for it or because it came from below—is an agency will develop a proposal about something they want to do. Let's suppose that proposal also involves highly sensitive intelligence issues; as in, for instance, the context of covert action. That proposal then usually goes to an interagency lawyers group. The key interagency meetings tend to be dominated by lawyers, who are mostly arguing about whether this is legal. Then there are intense debates on how to describe the appropriate authorities—in which, again, the primary drivers are the lawyers. Finally, the document is finished, and the policymakers come back into the process, usually at the level of Cabinet principles. At this point, the cake is already pretty

well baked.

I would argue that this is not an ideal way to make decisions about legal policy in the war on terror. John Yoo, I think, was an important policymaker in this regard. It's hard to read his book and not come away with that impression. Indeed, many of the major characters in his book are lawyers who worked with John in fashioning these policies. Without taking a side on his decisions, step back and notice the way policies are made, and who the critical participants at the sub-Cabinet level are making them. There are exceptions—some of the internal DOD procedures and so on—but I think what I'm describing occurs commonly enough.

What then are issues that surface when you bring full policy analysis to bear, as opposed to the simple question of what can I do and what can't I do? Basically it is a balance of effectiveness against moral issues. Moral issues are not the same as legal issues. I need to stress that point. So, for instance, considering the effectiveness of detention and interrogation procedures, you can look at the experience of the French in Algeria. John cites the effectiveness of French techniques, for example, in the Battle of Algiers. But those same techniques caused an enormous reaction in France that helped shorten France's ability to conduct the war, not for legal reasons but for larger political reasons.

I wrote two case studies on the conduct of policing in Northern Ireland about fifteen years ago, spending a lot of time in Belfast. It's been a tortuous process of trial and error in British policing and interrogation methods. The question is not just one of effectiveness. It is a question of the sustainability of certain procedures over time. They're learning in this painful process what is both politically, internationally sustainable and effective. It is a similar story with Israel and the United States. We have a lot of history in these matters. In the interrogation procedures, for instance, much had not been thoroughly analyzed at the time decisions were made—understandably, as they were made under great stress. Even today, we have an almost laboratory case of the way we handle terrorists outside of Iraq and the way we handle terrorists inside Iraq, under the law of armed conflict—who are just as dangerous.

Another issue is sustainability—both in the domestic and in the international sense. The most effective policies will be those that survive from one administration to the next, regardless party

affiliation, regardless of who's in control of Congress. The people carrying out these policies need to feel that they're not going to be whipsawed back and forth, as in the Church committee period and after. Late this summer, the President made a series of announcements that really moved us into a different legal phase in the war on terror. He was already moving into this phase before the Supreme Court decision, despite the controversy over the Military Commissions Act. He is building a sustainable partnership, working with the Congress and foreign countries for what he called "a common foundation." He is using the military commissions for the major war criminals who helped carry out the 9/11 attacks--accepting that the way those people are treated will come out. It's more important to bring them to justice. This means a relatively limited role for some of the secret CIA procedures. But it fences off the things we have to be able to do in that realm that are invaluable. We need a durable legal framework in which to provide necessary policy guidance for the conduct of this conflict, and we need to be able to obtain broad durable support for the way we conduct it. I think, in other words, despite what you may read, we are moving in a reasonably healthy direction, moving forward, in a way that will allow us to sustain the fundamental paradigm shift that occurred after 9/11.

**JOHN YOO:** I'd like to thank the Federalist Society for inviting me to speak twice in two days. And in particular, I'd like to say that I'm not plugging my book again. I'm going to plug Phil's book. He has a great book on the Cuban missile crisis, which I read a long time ago, about how interagency process is an important factor in how we make policy, and how sometimes interagency processes take over and decide things that the elected leaders of the government don't actually intend or want to happen. I also learned a lot from Phil Bobbitt's book, which I highly recommend, *The Shield of Achilles*, which is sort of a bigger-picture analysis of the changes in the world and the place of the United States in that world and how we, in some ways, have to confront the dangers of proliferation of WMD and terrorism. From both of those books I've learned quite a bit in thinking about these issues.

First, let me say that as regards the question of the panel, has there been an over lawyerization or a

change in the amount of lawyering in the way we conduct foreign affairs? I think it's undeniable that there has been. You could look at the war on terrorism and some of the wars before that for evidence of this fact. We have accounts of our military leaders, our civilian leaders, going up even to the President of the United States, choosing bombing targets in Kosovo and Afghanistan with lawyers sitting right next to them, evaluating on-the-fly, on an *ad hoc* basis, whether selection of this or that target would be legal or under international law.

There's a well-known story about a convoy leaving Kandahar that our commanders thought about attacking because it was believed to have a large number of Taliban leaders. But because their families were in the convoy, a military lawyer in the command center vetoed the strike. I can't tell whether that was a good decision or a bad decision, but it gives you a sense of how powerful lawyers have become in the fighting of war. It's hard to imagine this happening in the other major conflicts that we've waged, such as World War II or the Civil War. You don't see any accounts of lawyers playing that significant a role, sort of day-to-day operations of the military.

This also takes place at much broader policy levels. Here I disagree with what Phil just said, that there is a line between law and policy. My sense from working in the government is that, actually, lawyers tend to confuse that line; they think that a lot of what most people think of as policy is actually governed by law. One of the jobs of the Justice Department while in the Administration, oddly enough, was to stress that in fact the law doesn't decide these questions, that it really is a more difficult decision for policymakers to make. I quite agree with Phil, that, as lawyers, we may not be the most competent people to make those policy decisions because we are not trained in how to make decisions about the effectiveness of different procedures, the effect they have on our ability to cooperate with other countries and the effect they have on support for the United States in other areas. Those are all very important things that people are trained to do in public policy schools, through experience in the bureaucracies.

Take, for example, the Geneva Convention debate, which you've all likely heard about. Even to say, as I thought, and I think the Administration thought, that the Geneva Conventions did not cover the war with Al Qaeda, that doesn't tell you as a

policy matter whether we ought to do so at all. There are important reasons you could argue, as Secretary Powell did at the time, in favor, but there are also reasons against it. Philip mentioned this interagency process of lawyers and said that I was going to have posttraumatic stress syndrome because one thing I thought I would never have to hear again after I left the government was another interagency process. But my let me relive it for you to show you how painful it can be.

In this interagency process you have lawyers who say, “We should give people Geneva Convention protections, because we’re worried about how the Conventions will be honored in future conflicts against the United States.” That’s a perfectly valid concern. But, to me, it sounds like a policy consideration. We felt that this kind of enemy was not covered by Geneva because of the nature of the organization, that that ought to be taken into account when we think about whether to engage this war. Concerns about future compliance with Geneva by other nation-states should not influence what we decide now, in this particular situation. It’s not a question about whether the Geneva conventions and their text and history really cover the war on terrorism; it’s an argument about policy considerations and the debate over whether to follow them or not. What I found in the interagency process debates is that lawyers in favor of following the Geneva Conventions with Al Qaeda would make the argument as though it were a strict legal matter, how those conventions ought to be interpreted, rather than a policy argument about what to do once you know what the law is.

The other thing is that we are all trained in law school to understand that the law we have today and the law we’re making in the future is subject to policy, that it is an expression of policy. Legal scholarship over the last 30 or 40 years has shown how often legal rules are actually policy choices. I found in the government that there was a curious inability to understand international law in that way. In some respects, the people we train to work on international law issues and think about international law bring this very oddly formless perspective to it. It’s thought that international law is very clear, that it can be applied with great clarity, that it doesn’t embody policy choices, and that it ought to be obeyed in all circumstances, without regard to thinking about how to change it. Those

of us or common-law lawyers understand that the common laws is an evolutionary system and that you can change it through time over practice. There’s an important component of that in international law. But we had people in these arguments who thought that it was quite clear what international law required, and how it applied to something which a common law lawyer would typically think of as protean; as in, here’s a new situation, the war on terrorism, and we have to think about how to apply and adapt these older rules, drafted for a different situation, to this new circumstance.

A third thing that really struck me in these interagency processes is that there are people who firmly believe that international law is not just as secure and firm as domestic law, but that in fact it is federal law. There are people who would say that, if we think this is international law, the President is constitutionally bound to enforce it as though it were on a par with a statute or a treaty. That was just striking, how much that view—which I’ve always thought of as a fairly aggressive view promoted in the academy—had really seeped into the teaching of international law in our government. I just don’t think there’s much historical or textual basis for that proposition. There’s no international law part of federal law, in the Constitution itself, aside from when Congress decides to make something a criminal offense. We have historical examples, for example, of people like President Washington, who tried to prosecute people for violating his proclamation of neutrality in the absence of a congressional statute, though the courts refused to go along. But I’ve often thought this fails to think about how international law is an extension of international politics, and that taking some of these positions really does advance a certain kind of foreign policy or not.

