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 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

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

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 that 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 of 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 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—asically 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 untrammeled 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 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 17th and 18th 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 *Trong* 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.