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Debate Transcript

A DEBATE: THE EXECUTIVE BRANCH VS CONGRESSIONAL PREROGATIVES IN NATIONAL SECURITY DECISION

PART I

Moderator

Will Ruger, PhD.

Speakers

Louis Fisher, PhD.
Robert Turner, LLD.

PART II

Moderator

Michelle Van Cleave, JD

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AFPC
The Executive Branch vs Congressional Prerogatives in National Security Decisions

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Part 1

HP: Herman Pirchner

WR: William Ruger

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HP: Good morning. I'm Herman Pirchner, President of the American Foreign Policy Council. Welcome. First want to thank Senator Chuck Grassley for making this room available for our session. Second, I want to note that a time where the world is so fragile, that national security decisions that will be made in Washington during the remainder of this year, and especially after the next president is elected, may have potentially significant influence on how we all live.

And of course, the topic of today is how those decisions are made. What's the proper balance between congressional and executive branch prerogatives? To moderate the first panel, I'm going to call Dr. William Ruger. Will is a Brandeis PhD. He's taught at LBJ School. He's a veteran of Afghanistan. He's published books and articles and many of you have seen him on various TV shows over the years.

He's currently Vice President of the Charles Koch Institute, Will, I welcome you to the podium to begin.

WR: Thank you very much. Thank you very much, everyone, for coming out today. I appreciate it. I think this is a subject of great importance, and we really have tremendous individuals here in Lou Fisher and Robert Turner. I want to try to keep this conversational today and so we're not going to have a strict structure, but we will have a chance for these gentlemen to talk at some length, especially about the first question, which I'll go into.

I'm going to talk from down here at the table so we can make it look like we're all on the same level here. Let me introduce Lou Fisher. Lou is just -- has been an incredible resource for Congress over the years, at the Congressional Research Service, and is now at the Constitution Project. And he's been a specialist on this issue for some time. Lou's the author of my books including Presidential War Powers, which is a book that's been used across many campuses, including my own when I was a professor.

And then I'd like to also introduce Robert Turner, who's at the University of Virginia and has been long involved in these debates, Bob has published numerous articles on a variety of subjects, especially on Vietnam and these issues

of war powers. Welcome, gentlemen. We're really happy to have you here.

Now, this first question I want to get to is, what does the Constitution say about executive legislative powers in the national security arena? In other words, what textual powers does it grant and to whom does it grant them? Because oftentimes, we get away from the text of the Constitution when we think about how people should or do behave in international relations and in US foreign policy. And I think it's really important to kind of ground in the text. I'm excited to see that Robert has brought a copy of the US Constitution, which is really, I think, the touchstone for all these discussions. I think it's very important that that -- and to Lou has it, as well.

RT: Lou has memorized it, so he doesn't need it.

WR: Yeah. So it's just great to see that, because so often we get outside of that text. So let's first think about, what does that text say? So Robert, I'm going to let you start first here and then we'll turn it over to Lou.

RT: All right. Well, first I want to thank Herman Pirchner for inviting us and setting up this program. Trying to talk about the complex history and jurisprudence of these issues in a few minutes is impossible. I did a 1700-page doctoral

dissertation with over 3000 footnotes and that doesn't even cover all of the issues.

Let me touch on a couple of highlights. It is first important to understand the language that was used and what it meant to the Framers. On August 17th, 1787, James Madison moved to change the power being given to Congress from the power "to make war" to the power "to declare war." That was overwhelmingly approved, and Madison explains that would leave the president free "to respond to sudden attacks." That is, the president could act defensively but could not engage in an offensive war of choice, if you will, without legislative sanction.

If he wanted to engage in what today we would call an "aggressive" war, the president would have to get the approval of both houses of Congress. The Framers chose the term "declare war" because it was a term of art in the "Law of Nations," or international law. I have taught international law, and declarations of war were fairly narrow instruments. They were only associated with what were called "perfect wars." All out wars.

Hugo Grotius wrote in *The Law of War and Peace* in 1620, "No declaration is required when one is repelling an invasion or seeking to punish the actual author of some crime." But if you're going to war to conquer another country or seize

territory, something like that, you needed to formally declare war.

We also need to understand the meaning of the word "executive power". In Article 2 Section 1, the president is granted the nation's "executive power."