The United States often promoted a view of international law that sought to constrain British interests, when we were weaker country and they a stronger country. And, if you think about it, that’s exactly what’s going on today, in reverse. Weaker countries, particularly in Europe, are using international law to constrain policy options that the United States should have in the war on terrorism. So, if France wants to play a bigger role in international affairs, but doesn’t want to invest the military and diplomatic resources required, international law affords itself as a convenient way to constrain the



larger power in the world, which at this time in history happens to be us.

What we have to do is decide whether we're going to decide on policies that might be effective, and balance it against what the effects might be, which Phil described quite well, in harming cooperation between the United States and other countries in fighting the war on terrorism. Those policies might be inconsistent with the way other countries view international law, but I do think that the United States' views are often downplayed. And we are a country that is providing a public good: international stability. Our views on international law, I think, ought to be taken into account more seriously and heavily, particularly in the laws of war. A lot of other countries just don't fight wars and aren't responsible for conducting military and intelligence operations designed to protect the West.

**JOHN D. HUTSON:** Good morning. I, too, want to thank the Federalist Society for inviting me here. It's a real honor. I'm a little embarrassed to admit to you that I have not actually written any books. I have read a number over the years—none of those that have been touted thus far, though, I have to admit. But it's an honor to be with this distinguished group, whose careers I have watched over the years.

In answer to the question, I would echo John with a resounding "Yes." But, also agreeing with John, I'm not sure that really answers the question. We in the United States overlawyer an awful lot. This is part of it, to be sure. But the other way of looking at it, is that we often hide behind law and lawyers. We let them do the dirty work for us. One of the things I discovered, after being a lawyer for 35 years or so, is that the law itself is less important than I thought. The lawyers are more important. Clever lawyers, perhaps too clever by half, can get around the laws. And so, lawyers have become increasingly important, but that creates the problem of overlawying.

My job this morning is sort of unique and narrow. I am supposed to talk about the military and military lawyers, because they've been thrust into the forefront recently. They've become of great interest to people, and I think they have acquitted themselves nicely. In that context, let me talk for a moment about the law of war. (I should credit Colonel Bill Eckhart at the Army War College for what I'm about to say, because I've grievously stolen a lot of his ideas.)

I view the law of war as a sort of continuum, with law at one end and war at the other end. There's a great deal of tension in that continuum. The law values the system, the means. War glorifies the end, the results. The armed forces fear that they're going to lose the necessary means by which to achieve the end. The lawyers worry about loss of jurisdiction (yet another tension). The law restricts power. War uses power. The law tries to limit disorder and violence. War thrives on disorder and violence.

There are some great similarities, though, too. Both are vital to the success and security of the country. And to some extent, one is a means to the end, in that there are lawyers involved with the military mission, trying to facilitate it and make it work. The military mission is to fight and win the nation's wars. But that is all the military can do. We need to keep this in mind in the present situation. All the military can do is provide the time and space necessary for the real solutions to take place. The military is not the solution in and of itself. The real solutions are legal, economic, cultural, social, religious, and legal; so that, the lawyers involved in the war-fighting aspect, providing the time and space necessary, become part of the solution in the sense of providing the law of war. The military and the lawyers in the military aren't really very good, honestly, at peacekeeping. They can do it at the point of a bayonet, but when you sheath the bayonet, all hell can break loose again. And they are particularly unsuited for nation-building. That's somebody else's responsibility. The Judge advocates understand and respect the chain of command and the mission of the military. They also are very good generally at protecting their superiors from making mistakes, protecting them oftentimes from themselves.

It's absolutely necessary that the military lawyers understand that the four-star general or presidential appointee sitting across the table from them is not their client. Their client is the United States of America. It's not the individual. It's very easy for lawyers in the government and in the military—particularly in the military, where chain of command and loyalty are so vitally important—to forget that. When I was a young lawyer in the Navy—and this was during Vietnam, and we were all essentially avoiding the draft and becoming lawyers because it seemed cleaner—we spent a lot of time debating whether we were lawyers first or naval officers. What was our

primary responsibility? To whom did our allegiance lie? To what profession did we owe fealty?

But this was a red herring. Nobody asked the pilots whether they were pilots or naval officers first. Nobody asked the submariners where their loyalty lied. It's the same thing for JAGs. The United States Armed Forces demands of them that they be the very best lawyers they can possibly be. That's all that they have to do, be the best lawyers that they can possibly be. I say with some pride that we've seen that in the last few years. We've seen it with the lawyers that have been defending people on military commissions. People come to me and say, "John, are you surprised that they've been so vigorous?," like we expected the lawyers in uniform to just lay over and play dead because defending alleged terrorists wasn't the thing to do. The answer is no: I wasn't surprised at all. In fact, I expected it.

I testified at the Senate Armed Services Committee a few months ago about the military commissions, and sat next to the JAGs of the various services. They testified honestly and forthrightly about where they thought the military and the administration had made mistakes, and what they thought was the way ahead. I thought they showed a great deal of courage in doing that. But again, I wasn't surprised. I think it's important for all lawyers, particularly lawyers in the military, to lead from the rear. Whether you're trying to get some junior enlisted person to understand that it's not in his or her best interest to take the stand or whether you're trying to convince the four-star of what he ought to be doing, it's necessary for lawyers to lead from the rear. If you do that, you will find yourself not directly but very effectively in the policymaking position, because lawyers have the unique position of advising the people who make policy. It's easy to get lost in that. It's easy to hide and say, "Well, it's not my decision; all I did was give advice." But good lawyers know the law, and great lawyers know about life. Law is not practiced in a vacuum, its practiced in real life. The military lawyers I've seen have demonstrated that in great abundance. And I'm awfully proud of them.

Thank you.

**PHILLIP C. BOBITT:** In 1990, the states of the world gathered in Paris to adopt the Charter of Paris. It incorporated the Moscow and Copenhagen

Declarations. It was perhaps the most important treaty since the Charter. I'd just started work then as the Counsel on International Law for the State Department. And I tried to get IL, as it's known, to send lawyers to Paris. The acting legal advisor said, "Why? I mean, what would they do?" His view, I think, was rather like the view of my colleagues up here. There is law, and then there's policy. That struck me as wrong then, and it does now too. It leads to all sorts of practical impossibilities, because it's hard to extricate law from policy.

In fact, it makes lawyers much more dictatorial. When they reflect policy preferences, they're forced to clothe them in the language of the compelling nature of the law. It represents a very retrograde view of how we use lawyers in this society. I agree with the premises of my colleagues here; we do need to reform international law, as well as domestic law, to appreciate the new strategic context we're entering. But I strongly disagree that the way to do that is to pretend that lawyers should be confined to reading statutes and declaring obstacles or their removal.

For the long wars of the 20th century, we separated law from strategy. That was good for us. It allowed us to avoid militarizing the domestic environment and politicizing the strategic environment. That, in turn, allowed bipartisanship over many decades. We won the wars against fascism and communism. But in the period where entering now, we need to reintegrate law and strategy, and the failure do that, which we have seen in abundance in the last few years in Iraq, is giving us a reputation for fecklessness and lawlessness that will make the sort of consensus that Phil Zelikow talked about very difficult to achieve, not only abroad but also domestically.

There are, I think, three wars on terror that we are trying to prosecute simultaneously. One is a war against terrorism, a particular kind of terrorism, 21st-century networked global outsourcing terrorism. This one will not be confined to radical Muslims, although the market innovator of sorts was Al Qaeda. The second war against terror is a struggle against the proliferation of weapons of mass destruction for "compellence" rather than deterrence. Sometimes these two theaters intersect, and that makes terrorism especially terrifying. But sometimes they don't, and progress in one dimension makes the other dimension actually worse off. The third is an effort to protect

our civilians from the consequences of infrastructural failure, whether it's natural or unnatural, critical infrastructure failure or a biological attack whose origins we do not know and may never know, as indeed we do not know the authors of the anthrax attacks.

To win those wars, the first weapon we must deploy is law, and the way to deploy it is not to treat lawyers like closet cases. When we have learned that law is our strongest suit in this society, that there's a reason why lawyers play such a large role in Congress, we will avoid the two extremes of either pretending that a lawless approach to strategy can succeed or lawyering in a way that makes law a kind of Trojan horse for the policy preferences of lawyers.

