Showcase Panel I

Limited Government and Spreading Democracy: Uneasy Cousins?

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

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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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*….

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,th 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!

The American: It happens sometimes, even to you. But, good! I've got one too!

The Frenchman: OK. If we say individuals come first, and government therefore has to be limited, can't we agree that spreading democracy *is the work of individuals first before any public policy*? Let's take my compatriot Montesquieu. He was 100% French and belongs to the Founding Fathers of America's constitutional identity. So what, you say? Well, Montesquieu was not acting as a French agent. He was an individual, without any governmental support. He wrote the *Spirit of the Laws* (1748), all alone in his *Château*.

The American: You're right: Revolution was made here first "*in the minds and in the hearts of the people*," as John Adams said. James Madison has to be mentioned, too, in individual references.

What should we say about the Founding Fathers as individuals? Democracy is spread by individuals first. Yes civil society and outside powers do have a major role in spreading democracy! From the 18th century circulation of ideas to the 21st century global world, democratic ideals are spread by intellectuals; individuals, before governments. So being a Federalist and spreading democracy are compatible!

The right way to spread good democracy is first to encourage and develop individual and conservative minds, especially among law professors, judges and attorneys!

The American: Now, can we agree on other things regarding the *content of ideas* which have to be spread?

Can we find a kind of *convergence*?

The Frenchman: Not sure it exists, but let's try!

The American: May I ask you some questions? First what does "*subsidiarity"* mean in the EU?

The Frenchman: It means essentially that member states are *first*; what belongs to them has to be respected, and the Community must act within the limits of its powers, and furthermore only if the action is better achieved by the community;

The American: Good. That reminds me of something. How do you limit power in Europe?

The Frenchman: As we learned from our compatriot Montesquieu, (again), by power! We think that only power can stop power and also that separation has to be strict, even rigid— it must tend toward a balance, but has to be rigid—not for the efficiency of government, but to protect individual freedom.

Also limitation of power comes within the rule of law (e.g., Constitution, Bill of Rights). There can be no liberty without the rule of law.

Europeans know all about the "*encroaching nature*" of power and of the need to limit its aggressiveness, to contain it within legitimate boundaries, including, and perhaps above all parliaments, as you do in America. We like our nations to be nations of laws and not of men. And you know, there is something we think is very basic in your Constitution, the Guarantee Clause (article IV, section 4): "The United States shall guarantee to every State in this Union a Republican Form of Government…"

The American: Good. Another question: with whom does sovereignty rest?

The Frenchman: Not necessarily with Parliaments: it rests with *the People*! Sovereignty belongs to the people and is given on loan to government!

The American: Good, good, good!

The American: Let's just ask some basic questions and give me some European answers: Why does the state exist?

The Frenchman: Not for itself. To preserve freedom.

The American: Which is the best economic system consistent with human freedom and dignity? Free enterprise!

Why do we have to promote the supremacy of the rule of law (Constitution and Bill of Rights especially): to limit government powers and functions, to protect from the majority! These basic ideas may contribute to a true "*vision*" of spreading democracy by the rule of law.

Finally, I've heard of great European thinkers named Descartes, Montaigne, Montesquieu,

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

fend 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 *Koramatsu*, 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 been 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 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 opther, I'm happy to help Cato in their attempt to cut farm subsidies.