The framers understood this as the term was defined by Locke, Montesquieu and Blackstone. That is, a power consisting of two components: carrying out the domestic law and conducting relations with the external world--what Locke referred to as the power over "war, peace, leagues, and alliances."

In a memo to President Washington in April 1790, Jefferson noted the constitutional grant of "executive power" to the president, and added" "The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, except as to such portions as are especially submitted to the senate. Exceptions are to be construed strictly."

Three years later, Jefferson's chief rival in Washington's cabinet, Alexander Hamilton, noted in his first *Pacificus* essay: "It deserves to be remarked, that as the participation of the senate in the making of treaties and the power of the legislature to declare war are exceptions

out of the general 'Executive power' vested in the president, they are to be construed strictly and ought to be extended no further than is essential to their execution."

It is important to understand that international law has outlawed the kinds of aggressive war that were historically associated with formal declarations. We did that first in the Kellogg-Briand Treaty of 1928, and more recently and more decisively in Article 2.4 of the UN Charter.

Thus, I would argue the power to "declare war" is today as much an anachronism as the power given to Congress in the same clause--Clause 11 of Article 1, Section 8--to grant letters of marque and reprisal. Letters of marque and reprisal were used by governments to authorize private ship owners to seize enemy ships--usually commercial ships, unless they had the courage to take on a warship. They would then bring the captured vessel into port, and the matter would be taken before a prize court. If the bona fides were upheld by the court, the captured ship and its cargo would then be sold and the proceeds split among captain, crew, and so forth. But Letters of Marque and Reprisal were outlawed by international law in 1856.

Now, having said that, it does not mean Congress has no powers relative to the use of armed force. But it is not a

veto unless it involves an all-out war, a "perfect" war. The Commander in Chief has no forces to command, unless Congress first raises and supports an Army or provides and maintains the Navy. Article 2, Section 9, of the Constitution requires appropriations be made by law before any money can be taken from the Treasury. It's very difficult to fight an armed conflict without money.

However, I emphasize that the "power of the purse" does not allow Congress to use conditional appropriations to usurp the independent constitutional powers of the president. When Senator Barack Obama introduced an amendment to block the surge in Iraq, that was an unconstitutional attempt to assert presidential power. The surge was calling up reserves in the middle of an authorized war—a core component of the Commander-in-Chief power.

If I'm wrong on this, if Congress can put any condition it wants on appropriations, then all it has to do is pass the "Supreme Court Naturalization Act of 2016" and say no money in any bill or act shall be available for the Supreme Court, and then you fill in the blank. If they overturn Roe v. Wade, unless they overturn Roe v. Wade, if they declare any act of Congress to be unconstitutional, and so forth. We would no longer have a separation of powers doctrine. The power of the purse is a broad power, but it

is not a power that allows congress to usurp the powers vested in the other branches of government.

Now, for prudential reasons, I'm generally a fan of AUMFs (Authorizations for the Use of Military Force). They can signal the bad guys that the United States is united, and thus help deter aggression. But certainly no AUMF was required after the 9/11 attacks in the view of Madison and the others who took part in those debates in 1787.

There is a lot of misunderstanding about the power to declare war. Some interpret it to mean Congress has every power having to do with war, and the president can do nothing, offensive or defensive, without a prior approval of congress.

WR: Dr. Fisher, how would you like to respond to that?

LF: The framers knew all about John Locke and William Blackstone, both of whom put all of the external affairs with the Executive Branch. And all you have to do is read the Constitution, Article 1 and Article 2, and see that's not the model we have. That model was repudiated.

Now, Hamilton, of course, at the Philadelphia convention gave a very lengthy speech and he said, which was true, his model, the best Constitution was the British one. And he talked about it at great length. But as he continued to

talk, he said that the British model has nothing to do with our system here in America. We have self-government. Has no application. So even Hamilton recognized that the British model doesn't apply to the United States.

Now, some people say that once the president gets involved in war, say, we do authorize and we did declare, that he's left alone as Commander in Chief. And even that wasn't true at the start, because with the [unintelligible] War in 1789, that was authorized by about 20 statues. But in that war, although Congress had authorized the president to intercept ships going to French islands, President John Adams authorized going to and from.

And that got to the Supreme Court in 1804 and Chief Justice John Marshall, right into the court, unanimous court. What do you do when there's a tension between what the statute said and what the president says by proclamation? And the Supreme Court said the statute prevails. That's national policy, not an inconsistent proclamation. And struck that down.