I was sitting here listening, and thought of a deceased friend of mine. I wish he were here. His name was Lloyd Cutler. He was a very prominent Washington lawyer. He wasn't a conservative. I doubt he was a member of the Federalist Society. But he had a very subtle and powerful view of law. Most people don't realize this, but he was the mind behind the Algiers Declaration that got our hostages back. He was the guy who [microphone problems]. It allowed the President much more flexibility than we otherwise would have had. He even treated being a lawyer as something like being a mechanic, like something which would have forced him to defer to policy persons. Had that happened, he would've lost his usefulness. As the dean told us, it was because Lloyd was a very great man as well as a great lawyer that he was so useful to the many presidents—presidents, by the way, of both parties—over such a long period of time.

I imagine that many of you are lawyers, and some of you law students. I ask you to reflect on the unique role that America has given lawyers. If you're a physicist or a mathematician and you cross a border, you still have your yellow pad with you and your chalkboard. But when a lawyer crosses the border, she becomes just another tourist. It's the jurisdiction that empowers you. And in this country, lawyers have been given a unique role. That puts a big responsibility on you. You've become defenders of the Constitution, just as much as the 101st Airborne. To withdraw from this or fail to appreciate the important role law and lawyers play in the wars on terror would be a big mistake.



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## ANNUAL CONVENTION LUNCHEON: JUDICIAL INDEPENDENCE

*Carlos T. Bea, Danny J. Boggs, Timothy B. Dyk, Patricia M. Wald; Moderator: Dennis G. Jacobs*

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**DEAN REUTER:** Welcome to our National Lawyers Convention Luncheon. It's my great pleasure to welcome you here today. You, that esteemed group described by the *Washington Post*—and I want to get this right—as the “pinstriped tribe of conservative legal minds called the Federalist Society.” Now why is it every time I quote the *Washington Post*, you laugh?

Anyhow, it is my great pleasure to introduce this panel and its moderator. Internally at the Federalist Society, we've been referring to this as the “bunch of judges” panel. Of course we refer to them only very respectfully as “a bunch of judges.”

Now, many of you probably know that we have conference calls in advance of these panels to get everything right and discuss the logistics. And sometimes disagreements can arise. But I'm happy to report that when I had the call for this panel, there were no disagreements about the order of the speakers or anything that anyone would propose to say. In fact, the only points of disagreement were how many gavels should be provided and how many federal marshals would be on hand. I'm now beginning to hope that this has not becoming the “contempt of court” introduction.

Anyhow, what better topic to discuss here today at our luncheon than judicial independence, after the recent *Wall Street Journal* exchange between U.S. Supreme Court Justice Sandra Day O'Connor and Circuit Court Judge Bill Pryor? And what better group of panelists could we have assembled to speak about the issue than federal appellate court judges, current and former? These are people that live, eat, drink, and sleep judicial independence on a daily basis. In fact, here at the Convention we have some 20 federal appellate court judges participating, many in today's audience. When you stop and think about it, 20 judges, that's a fair percentage of our entire active federal appellate bench that we've presented at this year's convention. And of course, the other night at dinner we were just a couple votes shy of being able to grant *cert*. It really is remarkable when I reflect on the personalities and organizations that are represented by the participants in our convention; 20 federal appellate court judges, two

Supreme Court justices, state judges, and law school professors from the very best law schools in the country—Yale, Harvard, Chicago, Northwestern, Georgetown, Northwestern, Berkeley, Duke, Columbia, Northwestern, Pepperdine, and Texas—three law school deans and public policy officials, a sitting governor and three state AGs, a couple of former U.S. attorneys general, the current and two former U.S. solicitors general, and of course the Vice President. Roaming the halls and on stages, we've also seen quite a few U.S. senators, congressmen, and former congressmen, several Cabinet secretaries, the Head of Domestic Policy, journalists and commentators, and importantly representatives from Human Rights Watch, the ACLU, the Center for American Progress, People for the American Way, and the ABA. (That wasn't one of my laugh lines.) These last few are very welcome to join us here in our discussions, and they really do help underscore the spirit of debate that is so integral to the Society.

The moderator for our next panel is truly a remarkable, likable man. Judge Dennis Jacobs is the Chief Judge of the Court of Appeals for the Second Circuit. He's been a judge on that circuit since 1992, leaving a partnership in a major private firm to assume his position on the bench. He's a regular participant in Federalist Society events. I've never seen him perturbed or with anything but a big smile on his face and a ring of laughter nearly always in his voice. Given that demeanor, I'm keenly interested to learn just how deep his concerns about judicial independence could possibly run. We're very pleased to have him with us here today. Please join me in welcoming Judge Jacobs.

**DENNIS G. JACOBS:** The first thing I want to say is what a privilege it was for me to be here in the room last night listening to the Vice President. For me, that was sort of a lucky accident. I just saw a very long snaking line outside, and I got on the end of it, and when I got to the front I thought that I was going to be able to buy a PlayStation. But the event was much more rewarding than even that.

As a moderator of a panel on judicial independence, I suppose I should talk up the

importance of this topic and justify the time that we will spend exploring it. This discussion will be provocative and absorbing. The subject is important. But the threshold question for me is really whether judicial independence is a great issue in terms of the size of the threat to judges. Is judicial independence so precarious nowadays that it's a legitimate preoccupation? And if it's secure, what fuels this issue is a major controversy?

One essential preliminary to the discussion: this topic will be discussed chiefly though not altogether in the context of federal judges. The subject sprawls when it's expanded so that each of the states is in play; and the panelists and your moderator have all been on the federal side. So we'll focus on what we know. As to independence, I suppose I should ask if I should be worried. Under Article III, I enjoy enormous insulation from reprisal. My salary is secure, and if I'm impeached, I won't make less than I do now. I hold a position of distinction and moderate power, recently diminished by my becoming Chief Judge. And if I am so inclined, I can arrange to be lionized.

Federal judges who focus on criticism or threats of impeachment may be susceptible to being characterized, possibly mischaracterized, as a bit overwrought. On the other hand, there are assaults on judicial independence that need to be decried. But when one talks about independence, it's important to ask, independence from what? From Congress? The Executive? From critics? From humiliation? From gross disrespect? From threats of impeachment? From imputations of partisanship? And, independence to do what? Presumably, our jobs.

Finally, as we talk about the subject, we should not forget that the empowerment of judges is at the same time an empowerment of the legal profession and the legal community. The bar has its own interests, and it would be naïve to think that the bar is the only major player in our economy that is not self-interested and working to expand its influence. So, when the bar rears up to defend judicial independence, often for judges who exercise or overextend their sweeping powers, we cannot know who is moved to defend judges out of neutral sense of public interest, who is making room for doctrines that they approve and that judges promote. And who in that group is aggrandizing the power of the legal profession generally to operate and promote its

agenda without the kind of bare-knuckled criticism that prevails everywhere else in our culture?

To discuss these subjects and many others, we have, as Dean has pointed out, a very distinguished panel. We're going to hear very briefly from each of the four speakers, so that you can get acquainted with their views, and then I'll pose a bunch of questions.

Our first speaker is Danny Boggs of the Sixth Circuit Court of Appeals. He is a Kentuckian who attended Harvard and the University of Chicago Law School. He returned to Kentucky after school and was legal counsel to the governor, among a number of other distinguished positions in state government. He came to Washington and was assistant to the Solicitor General of the United States, and other jobs. And then, after an interlude in private practice, he returned to serve in the White House Office of Policy Development and Special Assistant to the President. In 1986 he was appointed to the Sixth Circuit. In 2003 he became Chief Judge.

Patricia Wald was educated in my circuit with a law degree from Yale and a clerkship on the Second Circuit. She's had a varied career and practiced in the Justice Department, in the neighborhood legal services, in the Center for Law and Social Policy. She was appointed to the D.C. Circuit in 1979, became chief judge of that court in 1986, retired in 1991, and since then has been intensely active in the ALI, and (very recently) as a judge of the International Criminal Tribunal for the former Yugoslavia.

Carlos Bea grew up in Los Angeles. He has a BA and a law degree from Stanford. He worked in a firm in San Francisco, had his own firm for 15 years, until the Governor appointed him to the San Francisco Superior Court. In 2003, he was appointed to the Court of Appeals for the Ninth Circuit, where he now serves.

Timothy Dyk is a circuit judge on the Federal Circuit. He took office in 2000. A graduate of Harvard Law school, he was a law clerk to Justice Reed, Justice Burton, and Chief Justice Warren. He served as special assistant to assistant attorney general Louis Oberdorfer in 1963 to 1964. I'm happy to say that I sat with Judge Oberdorfer on my court this past Tuesday. And Judge Dyk has been adjunct professor at a number of distinguished law schools.