Then some people say that if you look at Jefferson using force against the Barbary Pirates, that shows that presidents can initiate military actions. And it's an interesting area, actually. A senator said that on the floor, and I, at CRS, I spent a Friday night doing a CRS

memo on that, a report, and I sent it to the Senator's office. And I pointed out that although Jefferson did use vessels out there and there were hostilities, when it came back he gave a talk to Congress, an address December 1801, and he told Congress what he did.

Then he said he acted in a defensive manner, and his boss said, "There's a difference between defensive and offensive," and Jefferson said, "Beyond the line of defense, I cannot go. Anything of an offensive nature, I have to have authorization from you." And Congress proceeded to pass 10 statutes authorizing military action against the Barbary Pirates, 10 statutes for both Jefferson and Madison.

So people knew the difference between defensive and offensive, and we'll get to it later. But no -- from 1789 up 1950, any time presidents went to war, they always came to Congress either for authorization, as with the [unintelligible] War, the 20 statutes, or they came for declaration. And we need to focus later on what happened in 1950 when Truman decided he would go not to Congress, but would go to the Security Council and we need to focus on that.

Because that became a precedent for President Bill Clinton not to go to Congress, but to go to the Security Council.

That became a precedent for President Obama not to go to Congress for authority for Libya in 2011, but to go to the Security Council. And one other thing.

The UN Charter has language. We have to analyze it later. The UN Charter says there will be a special agreement by member states. The Security Council didn't have troops, so member states would have to contribute troops and equipment and money. And that was being done in accordance with special agreements, and I think it was very interesting of the UN Charter Article 43 when you talk about special grievance.

It says, "They shall be subject to ratification by the signatory states in accordance with their respective constitutional processes." That means every country had to decide that for themselves, and Congress did that. We'll talk about it later. They did it in the UN Participation Act of 1945, but we'll focus on that later. Thanks.

WR: So what were the framers trying to achieve with these arrangements? What were the goals? Certainly security, but were there other goals they were trying to achieve in this arrangement? Lou?

LF: The point of the framers always was against concentrated powers. The point of the framers was to make sure that if

powers are concentrated, they get abused. And they made certain that, in this system, there would be one of checks and balances and you would never let one branch go off by itself and say it has the final word.

I would say that applies to the Supreme Court. Many people say the Supreme Court decides the Constitutional question. It's final unless the court changes its mind or unless we amend the constitution. There's nothing to that at all.

Just a quick example of current one. 1986, the Supreme Court decided case five to four that the Air Force could prohibit a member from wearing his yamaka on duty. Five to four. Last word? No. In one year, Congress passes legislation telling the military, "You'll allow people to wear religious apparel, unless it interferes with his military duties." And then you wonder, how could Congress have the nerve to pass a bill completely contrary to what the Supreme Court decided?

And the answer is, look at Article 1. If you look at article 1, where is the power over military regulations? Not with the Supreme Court. With Congress. So the idea that the court can decide the constitutional issue and that's final, that's not true. It's never been true.

RT: The Supreme Court does several things. It's the ultimate interpreter of the Constitution, subject to being overridden by the people through a Constitutional Amendment. Lou mentions a case, which did not involve a Constitutional interpretation, in which Congress changed its mind. Obviously, when Congress passes any otherwise valid statute, the Supreme Court enforces that statute. So I don't think that's a relevant case.

The framers intended to preserve liberty, but also to preserve security. And they did intend to give the president a number of unchecked powers. If you read Marbury versus Madison, John Marshall talks about there being certain important political powers given to the president in which he is to use his own discretion and is accountable only to his own conscience or to the people if he runs for reelection.

And he uses an example of this power, the bill establishing the Department of Foreign Affairs—later redesignated the Department of State--noting that the Secretary was, and even by statute, to carry out the instructions of the president, not of Congress. The Supreme Court has noted the United States has sent US armed forces abroad into harm's way more than 200 times without the approval of Congress.

Lou mentions Jefferson and the Barbary Pirates. In reality, when I was doing my doctoral dissertation, I went to the Library of Congress and found Jefferson's handwritten notes on his first cabinet meeting in March 1801. His cabinet unanimously agreed to send two-thirds of the new American Navy halfway around the known world, and if when they got to the Mediterranean they learned war had been declared against us they were authorized to use force. Keep in mind that it took six weeks to get a message from Europe back to America in those days. They didn't have cell phones then or instant messaging.