We will begin with Judge Boggs.





could be issued in favor of the format that laid down in it. We also have other doctrines, some of them imposed by the courts themselves, like state secrets, which obviously we need to a degree, but have been interpreted to in effect remove judicial review in some cases—such as the wiretapping surveillance program. That decision has gone the other way but some other decisions have not, so that the courts have in effect lost their role entirely. That’s something I think we judges and others should keep their eye on, to make sure that the courts don’t get marginalized or stripped of what I think is their true role in the constitutional structure.

**CARLOS BEA:** I was very glad to hear Judge Wald say that we’re not here to defend particular attacks on judges, being from the Ninth Circuit, as I am. The term in the discussion is judicial independence, and I propose we step back and take a look at it from two different angles. The one we’ve been talking about up to now is the independence of the Judiciary from outside pressure.

But the electorate has been telling us, I think, over the last few years that there’s another type of judicial independence they are interested in, which is perhaps independence *from* the Judiciary in certain matters, such as same-sex marriage. Overreaching courts have spawned this criticism, and, as we know from the recent exchanges in the *Wall Street Journal*, Justice O’Connor has taken the view that this poses a grave threat to judicial independence.

She has cited three sources which I’d like to discuss briefly. One is the state ballot measures, the most unusual of which was Jail for Judges, which would have stripped immunity not only of judges but of jurors in grand jury proceedings in South Dakota. That went down to a 90-10 defeat, showing the good sense of the people of South Dakota. The next one was the Colorado initiative, which limited judges’ terms and applied the limitation retroactively, which also went down in defeat. The third was what I thought was a rather modest proposal in Oregon to have appellate court judges have districts for elections, on retention elections. This is not a revolutionary idea to us in California, since we’ve had that since 1905, but that also went down to defeat. So, it doesn’t look like the ballot is going to be a big threat to independence of the Judiciary, at least this year. Congressional action also has not been

particularly successful. The Inspector General bill of Congressman Sensenbrenner was not acted on. Also, the Pledge of Allegiance jurisdiction stripping wasn’t acted on.

So, what it really boils down to, I think, is that Justice O’Connor is a bit touchy about public criticism of the Court’s decisions. And she’s picked up an ally, Nan Aron, president of the Alliance for Justice, which I’m not sure was expected or not, who writes in the *Wall Street Journal* letter column a few days ago: “Judicial independence is under attack not because judges are busy creating the right. Rather, it is under attack because the Right’s messaging machine espouses facile rhetoric so often that activists are now responding with the overreaching measures which Justice O’Connor correctly decries.”

So, what grave threat is left? The Alabama jurists who took that strong position on placement of the Ten Commandments in the courthouse have not even survived the Republican primary and are no longer in office. Personal threats—well, I don’t want to minimize what happened in Chicago a few years ago, but we don’t seem to have the personal threats we did in the days of desegregation—and the kind of person who really intends to do us ill will act this way: there was an item in the *Fort Worth Star-Telegram* recently about a lady who had sent some home-baked cookies with rat poison to the members of the Supreme Court and the chiefs of staff of the Army, Navy, and Air Force, with a letter saying, “This is meant to kill you, this is poison,” tacked on top of it. I don’t know whether she benefits or not under the sentencing guidelines that allow downwards departures for early acknowledgment of responsibility, but she got 15 years.

Now, the jurisdiction stripping question is front and center. First of all, I would note that this really isn’t something new. Jurisdiction stripping has been around since about 1820, when some people tried to get rid of Section 25 of the Federal Judiciary Act of 1789. That went through certain mutations in the Reconstruction Era. It was not always a conservative construct. Remember the Norris LaGuardia Act which stripped the federal courts of injunction power in labor disputes and in Yellow Dog contracts? We have a series of jurisdictional stripping statutes of recent vintage which are not all that controversial in the Antiterrorism and Effective Death Penalty Act of 1996. One deals with second and successive *habeas*



petitions. The Immigration Act has one regarding removal orders for prior convicts. The one that Judge Wald indicates is going to be the subject of some discussion: whether limitations of review of *habeas corpus* is a suspension or not under Article I, Section 9.

But I'm going to talk a little bit about what I consider to be a real threat to judicial independence, which doesn't have to do with the federal judiciary; it has to do with State-contested elections. First, a disclaimer: I was appointed a judge, and within eight days was told by the county clerk that I was in a contested election. I didn't have much time to do anything bad or good, but I knew I was in an election. And I was sitting in the City and County of San Francisco, appointed by a Republican governor, registered Republican, a Catholic, white and married—and it was not a same-sex marriage. So my election was less an election than a miracle. I won 59-41.

But there are two types of elections. The retention election is used throughout the country, and it says yes or no as to a sitting judge on an appellate court. I don't have anything particularly bad to say about that. It's very rare that one has to spend a lot of money in defending a retention election. They're usually not successful, although they were in California in getting out three Supreme Court justices in 1986. I think that's a valid exercise of democratic consensus, whereas the contested elections where one or more candidates run for trial or appellate seats have gotten totally out of hand. My election cost me \$100,000, and that's peanuts these days. The average price of the appellate positions in Michigan, according to a study by an organization which always draws a laugh here, the ABA, is between \$431,000 and \$500,000. In Texas, the price of election has gone from \$300,000 up to somewhere around \$5 million.

These increases have two effects. One, the judge who gets the money to run the election gets it mostly from attorneys, and sees those attorneys the next day in court. Second, I've observed judges looking over their shoulder before making decisions because of an upcoming election. It's happened in San Francisco with some frequency. And then there is what I call the bureaucratic and administrative nuisance. It's a subtle limitation on independence. To give you an example, the recent Advisory Opinion No. 67 of the Judicial Council, which requires judges to make

disclosures as to which seminars they go to. You must make disclosures, for instance, when you go to FREE. That's the Foundation for Research on Economic and Environmental Issues in Montana. And you must make one if you go to a George Mason seminar. But you don't have to make one if you go to the seminar by the judicial division of the ABA. That distinction supposes that FREE and George Mason are tainted by ideology, while the ABA is not.

Overall, I think that the grave threat that Justice O'Connor was talking about does not exist, at least not at the level of the threat to independence which exists at the state level because of contested elections.

**TIMOTHY DYK:** Thank you. I agree that the problem at the state level is a significant one. I'm going to confine my remarks, however, to federal independence and look at this a little bit historically. It's a lot easier to address this subject historically since the passions have cooled, though addressing it in the present is obviously important also.

It strikes me that there are two kinds of threats to judicial independence. One is the kind of threat that results in a case or controversy. In that category the Judiciary has the keys to its own prison. It is able to adjudicate whether the threat to its independence is consistent with the Constitution, with the Compensation Clause, with the Life Tenure Clause, or with Article III itself. Perhaps with some exception, most people seem to agree that the Judiciary can be the final word on those issues. We have court cases considering issues of judicial compensation, of jurisdiction stripping, and of the elimination of judgeships, as happened in the 1802 Judiciary Act, as well as cases involving congressional efforts to change the result in particular cases that have been adjudicated by the courts to confer inappropriate duties on the Judiciary, such as advisory opinions. In these areas, the cases come to the courts; the courts can resolve them. And the Supreme Court is accepted by most people to be the ultimate arbiter of the question.

I don't see those issues as presenting quite the same threat to the Judiciary as the kinds of issues that cannot come before the Judiciary, those with regard to which we have to rely on the good will of the Executive, the Congress, and the support of the bar and the public. The quintessential example of this,

of course, is the FDR court-packing plan. Adding Justices to the Supreme Court is not something that results, I would assume, in a case or controversy that can be adjudicated by the courts. The courts had to rely on the U.S. Senate to support it and prevent the court-packing plan from being enacted. Another example would be the refusal of the executive branch to enforce judicial decisions. There's not much the judges can do about that, and there are historical examples—of course, President Jackson's famous remark about *Worcester v. Georgia* that, "Chief Justice Marshall has made his decision; now let him enforce it." There are modern examples too. In the Eisenhower administration there were decrees in desegregation cases that the Administration simply did not do anything about in the *University of Alabama* or one or two other instances; ultimately forced by public opinion, as in the paratrooper intervention in Little Rock. That's a matter of some concern.

Restricting the resources of the Judiciary would be a matter of serious concern that the Judiciary itself can't deal with, or refusing to provide physical security for judges, which we see as an issue in foreign jurisdictions occasionally. Those are things that the Judiciary itself can't do anything about. The questioning at confirmation hearings of judges, where there are efforts to get judges to promise to rule in particular ways in future decision-making—there's not much other than refusing to answer the question that the judges can do in the course of those hearings.

So, there are hundreds of pages of Hart and Wechler that can come before the Judiciary where the thrust to judicial independence can be resolved by the Judiciary itself, but the more serious problems are the instances in which the Judiciary can't do anything to protect itself and has to rely on other parts of the government and the bar and the public to protect it.



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## SHOWCASE PANEL IV:

### THE ROLE OF GOVERNMENT IN DEFINING OUR CULTURE

*Hadley P. Arkes, Walter E. Dellinger, William N. Eskridge, Jr., Charles Murray, Anthony D. Romero, Phyllis M. Schlafly; Moderator: Edwin Meese III*

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**EDWIN MEESE III:** Good afternoon, ladies and gentlemen. I'm Ed Meese, and I have the privilege of moderating the panel this afternoon. On behalf of my colleagues here, I welcome you all to the last panel of the Federalist Society's 2006 National Lawyers Convention.

As you know, the theme of the Convention is limited government. We've had "showcase panels" on limited government and spreading democracy, a panel talking about the economic aspects of things like taxes and regulation, and before this a panel on the question of whether constitutional measures are necessary in order to achieve limited government. This last panel is an interesting one, I think, because it centers less around governmental things *per se* than it does around the relationship between government and the everyday lives of people. The topic is "The role of government in defining our culture."

The initial question, of course, is: What should that role be? We can think about it in terms of what the Founders had in mind, and what that role is today—if there is a difference between the original concept and how it's worked out a little over 200 years later. We might consider what the other institutions of society are that are competing perhaps with government in defining our culture, and to what extent more attention should be given them when limited government is one of our objectives. We might ask: What principles do we have to determine when government should intervene in determining culture? And whether you can ever have a governmental role in culture that is outcome-neutral? Finally, we might debate whether there is some consensus among the people generally as to what that role of government is in defining the culture, or if this a matter of continual tension, perhaps what the Founders had in mind when Publius, or Madison, wrote in *The Federalist*, that ambition and would counter ambition?

Is there a consensus today as to the role of government in defining culture? To answer this

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\* *The Hon. Edwin Meese III served as Attorney General under President Ronald Reagan, and now works at The Heritage Foundation in Washington, D.C.*

question in Federalist Society tradition, we have a number of people here gathered who do not always agree with each other. And so, as a result, I think we will have a lively discussion. I will introduce each person briefly before they speak. I'm not going to introduce the speakers with a lengthy introduction because, first of all, they are all so distinguished, have such lengthy backgrounds and such distinguished *curriculum vitae* that it would take up most of their time if I were to introduce them. So I will make the introductions very brief.

To kick off this session, we are pleased to have Walter Dellinger, well-known to all of you from many standpoints. A Solicitor General of the United States who has rendered great public service in various capacities, a private practitioner of law, and a law professor. Please join me in welcoming him.

**WALTER E. DELLINGER:** In January of 1998, the Ninth Circuit decided *Finley v. National Endowment for the Arts*. I was acting Solicitor General at the time, and the issue came quickly to my desk, along with a visit from the Director of the National Endowment for the Arts (NEA), the excellent actress Jane Alexander. The case involved the constitutionality of I believe it was the Helms Amendment, which required that the NEA take decency into account in choosing who should be awarded artistic grants. Karen Finley was one of those whose expected grant did not get renewed after the decency criteria had been invoked.

The Ninth Circuit decision ruling against the NEA was, as you might admit imagine, welcomed with great enthusiasm by the NEA. They did not care for the Helms Amendment, and when the director came to me, she said happily, "We have this wonderful loss in the Ninth Circuit, and as your client, we'll be happy for this matter to end there. There will be no need to seek review in the Supreme Court." My response was that she and I were both employees or officers of the United States; that my client was the United States; the Congress spoke for the United States; and that we had an obligation to defend acts of Congress if they were defensible

grounds for doing so. There were defensible grounds indeed, almost certain to prevail—and indeed, correctly so, in my view.

To the question of whether this isn't governmental censorship and offense to the First Amendment, my response was it may well be, but that the problem is that, if the Helms Amendment is an unconstitutional imposition of government values, then so is the NEA itself. What they do all day long, every day, is censor. And if government cannot take values into account in making awards, then we've got a much bigger problem for the Endowment than the Helms Amendment. But what we cannot do is say that because we prefer Karen Finley's art to Norman Rockwell's art, Congress can't have the reverse presumption and say we like Norman Rockwell better than Karen Finley.

Now I raise case this because it brought into sharp focus the fact that all of us want government to impose cultural values as long as they are our values. In fact, one of the moves we are all tempted to make is to define our cultural values as something other than that, which is what immediately transpires in this kind of discussion. The Director of the NEA, like most people in that community, would say, of course, that's a mistake. The Helms Amendment imposes cultural values imposed by the government; our people judge on artistic merit, and that is a different category. To which my response was, "Look, I may agree with your notion of artistic merit." In Karen Finley's act, she smears her body with chocolate and gives a paean to feminism. "But I cannot believe that if you have some equally effective actor who smeared his or her body with chocolate and made an impassioned cry to index capital gains for inflation that they would have gotten the award. It can't be. You don't make these awards on weakness of application."

So, I came away from that experience with the thought that I actually find it quite troublesome that the government funds the arts at all; that while the Helms Amendment could well be problematic, so is the funding. I find myself dismaying my friends who, like I, enjoy government-funded art, wondering about National Public Radio and National Public Television. I don't see how we get out of this box. The one thing I knew was that we couldn't say, "It's okay to prefer Karen Finley to Norman Rockwell, but not vice versa," however artistically merited that position might be. We all, I think, are drawn

by this tension. I come at it, I think, from the Cato Institute perspective. Roger would say that I am a soft Catoite, a squishy Catoite that still thinks *Lochner* was wrongly decided, in spite of his pounding. But I want to raise it in the context which I think is quite salient; that is, the role of government in shaping religious values and opinions of the population.

Since we don't really know what the new Chief Justice or Justice Alito's views will be, I believe eight of the nine Justices on the previous Court got this wrong on one principle or another. In other words, that we have a group of Justices who are comfortable with having the government impose its religious values directly by having government views of religion, government endorsement and government promotion. And there are four other justices—Stevens, Ginsburg, Souter, and often Breyer—who would have the government take cognizance of religion in a negative way, denying the use of funding by religious groups or individuals—when government funding is itself neutral. Anybody may use an interpreter for the deaf to go to school; anybody may use the school premises, first come first serve; anyone may have a student club. All of these are areas where there is government funding. And those who would exclude—including vouchers—religious people from being able to participate, also miss the notion that what ought to be controlling is the critical right of private choice.

There ought to be private choice about religion, and I believe that only Justice O'Connor, who's been underappreciated in this area, got it consistently right. By the magic of 5-4, the Court, I think, got every religious decision right for almost the entire time of the Rehnquist Court, because of her consistent voting on a very simple principle: government religion, bad; private religion, good. Her view of private religion was robust private choice. That is to say, where government provided resources for citizens to decide how to use those resources, you were free to make an intervening private religious choice: robust private choice with government itself having no role. Only she got it right in terms of shaping the religious culture.

Thank you.

MEESE: Our next speaker is Dr. Charles Murray. He is the W. H. Grady Scholar at the American Enterprise Institute. He has written a number of

books, is a well-known social scientist, and we're pleased to have him as our next speaker. Charles.

**CHARLES MURRAY:** Okay. What is the role of government in defining the culture? In principle, none; in practice, disastrous. Look, the culture is the constitutional system that was set up. That was the culture, which, in his first inaugural address, Jefferson defined as protecting people from injuring each other, and otherwise leaving them alone. And it's that kind of framework of liberty that creates our culture, in this country in particular.

I want to make two points about how, in practice, I think we have gotten it wrong. The first has to do with the attempts to prohibit or control individual behavior, whether you're talking about drinking, as in the case of Prohibition, or whether it's drug use or censorship of the kind that Walter was talking about. In all of this, I think there are a couple of problems that probably are not paid enough attention. It was called by an e-mail correspondent of mine "law inflation", which in effect has the same effect on law and our attitude toward the law that inflation has on money.

The point is this, that if you have a few simple laws against things that people all agree are bad—rape, robbery, murder, things like that, fraud—you have no problem. You can establish cultural capital, which says you shall obey the law because the rule of law is so important that you will not try to judge each law *de novo*. When the government gets involved in cultural issues in which large numbers of people in the population do not think they are doing anything wrong, A, you label them criminals, and B, they say to themselves, "I'm doing this thing which the government says is illegal; I'm not doing anything wrong." And people start to pick and choose which laws they're going to obey.

Tonight I'm going to go home, and first I will probably pour myself a large martini, which is legal. But if I were to light a joint, I could get put in jail for a long period of time. We have hundreds of thousands of people in jail right now for doing things like that; not because they've hit somebody while they were smoking dope, not because they abused their children, not because they robbed anybody, but because they engaged in that act—which, as far as I'm concerned, is basically like drinking a martini. I would log on to FullTiltPoker.com and play poker,

but the government has said I can't do that either. Well, you have millions of people who disagree. Every time that happens, that you have new government attempts to push and poke the personal behaviors that define our culture, you have a lot of people who say, "This is nonsense; go ahead and break the law." And, thus, you weaken the cultural capital, which is the most precious legacy we have: respect for the rule of law.