Captain Richard Dale's instructions were: If you get there and they have declared war against us, you will so dispose of the forces at your command as to "chastise their insolence" by "burning and sinking their ships" at every opportunity. That's exactly what they did. I would add that Dale's squadron sailed on June 1, 1801, and Jefferson did not even tell Congress about it until his State of the Union message of December 8th.

Jefferson did not seek prior congressional approval for the mission. In his December message to Congress, Jefferson lied to Congress. He said the schooner *Enterprise* commanded by Lieutenant Sterret had fallen in with an enemy ship and had bested it with no loss of American lives. And

then he said Congress may wish to authorize the use of force beyond self-defense.

In reality, that's not what happened. We have the messages between Richard Dale and Lieutenant Sterret, and the instructions were to go to Malta to get water for the squadron. If going to Malta, Sterrett was not to be delayed. If you fall in with enemy ship en route to Malta, Sterrett was to cut loose the sails, toss the guns overboard, and leave it to drift ashore. If coming back from Malta, Sterrett was authorized to capture the ship and bring it back to the squadron as prize.

The only reason Lt. Sterrett did what he did was because he encountered the Tripolitan ship while going to Malta, not while returning to the fleet with water.

Lou mentions the 1945 congressional debates. But he forgot to mention the Wheeler Amendment. Burton Wheeler was an isolationist Democrat from Montana. And during the UN Charter debates, Wheeler introduced an amendment to the UN Participation Act in December of 1945. The Wheeler Amendment said the president shall not have authority to authorize the use of any US forces to carry out a Chapter 7 decision of the UN Security Council in the absence of explicit statutory authorization for the specific case considered by the Security Council.

That was defeated by a margin of greater than seven to one. Overwhelmingly, the leaders of both parties said, "We have already made a commitment to help keep the peace through the Security Council. This would violate that commitment." Even the great isolationist Ohio Senator Robert Taft opposed Wheeler, saying Congress had already made this commitment, and Wheeler's amendment would violate that promise.

The UN Charter and UN Participation Act overwhelmingly authorized the president to use force without further congressional authorization to carry out Chapter 7 resolutions, and in unanimous language in the Senate Foreign Relations and House Foreign Affairs Committees, Congress said the president would carry out America's obligations under the Charter--under his duty to take care that the laws we faithfully executed. Remember, the Supremacy Clause says the Constitution and laws made pursuant to the constitution, and treaties made under the authority of the United States, were to be the "Supreme Law of the Land."

The unanimous Senate and House foreign affairs committees made reference to the Supremacy Clause, explaining the president had the power to carry out America's obligations under chapter 7.

WR: So you've jumped ahead a little bit, but I think that's good. We're going to get to that issue of the UN, but Dr. Fisher, could you just comment a little bit upon that historical record? Do you see the historical record the same way as Dr. Turner?

LF: No, I don't. Of course, first and foremost, the yamaka case, that was a Constitutional issue. Captain Goldman said he had a right under the first amendment, a religious liberty, to wear his yamaka indoors. It was a Constitutional issue.

Bob brings up Marbury versus Madison and it's a good point that he says. Chief Justice John Marshall said that there are certain political duties that Executive officials have to the president, and Marshall said the courts do not interfere with that at all. But interestingly, Marshall then said that there are other duties. Not political duties, but what Marshall called ministerial duties. Namely, that when Congress by statute vest duty in an Executive official, that Executive official doesn't look to the president for guidance. It looks to the law. It's a ministerial duty.

And we have many -- we have a book on the Unitary Executive, and somehow the president has control over everybody in the Executive Branch. It's never been the

case. As Bob notes in 1789 when Congress was creating the Treasury Department and the other departments, it was understood, although it's not said in the Constitution, that the president had authority to remove the heads of the Executive Departments.

And the reason comes right from the Constitution. The president has to take care that the law is faithfully carried out and if the head of a department isn't doing it, then the president has to have removal authority to get rid of that person to put someone in who can carry out the law.

But when they debated the Treasury Department, there's an officer inside called the comptroller, and he was the one, the judicial officer would get claims against the United States and he'd have to weigh the different sides. And Madison says that person does not serve at the pleasure of the president. And after that, beginning in 1823 and going decade after decade, attorney's general told presidents, "You cannot interfere. Those are judicial duties. You cannot do that. It would be unlawful for you to get involved in second-guessing what someone did."