The second point has to do with attempts to positively affect the culture, to encourage stable families, religion, and the rest of it. I think it's fair to say that almost everything I have written over the last twenty years has started from the premise of the importance of the married two-parent family as the generator of a civil society. I am very, very one-sided in my view of the importance of the family. But I would also suggest to you that government no more knows how to encourage certain values regarding the family or religion or other institutions that I hold dear than the Left had when it was trying to social-engineer its values in the 1960s. So, any time you have an administration, whether it's conservative or liberal, that says, "We will use the instruments of government to push and pull and tweak," they get it wrong.

They get it wrong for a couple of reasons. Those of you who are familiar with public choice theory know that however good the idea is originally, by the time it is crafted into legislation, public choice dynamics have contaminated it beyond recognition. You also know all the political problems that go along with it. I would add that there is an incompetence inherent in this kind of effort. The smartest social scientists in the world cannot tell you what's going to happen if, for example, you have a major new tax deduction for children, just to pick one that's kind of a conservative attempt to affect the culture. We don't know how that's going to play out, but I will tell you this, that if you go to countries which, say, have tried to encourage the family by having very generous child allowances, generous maternity leave and day care centers, you're going to find plunging fertility rates, plunging marital rates, and soaring illegitimacy ratios. That's the way it has worked out in these countries which openly label their policies "child-centered." Similarly, if you go to Sweden, rural Sweden, as I did a few years ago, and drive through the country, you will see in town after town absolutely beautiful

churches, freshly painted, meticulously maintained grounds, subsidized by the government. And they're empty—empty on Sundays, as well as every other time. When government gets involved in the crucial institutions that define the culture in which we live, family and community and religion, it inherently, ineluctably, inevitably enfeebles it.

Thanks.

MEESE: Our next speaker is Anthony Romero. He has been involved in public interest law for most of his professional career, and currently serves as the Executive Director of the American Civil Liberties Union. We're pleased to have him with us today. Welcome.

**ANTHONY ROMERO:** Now first, I want to tell you, whenever I get a request from the Federalist Society, I tell my assistant to put it to on the very top of my list of speaking engagements. Even as I was flying down here from New York on this beautiful Saturday afternoon, I kept asking myself, "Why, again, did I accept this speech?" I will tell you quite candidly: "It's because when I put together our ACLU membership convention, and we reach out to conservatives and individuals who disagree with the ACLU, I very much appreciate it when we have individuals like Ken Starr, who came to our membership conference a year ago, Wayne LaPierre, who was there two years ago, or Bob Barr, who's spoken there several times. Bob Mueller even had the courage of his convictions to come and walk into our Coliseum, and he walked out the live Christian that he was. So I just hope to walk out with my life, out of this Coliseum.

Let me just say, I also appreciate it because it gives me an opportunity to hear from individuals that I normally don't get a chance to hear from; whom I can only read. For instance, I completely agree with much of what Dr. Murray has just said I completely agree with. It might surprise you or my the ACLU's members or even myself me how much consonance there is on some of these issues. In fact, there is a common bond between those of us who care about the rule of law and those of us who care about American values. My day-to-day work is to apply the Constitution and the Bill of Rights; to make them come alive for people; to help people who struggle for their rights to live with dignity and equality; to make that not just a paper aspiration

but a reality. That's what I we do. It's the alchemy of taking great founding principles and making it them real for people.

And I think that one of the things that liberals or progressives, if they call themselves that, have done poorly is that they have run away from the those core "American values." discussion. They've been reluctant to engage in a discussion of what it means to be an American. When I took over the ACLU right after 9/11—I was there on the job a week before the 9/11 attacks—I was very clear that we should wrap our organization in the American flag, and we should be unapologetic about being patriotic, about what defines us as a people, and what it means when we salute the flag or sing the national anthem.

What is it that makes us feel proud as Americans? What is atare those core American values?

Innocent until proven guilty. The right to due process of law. Equality under the law. To be who you are and say what you think and live and love the way you want. Those are core American values that define us as a people. And in a country with no unifying language, no unifying culture, no unifying religion, what brings us together is our adherence to these core values, that our adherence to the rule of law.

When I look at the last four years or so, I see a very significant betrayal of some of these basic values. If I were a member of the Federalist Society—I have yet not joined, although I think I could, especially with Attorney General Meese being one of the distinguished leaders of it—I would think that these are very tough times to be a conservative and a patriot. I will say quite candidly that I think the Bush administration is engaged in a wholesale betrayal of the values that you and they and some of you say they espouse. Think of the whole question around torture and abuse. Think about how some of the highest levels of our government have authored documents that allow the redefinition and backing away of long-held traditions of the protection of human rights and stability. Think about the Office of Legal Counsel's memos. One of your speakers this afternoon is an author of those memos. You have the memos from the Attorney General Mr. Gonzales, who called the Geneva Conventions "quaint and obsolete." You had this President sign into law the Military Commissions Act, which backed away from one of our greatest traditions, the writ of *habeas corpus*—shutting the courthouse doors to individuals as much entitled as

any person to deny them rights of access to the court system.

The culture that has been created by those actions is a culture of impunity, and we ought to be clear that that is what we're creating when we allow or encourage or look aside when officials take those actions. Look at the culture that has been created by the National Security Agency wiretapping program. Mr. Cheney ridiculed my organization just the other day at your Convention, saying that perhaps we were not going to suffer the great irreparable damage that the court held in Michigan. With all due respect, I take great issue with that statement. The great harm is the fact that this President decided that he did not need to adhere to the law enacted by Congress, the Foreign Intelligence Surveillance Act of 1978. This President believed that he need not go to any judge to authorize his wiretapping program, which could reach Americans in the U.S. That, my friends, leads to a culture of a President above the law. That affects all of us. And if that President really believed that he needed those powers, he ought to have engaged Congress in that discussion. Or he ought to have gone to one of the Foreign Intelligence Surveillance Court's judges and asked for their permission. To step outside that context the law, I believe, just undercuts our core American values.

It must be hard to believe in "limited government" and see changes current events in the political landscape. This abortion ban that was put on the ballot initiative in South Dakota, which lost in a predominately red state—even with many individuals, including Jerry Falwell, pouring millions of dollars into the campaign in South Dakota—would not have allowed banned abortions even in the context of rape or incest. It would be very hard for someone believing in limited government to believe that was good foreign policy.

And take the example of gay marriage, as some of you call it; the idea that government need not legislate or create this culture of rights, these "special rights" for certain groups. I will tell you, while Dr. Murray goes back to his home and pours his martini, I will go back to my home into the arms of my partner, my husband of 10 years, in a committed, solid, loving relationship. When his father came to New York from Miami dying of liver cancer, he was on our sofa. I rushed him to the hospital. I wiped his brow. I grieved when my father-in-law died.

When anything hits our families, we are married; we engage it as two co-equal, loving, committed partners. And yet, before the law we are treated as strangers. We do not have the rights that those of you who are married have. We do not have the material benefits that those of you who are married have. But regardless of whether you grant us those rights or not, we will remain married, and we'll fight for those basic rights.

Whether you choose to be on the side of granting people equality and dignity and freedom under the law or stay on the side of those who would deny people the protections, the rights, that will ensure these strong families that we all deserve and wish to have, the choice is yours. I'm confident that history will be on our side. And generations from now, when my grandkids talk about how Grandfather Manuel and Grandfather Anthony their grandfathers were not allowed to be married, and they ask their counterparts in school, "What did your grandparents think of this issue?" I hope you make them feel proud.

Thank you very, very much.

MEESE: Thank you. Phyllis Schlafly has a very long career and a very distinguished career on public policy issues. She's a lawyer, the President and Founder of Eagle Forum, and she has been active in a number of constitutional matters. Phyllis, it's a pleasure to have you with us.

PHYLLIS SCHLAFLY: Well, thank you, General Meese and friends. I want to shift gears here for a few moments. Government is the most powerful influence on our culture today because government spends about \$2-1/2 trillion a year, and every dollar carries the power to affect our culture and behavior through laws, regulations, grants, entitlements, and tax credits. And more influential than all the laws and judicial decisions, and even the media, in directing our culture is the arm of government known as the public schools. The public schools are guiding the morals, attitudes, knowledge, and decision-making of 89 percent of American children. They are financed by \$500 billion of our money each year, forcibly taken from us in taxes, federal, state and local, which the public-school establishment spends under a thin veneer of accountability to school board members and government-run elections.

Prior to the 1960s, the public schools used a McGuffey Reader style curriculum, where American kids learned not only the basics but also values such as honesty, patriotism, and respect for elders. The curriculum integrated kids assimilated by learning our language, our laws and culture. For example, the *American Citizens Handbook* published for teachers by the National Education Association in 1951 proclaimed, and I quote, “It is important that people who are to live and work together shall have a common mind, a like heritage of purpose, religious ideals, love of country, duty, and wisdom to guide and inspire them.” The message of this civics handbook was fortified by selections suitable for memorization, such as Old and New Testament passages, the Ten Commandments, the Lord’s Prayer, the Golden Rule, the Boy Scout Oath, and patriotic songs. My, how the public schools have changed, and how the teachers unions have changed since 1951.

The turning point came in the 1960s with the great influence of the humanist John Dewey and his Columbia Teachers College acolytes who argued for objective truth, against authoritative notions of good and evil, against religion and tradition. And then Sidney Simons’ 1970 book called *Values Clarification*, which sold nearly a million copies, was widely used to teach public school students to cast off their parents’ values and make their own choices based on situational ethics. Then the public schools welcomed the Kinsey-trained “sexperts” to change the sexual morals of our society from favoring sex in marriage to sexual diversity. Concepts of right and wrong were banished, and the children were taught about varieties of sex without any reference to what was moral and good.

Since the 1950s, the public schools have a rejected the Meyer-Pierce doctrine that parents have the fundamental right to control the upbringing of their children, and instead have adopted the view that the village—that is, the government—should guide the child. While tolerating massive illiteracy, the public schools are now powerfully impacting our culture by inculcating the values of situational ethics, diversity, and the easy acceptance of sex outside of marriage. American history and literature courses now teach the doctrines of U.S. guilt and multiculturalism instead of the greatness of our heroes and our successes. Public schools have become fortresses in which school administrators exercise

near-absolute power to guide the students’ values, morals, attitudes, and hopes, while parents are kept outside the blockades.

Federal courts confirm the monopoly power of the schools to affect our culture. The Ninth U.S. Circuit Court ruled last year that a public school can teach students whatever information it wishes to provide, sexual or otherwise, and that parents’ right to control the upbringing of their children does not extend beyond the threshold of the school door. After heavy criticism in Congress, the Ninth Circuit tried to soften the word “threshold,” but boldly reaffirmed the decision.

In five circuits within the last two years, federal courts have handed down anti-parent, pro-public school decisions. Federal courts upheld the right of public schools to indoctrinate students in Muslim tradition and practices, to force students to attend a program advocating homosexual conduct that used minors in sexually suggestive skits, to force students to watch a one-hour pro-homosexual video, to censor any mention of intelligent design, to use classroom materials that parents considered pornographic, to force students to answer nosey questionnaires with suggestive questions about sex, drugs, and suicide, and to deny a divorced father’s right to get his own son’s school records.

This is not only a culture issue; it is a free speech issue. The schools are censoring views that do not conform to the diversity/multiculturalism culture they are determined to teach. The courts upheld the public schools in prohibiting an anti-gay T-shirt but ordered the school to permit an extremely offensive anti-Bush T-shirt. The free speech issue has now expanded beyond the schools as the gays try to get people fired who criticize the gay agenda. The courts have upheld the constitutional right of any school child to refuse to recite the Pledge of Allegiance. But neither school nor court offered any child or parent the right to opt out of any one of these programs that I listed.

To sum up, it’s not a question of whether or if the government will or should define our culture. Government schools are, every day, powerfully defining the culture of the nation our children will live in by inculcating the values of diversity, multiculturalism, American work, situational ethics, and the easy acceptance of sex acts outside of marriage. There is no proof that the American



people have democratically chosen this definition of our culture. It has been done with the power of government employees spending the people's money. And since there is no prospect that either the public schools or taxes will be abolished anytime soon, our task is to stop government institutions from directing our culture in ways that the American people do not want to go.

Thank you.

MEESE: Thank you, Phyllis. Our next speaker is William Eskridge. Professor Eskridge is the John Garver Professor of Jurisprudence at Yale Law School. He has written a number of very important books. His specialty is in statutory interpretation, and he's going to talk to us about our subject today. Please join me in welcoming Bill Eskridge.

**WILLIAM ESKRIDGE:** Well, here's an irony. I actually agree with the main points made by the previous speakers, so you have two choices at this point: you can either sit down, which is not an option, or you can try to synthesize them. So, let me suggest a sort of odd synthesis of what you just heard, particularly from the panelists on my far left [Mr. Romero, Mrs. Schlafly & Mr. Murray].

It does seem to me—and Ms. Schlafly, I completely agree with you on this—that there's a strong tendency when, in our country, we have strong cultural and deep normative conflict, for each side to see the government as a needed ally in advancing their normative agenda. We saw this in the apartheid versus civil rights movement. We've seen this in the wets versus dries on the use of alcohol. We've seen this on the pro-life versus pro-choice view on abortion. We've seen this on gay rights versus traditional family values. And this is not an irrational thought because the government—and I'll go beyond Mrs. Schlafly—is teacher, police officer, and opinion leader. We're not only educated—(perhaps less so than before)—in the public schools, but the government is the locus of educational advertising campaigns that inundate us each day with information and norms. The government, moreover, as a police officer has a monopoly on legitimate coercion. The government can at least try, Dr. Murray, to force conformity or provide incentives for conformity. And then the government sees itself often as an opinion leader. Symbolic politics is often about the value of

government endorsement to carry normative weight, or at least be a signal of higher status for the victors. This seems to me the deep truth that you all have identified.

On the other hand, direct government intervention into these deep normative conflicts, it seems to me, Dr. Murray, doesn't merely usually not work but usually turns out not at all as intended. It's often counterproductive. The government produces effects that are not sought for, even by the proponents. Take the anti-same sex marriage initiatives that we've seen in recent years. As I understand it, the goal of these initiatives is either to strengthen man-woman marriage and marriage generally in the country or to bash or denigrate gays as homosexuals, or something worse. Those seem to be the main goals.

Now, it seems to me that the anti-same sex marriage movement has run into three types of problems, and I think you see this more broadly. The first is the problem of the distorted normative agenda. That is, political campaigns investing all sorts of resources to procure government intervention will often refocus attention away from the group's deeper goals. You see this in religion, for example. And so what we've seen in the traditional family values movement is that they have focused on stopping same-sex marriage, and they've done so successfully in many jurisdictions. But that has meant less focus on the deeper threats to marriage, which include high divorce rates, deadbeat dads, domestic violence rates, etc., that are genuine problems for marriages of all sorts.

Second is a problem of compromise. That is, when you get involved in the government and there's deep normative conflict—not consensus but deep conflict—then you're probably going to get a compromise, at least in many jurisdictions. These compromises can have unpredictable results. So, for example, one effect of the anti-same sex marriage movement in the last thirty years has been the generation of compromises with moderates that create new governmental forms for recognition of horizontal relationships; such things as domestic partnerships, which you see in California and dozens of American cities. You see civil unions. That's a new institution in Vermont, Connecticut, and probably New Jersey next year. You see reciprocal beneficiary institutions in Hawaii and Vermont. And sometimes, as in France and Vermont and many domestic

partnership ordinances, straight couples want to enter these institutions as well, even though they were created primarily for gay couples. By stopping gay marriage, you end up creating institutions that frustrate people and constitute competitors to marriage.

And then there's the problem of hyperfocus. That is, government attention to an issue creates hyperfocus discourse that can itself create and intensify unexpected phenomena. So, for example, anti-same sex marriage campaigns can create homophobia, but they can also create homosexuality not just as a coherent identity and a famous identity, but maybe also a fabulous identity, a sexy identity. Just ask Romeo and Juliet. As William Shakespeare recognized, state and parental disapproval will not dissuade Romeo from wanting loving Juliet—or Mercutio, as the case may be—and indeed might even make Juliet, or Mercutio, even sexier. And so, the anti-same sex marriage initiatives might get young people thinking about, and even romanticizing in unpredictable directions.

Now, the elements that I suggested—the hyperfocus problem, the compromise problem, and the misplaced agenda problem—are not unique to same-sex marriage. Clarence Thomas makes these very same arguments about the counterproductiveness of Affirmative Action. Affirmative Action, he says, has distorted the civil rights agenda away from things they should be focusing on. It has created compromises that hold back African Americans, that don't advance their lives, and creates a hyperfocus on race as a totalizing identity, perhaps even contributing to prejudice.