And then in the Myers case in 1926, the removal case, the Supreme Court, at the end, said there are two areas where the president doesn't have removal power. One are offices who do judicial duties in Executive Branch, he may not

interfere. And the other one is what Marshall was talking about, ministerial duties. That duty is to the individual.

And so I want to comment on just a couple facts here of the UN Participation Act. First of all, when the senate was --

WR: Can we hold off on the UN? Because we'll get to it a little bit later.

LF: He just brought up something. He brought it up so I'm going to respond to it.

WR: Okay, sure.

LF: When the Senate was debating the UN Charter, Truman was in Potsdam and he cabled to the Senate and he said -- and nations would have to enter these special agreements, sending troops and so forth. Special agreements. And Truman wrote to Senator Kenneth McKellar. It's put in a Congressional book and made public. Truman said, "When any such agreement or agreements are negotiated, it will be my purpose to ask the Congress for appropriate legislation to approve them."

And by Congress, meant both houses, not the Senate. Both houses. And in fact, after I told you the UN Charter talks about Constitutional processes, when we decided we're not

Constitutional processes [unintelligible] Congress passed the UN Participation Act of 1945. How do we participate?

The UN Participation Act Section 6 says the president is authorized to negotiate a special agreement or agreements with the Security Council, which shall be subject to the approval of the Congress by appropriate act or joint resolution. So Truman's message at the statute. He signed this bill without any complaints.

WR: So, Dr. Fisher, just to follow up here. You argued in your book, Presidential War Power, that, quote, "The framers design has been radically transformed." What did you mean by that and how has it been transformed? And then I'm going to get Dr. Turner to respond to that, as well.

LF: One thing that's been radically transformed -- I'm going a book now called Supreme Court Expansion of Presidential Power External Affairs, and the subtitle might be something like "Unconstitutional Leanings" about the Supreme Court leaning in the direction of the president, External Affairs.

And how that comes across from 1789 up to 1936, the Supreme Court had all kinds of Constitutional issues about Congress and the president. It didn't lean in one direction or the other. Tried to interpret the Constitution as best he

could, and then something phenomenal happened in 1936 with the Curtiss-Wright case.

The Supreme Court had to ask whether Congress can delegate to the president authority to have an arms embargo in a region in South America. And the year before, the Supreme Court had struck down two delegations in the domestic area. This was a delegation area. So the Supreme Court in 1936, Curtiss-Wright, said that Congress could. It was a narrow area- congress could delegate.

So that's the issue. But then the Supreme Court decides, Justice Sutherland throw in page after page of dicta. And what it did was to go to a debate in 1800, when the Jeffersonians were trying to punish President John Adams for giving over to England, an individual charge with murder. And John Marshall, he takes the floor, and he says there are no grounds to either censor the president or impeach the president.

He's acting under authority of the Treaty. The Jay Treaty has the provision saying that you can expedite someone charged with murder. So all Adams is doing is carrying out the law. And the Supreme Court used that language that Marshall said the president is the sole organ in External Affairs.

Well, if you read the -- I teach at William and Mary law school and have my students read the speech and so forth, and they know obviously Marshall didn't say the president has exclusive power over external affairs, but that's what the Supreme Court said. The Supreme Court in Curtiss-Wright said in External Affairs, the president has plenary and exclusive authority.

And that mistake laid there for decade after decade building up presidential power. And so I wrote two years ago an amicus brief, sent it to Supreme Court. I said, "You made an error in 1936. Fix it." And sure enough, last year without mentioning me, they quote "fixed it" and continued a lot of other areas. But from 1936 on, we do have a Supreme Court leaning in the direction of exclusive presidential power in External Affairs.

WR: And it's not just the Supreme Court who has said that, right? So Representative Boland says in 1983, if I'm remembering correctly, that he even admits in a Congressional hearing, "We are not coming here to dispute the president's preeminence in Foreign Affairs." So that's quite a transformation. Robert, do you want to comment on this?

RT: Yes, thanks. The legislative Power is invested by Article I of the Constitution in two Houses of Congress. Article

III vests the Judicial Power in the Supreme Court and such inferior courts as Congress may from time to time create or establish. Article II, Section 1, expressly vests the Executive Power in a President of the United States--one individual. It was not vested in the Executive Branch.