So, this is not a liberal versus conservative thing. It seems to me this is a truth claim. So is government unimportant in transforming culture? I think Mrs. Schaffly is right. It's very important. But the government is most powerful in transforming culture indirectly. I'll give you a couple of examples, and then the Attorney General will make me stop. I think the best example is war. You've basically got to have a government to fight a war, and war has produced, I think, deep cultural transformations in our society, including transformations that people fight for. So, for example, World War II transformed mainstream American values toward people of color, toward the roles of women, and even ultimately toward homosexuality. Government innovations as

to technology and infrastructure also can have deeper effects on culture than government. Railroads in the 19th century contributed to a national economy and culture. It was not necessarily the intent, but that was the effect. And new economic tensions fueled unionization, farm co-ops, popular political consciousness, and so on and so forth.

What about gays and lesbians? In my opinion, the anti-same sex movements are not going to deeply affect the American family in a good way, nor gays and lesbians necessarily in a bad way. For all of the DOMOs and the anti-same sex marriage initiatives, it seems to me that these will have less effect on same-sex marriage than two other government-sponsored innovations. One is the Internet. (Remember, Al Gore helped invent that; Gore and the military.) The Internet has made sexual information, as well as misinformation, widely available in ways that we never would've thought possible, and made match-making easier for gays, lesbians, bisexuals, heterosexuals, etc. Second is government-sponsored research. This has in some way contributed to the wide availability of artificial insemination technologies. And these medical technologies, in which the government probably doesn't play the primary role, enabled something the law has maybe much less to do with, at least affirmatively: creation.

Anthony speaks about same-sex marriages. According to the 2000 Census, there were 600,000 same-sex couples in the United States, probably an undercount; it's gone up by at least 100,000 since then. The Census found that a third of those female couples were raising children within the relationship; a fifth of the males were raising children within their relationship, many of them through artificial insemination and other techniques. This is transforming American culture. It's not an agenda. It's a social phenomenon that we are grappling with. The government plays a role, but not the role that you would have expected when you elected Ronald Reagan, Bill Clinton, and various Bushes.

Thank you.

MEESE: Thank you, Bill. Winding up the six initial talks here is Professor Hadley Arkes. Hadley is the Edward Ney Professor of Jurisprudence and American Institutions at Amherst College. I've known him since the days when he was a Salvatori Fellow. He's a very profound writer on a variety of

subjects, including the one that we're dealing with today. Please welcome Hadley Arkes.

**HADLEY ARKES:** Bill Eskridge reminds me of Mark Twain's line from *Pudd'nhead Wilson's Calendar* that Adam ate the apple not because he wanted the apple but because it was forbidden. And the great mistake was not forbidding the serpent; then he would have eaten the serpent.

I find myself in a position where I'm probably one of seven people here who thought that *Lochner* was rightly decided, and I have to play the role of the moralist here. It's like that line from Tom Stoppard, that the moralist is bound to sound like a crank haranguing the bus queue with the demented certitude of one possessed of privileged information. But I did something awkward; I prepared something to address the subject we were given. And so I may have to use an old device of mine and compress this talk Hebraically, by omitting the vowels.

I understood that the problem here at the core was the question of whether the government should shape the culture. It's curious how people affect to be unaware of the classic understanding of the connection between the logic of morals and the logic of law, and then find themselves persistently backing into the same logic, and indeed relying on it at every turn. Of course the government shapes the culture. It shapes our moral understanding because that was built into the very nature and logic of law. When we legislate, we override claims of personal choice and private freedom and replace them with a uniform rule and a public obligation. That move is coherent only as we appeal to some principle that defines what is just or unjust, more generally or universally. So, forgive me for being clinical, but when we move to a level of a moral judgment, we move away from statements of mere preference or private taste. We begin to speak about the things that are right or wrong, or unjust for others as well as ourselves. Thus, we come to the judgment that it is wrong to own humans as slaves, and we mean that it will be wrong for everyone, for anyone. And if we come to the judgment that it's wrong for parents to torture their infants, the logical response is not to say, "Ah, therefore, let's give a tax incentive to induce them to stop;" the logical response is with the voice of a command, a command that forbids that torture. To whom? To anyone. To everyone. We forbid it with the force of law.

That's not to say that it is wise to reach with the law everything that is wrong. We may hold back in prudence. But the law finds its ground of coherence and its ground of justification only in the moral ground of principle. So, when we restrict the freedom of people, we're obliged to say more than "Most of us don't like it." That's not good enough. And to get clear on the moral standards that must govern our judgment is not to legislate more, it is to legislate less. We raise the bar. That's what I, too, think. We have too much law.

The question was raised in the past: How does the law engage in moral teaching? The answer was that it teaches through the laws. When we legislate against racial discrimination in private inns and restaurants, we remove discrimination from the domain of private tastes and treat it as a matter of moral consequence. Between 1963 and 1966, opinion in the South came to be parallel with opinion in the North, with majorities in both sections holding to the wrongness of racial discrimination. We may ask: Why did the culture of the South change so strikingly in three years? Did it have something to do with new moral lessons being taught at the top of the state and taught dramatically with the laws?

In recent years, the most dramatic attempt to alter the culture, to shape a new moral understanding, has come through the efforts to impose, through the courts, a right to abortion and a notion of gay rights, including same-sex marriage. Clearly, those issues stand at the core of what we call today "the culture wars." In these cases, the project was to instruct the public gradually, persistently, that the things that elicited public recoil should now be tolerated, accepted, approved, then regarded as rightful and desirable, as things to be promoted through the use of the laws. In Massachusetts, we have seen the move to teach even more emphatically in the schools, to proclaim in the land, the new ethic contained in the orders of the court on same-sex marriage. Some administrators have declared they are merely teaching the pupils to understand the moral lessons that the law is trying to impart. Surely the most risible thing these days is to hear both proponents of same-sex marriage and even libertarians profess to be appalled at the notion of using the law to reshape the culture, the moral understanding of the public.

No one can rightly deny that the law imparts a sense of what is rightful and wrongful. The libertarians

would have us recede precisely because they wish to recede from moral judgment on certain things, perhaps racial discrimination or sexual matters. But even the libertarians are not willing to overthrow the laws on marriage. They insist that the laws require two parties competent to contract; not the marriage of children or the marriage across species, as some people have recently sought—Mr. Philip Ruple in Maine and his 37-pound dog, Lady.

Even if our libertarian friends are right—and the libertarians are right eighty percent of the time—well, what was Holmes’s line about Rufus Beck? He said his major premise was “Goddammit”. As the social scientists say, it explains a large portion of the variants. He got it most of the time. Even the libertarians wish to instruct people in the moral rightness of a government that restrains itself and respects personal freedom.

The point here is that nothing can be settled by invoking some empty slogan that the law should not try to shape morality. The law has no business speaking in the first place, unless it’s pronouncing on something of moral consequence. If we think it’s seriously wrong for a parent to withhold medical care from a child, we move to have the law register a concern and intervene. There used to be signs of saying “No Irish Need Apply,” “White Tenants Only.” They did not necessarily produce material harms. They denigrated, they produced at times certain emotional wounding. Yet the law came down to bar those kinds of signs, even when the law had not barred the freedom to engage in the discrimination in hiring or renting. Stephen Douglas famously insisted that the government should not pronounce on the vexing moral questions like slavery. People should be left to their personal choice. But if it was a matter of polygamy, say in Utah, well then he was willing to send in the troops because, now, this is serious stuff. And thus it is.

If people take seriously a right to abortion, they want to see it protected and promoted into law. They’re not content with a Federalist solution or the notion that people may be deprived of a right because they happen to live in South Dakota rather than New York. And the party that professes such a deep concern about privacy has led the charge over the years in withholding the shelter of privacy for private business and clubs respecting their own private criteria.

In the case of gay rights, there’s been an adamant opposition even to tolerating the right of people in their private enclaves, in their small businesses or rental of homes, to honor their own moral convictions on the rightness or wrongness of homosexuality. Surely, this would seem to be the place where the claims of private judgment could have been readily tolerated by people who have made privacy their anchoring slogan. Yet this doesn’t even get us to the clamor for new measures on hate speech, to censure and punish even priests who might state the traditional teachings on homosexuality.

As Lincoln said, “If slavery were right, all words against it would be wrong and could rightly be swept aside and I can grant your request to censor the federal mails to screen out the Abolitionist literature.” And so we can grant this point. If the people professing this new ethic on same-sex marriage happen to be right, well, the course they’ve taken is quite warranted. But that is the substantive question, and that is the question on which everything must finally hinge, not some cliché about the law not shaping the culture.

And so, like that character in Moliere who discovers that he’s been speaking prose all his life, some of our friends wringing their hands over the law shaping morality find that they have been doing precisely that at every turn.