Thus, there is a "Unitary Executive." That was the original understanding. That's why the bill creating the Department of Foreign Affairs did not say the Secretary shall conduct the Foreign Affairs of the country as he deemed wise. Rather, the Secretary was instructed to do, what he or she was instructed to do by the president. Congress understood that the entire Executive Power of the federal government was vested in the President rather than a branch of government.

The founding fathers intended to give the president a great deal of unchecked power. I mentioned Marbury versus Madison. Chief Justice Marshall discussed the president's unchecked powers in that seminal case. He drew a distinction between the president's powers involving, for example, Foreign Affairs, and issues involving individual rights, where the court did have a proper role to pass judgment on the president's actions. Most decisions involving Foreign Affairs area were considered presidential turf.

A good example of this was in the area of intelligence. John Jay in Federalist 64 noted there would be valuable sources of intelligence who would confide in the secrecy of the president, but not in that of the Senate or a popularly elected assembly like the House (or today's Senate). Jay said that the convention had done well in so distributing the the Treaty power, that the president, and I quote, "Will be able to manage the business of intelligence as prudence may suggest."

When Congress first appropriated money for foreign intercourse--what was often referred to as the "Secret Service Account" that once constituted 14 percent of the Federal Budget—the statute said specifically, "the president shall account specifically for expenditures from the said account as in his judgment may be made public and for the amount of other expenditures—so Congress could replenish the kitty.

There was no expectation or requirement that the president give Congress secret information. They knew from experience that Congress could not keep secrets. That was the practice until after the Vietnam war. I worked in the Senate in the mid-1970s when we first passed the House and Senate Intelligence Committees (HPSCI and SSCI), and that

was a dramatic departure from the traditional understanding of the constitutional separation of Foreign Affairs powers.

The legendary Congressman Henry Clay said during House floor debate in 1818 that it would be "improper" for Congress to inquire into how the president spent money from the Secret Service account. As a Federalist member of Congress in 1800, Congressman John Marshall declared that the President was the "sole organ" of the nation in the field of foreign affairs. By that he meant the president conducts our business with the external world. He is responsible for the enforcement of our international treaty rights and obligations, for example.

We had an extradition clause in the 1795 Jay Treaty. British authorities notified our government they had located a British deserter in a bar in Charleston, South Carolina. President John Adams instructed that the man be apprehended and turned over to the Brits. The Jeffersonians went ballistic and said that only the courts can do that, and in the end, Marshall and Gallatin had an extended debate on the floor of the House of Representatives over a resolution to censure the president.

Gallatin listened as Marshall spoke first. When Marshall sat down, Republicans crowded around Gallatin and urged him to respond to the Federalist's arguments. But Gallatin

replied: "Answer him yourself," declaring that he had been persuaded by Marshall's argument that the president had acted properly pursuant to his "executive power." In the end, the Republicans overwhelmingly sided with the Federalists in defeating the Republican resolution denouncing President Adams, and instead passed a different resolution saying that what Adams had done, without involvement of the courts, was proper.

WR: So, Dr. Fisher, Dr. Turner is making a case, it seems to me, that we actually haven't had an expansion of Executive Power over the ages. That it was actually there in the beginning. In fact, that perhaps the United States as John U had argued, did not consider it to be a break with the kind of British model of power, but instead continuity with that.

So do you agree with Dr. Turner's assessment? That there's been more continuity with the British perhaps than others would think?

LF: Well, there's a book that just came out, Sai Prakash, and it has the title "Imperial from the Beginning" and I just did a review of it. I've been in touch with him. I've known him for many decades. Although the title is kind of ambiguous. Imperial from the Beginning, it sounds like

imperial from beginning up until now, instead of imperial at the beginning.

But Sai clarified in some emails to me that he was talking about the initial decade or two. So no, I don't think -- I think we clearly rejected the imperial model and we rejected the British model. Even Hamilton, the biggest love of the British saw it didn't apply to a country like the United States. So I don't think for most of our history the president ever was favored by the Supreme Court.

And to my knowledge -- I'm doing a book on it and I'll see what the whole story is -- it didn't really start until 1936, with the Curtiss-Wright case. And I want to make a comment about Bob talking about covert spending. The Constitution does say no money shall be drawn from the Treasury. But in Consequence of appropriations made by law and regular statement and account of the receipts and expenditures of all public funding shall be published from time to time. Published from time to time.

So published so that the United States citizens can know what the government is doing. Now there is a man named Richardson who took his case to the Supreme Court, complaining about corporate spending, saying it's not made public at any time. And of course, the Supreme Court, as

it often does, "You don't have standing," so it wouldn't touch it.

But that eventually got to Congress and Congress passed legislation sometime back saying that they will be a public statement, not of the individual agencies, but of the aggregate. And we do now have at least the aggregate number from the intelligence community.

RT: It is very important to note that the Constitution provides that a regular statement of accounts should be published "from time to time" rather than "annually" as originally proposed. The lengthy debates show that the Framers understood there would be secret expenditures that should not be made public until the need for secrecy has passed. And thus they agreed upon the language "from time to time."

This was fully consistent with the understanding that the president can do covert operations without reporting them to Congress. The Founding Fathers understood Congress could not keep secrets. Time and again, while serving as Secretary of Foreign Affairs under the Second Continental Congress, John Jay complained that anything reported to Congress soon became known to the British and French ambassadors.

In those days, both ambassdors were loaning money to Congressman to buy homes in the capital. I'm sure both ambassadors were very nice men, but I suspect they also believed this generosity would create some sense of obligation on the part of legislators they helped. In any event, it is clear that the founding fathers felt that the whole business of intelligence, anything requiring great secrecy, belonged to the president.

In addition to secrecy, the Framers also talked about the important need of "speed and dispatch" and "unity of design." These discussions fill pages of *Farrand's Records* of the Philadelphia convention and *Elliot's Debates* on the state ratification conventions. Secrecy, speed and dispatch, and unity of design were recognized to be the attributes of the Executive, not the Legislative branch.

The wisdom of the Framers becomes clear if you examine the records after Congress started demanding secrets in the early 1970s. We've had tremendous problems of secrets being leaked with very harmful results. The Framers got this one right.

WR: So we've gotten, I think, into the weeds a little bit, which is great, but I want to kind of get up a little higher here, which is, and correct me if I'm wrong Dr., but are you saying that the founders, when it came to, say, the

initiation of warfare, that the founders would have no problem with, say, what we've seen over the last at least 25 years, maybe the last 75 years?

So think about, for example, the first Gulf War, where essentially Secretary of Defense Cheney, President Bush and others argued that Congress actually didn't have to play a role here. That authorization from the Security Council was sufficient. Or Libya. Or any number of these interventions where Congress has played second. Maybe even no fiddle, if you will.

RT: Since the passing of our mutual friend Lou Henkin of Columbia about six years ago, Lou Fisher has in my view become the nation's preeminent constitutional separation of powers scholar on what we might call the "pro-Congress" side. He is world class, extremely able, and a dear friend for many decades. We do, as by now is apparent, disagree on some things.

It is important to remember that the first Gulf War (Operation Desert Storm) was approved by an AUMF, an Authorization for Use of Military Force. It is true that the elder President Bush originally said he didn't think he needed authority, but I actually testified before the Senate Judiciary Committee on the 8th of January, 1991, on the matter. One of the questions raised was whether the

President should be impeached if he used U.S. armed forces to eject Iraqi forces from Kuwait without specific statutory authorization.

Shortly before the hearing began, the President had announced he would seek a formal AUMF. But angry legislators still held the planned hearing, which must have made Saddam Hussein's day. Several witnesses and legislators spoke of possibly impeaching the President, signaling Saddam our country was divided—and likely destroying any incentives he might have had in favor of compromise. He well knew how a partisan Congress had snatched defeat from the jaws of victory in Vietnam. But, ltimately, Congress passed an AUMF.

The theory of the declaration of war was if the president decided to launch an all-out war in a non-defensive setting, a war of aggression, which was perfectly lawful under international law until the 20th century, he had to get the formal approval of both Houses of Congress.

The Framers created a one House veto, if you will. Either house could block a presidential decision to launch an aggressive war. But in defensive settings, that was not true and in what the founding fathers understood as "force short of war," or any use of force is self-defense, the president could use force on his own. Again, more than 200

times in our history, presidents have threatened to use force and sent American forces into harm's way—often without even consulting with Congress.

But in most modern major conflicts since World War II, Congress has enacted formal statutory authorizations. Even though, as Madison said, the president could respond to sudden attacks without involving Congress, Congress enacted an AUMF right after the 9/11 attacks. The Congress overwhelmingly authorized him to use force.

And before going into Iraq in 2003, Congress enacted another AUMF. There was later a lot of accusations that Bush "lied" to trick us into going into Iraq. Remember, when Bush was still governor of Texas (when I doubt seriously he could have found Iraq on an outlined map of the world--Congress enacted the Iraq Liberation Act of 1998, which said it should be US policy to support the removal of Saddam Hussein from power and his replacement by a democratic government. It was passed overwhelmingly by both houses. George W. Bush did not need to persuade Congress that it was necessary to remove Saddam from power.

He did not lie to Congress. I'll save that for Q&A, but British Prime Minister Tony Blair came here and after meeting with the president told the media that he had told Bush that British intelligence had learned that Saddam was

trying to buy uranium in Africa--which is exactly what Bush had in his State of the Union address that people later said was a lie. If you go to Snopes.com and search "Democrats WMD," you will find a list of quotes from Hillary Clinton, Teddy Kennedy, Jon Kerry, Bill Clinton, Al Gore and virtually every other senior Democrat in the Senate or the Clinton Administration.

All the Senior Democratic senators said we had to stop Saddam's Weapons of Mass Destruction program, and they voted to authorize the president to do that. And then, when the war became unpopular, when it turned out we had totally misread what the people of Iraq would do, they said, "Oh, no. I've always opposed this and Bush did it on his own. He lied to us." It's very much like Korea. We'll get into Korea later.

WR: Dr. Fisher?

LF: Yeah. Let's talk about covert operations and what they've done to the United States. Eisenhower eventually concluded that Truman made a mistake going to war against Korea on his own and going only to the Security Council and not coming to Congress. But then you take a look at Eisenhower. It's true that Eisenhower was under pressure to intervene in southeast Asia and Vietnam to help the French.

And he decided not to. But he was acting covertly. Then you have to ask what help have we had from presidents who act covertly? They don't come to Congress either for statutory authority or for declaration of war or AMUF. And what Eisenhower did -- in 1953, there was a Dr. Mossadegh in Iran. He had taken political control. The parliament voted him to be the prime minister, and for some reason, I don't think with any evidence, Eisenhower though that Mossadegh was either a communist or would become a communist and be a communist country.

So we ended up with the CIA intervening in Iran to get rid of Mossadegh and as a result of that, we have the Iran we have today, which is run by Ayatollah. There was opportunity in Iran for some type of democracy to take root in the Middle East, and Eisenhower got rid of that. And then in the next year, Eisenhower in another covert action, decided to go in with the CIA help and get rid of our bins in Guatemala.

And I think anything you read about that, the destruction to Guatemala, to Central America, has been vast by US intervention, because the attitude was, why weren't anywhere in those countries a democratic sense? But whoever we get elected, the United States, through covert means, will discredit and remove that person.

So we paid high price for the unilateral action, particularly when they are covert. And on the war in Iraq, the congress passed a resolution in October of 2002. Bob is correct. A lot of people voted for that. They had in their minds -Hillary Clinton and Kerry and all the rest running for the president- and they didn't want to vote, apparently, to look weak on national security.

So I think it was obvious, at the time, in October 2002. There are six claims that Saddam Hussein has weapons of mass destruction. Many of them were discredited then, the so-called yellow cake from Niger and all of that were relying on people to name a curveball. Anyone from another country is going to tell you what would benefit that person so they can be protected and find the answer here in some western state.

So we went to war in Iraq on the basis of six false statements. Six demonstrably false statements. And this is the Executive Branch. We say that the Executive Branch is where you have your expertise. But I think the record shows that again and again, they either don't know what they're doing. They're deliberately coming up with claims that cannot be justified, cannot be substantiated.

So just to finish, I don't know how many of you read the New York Times yesterday and then today, how we went into

Libya in 2011. It's quite amazing that Hillary Clinton, the Secretary of State, met with one person who would be possibly the new leader in Libya, and that person talked to Hillary Clinton about the need for democracy and compromise and all of that.

And the state department was amazed at what the guy said, because he said exactly what we wanted to hear. Is it hard to figure out that that person is going to know what you want to hear and will just say it? How many times can we learn if you get rid of Saddam Hussein and have a broken Iraq and strength in Iran, which is what we've done?

Can't you learn something from going into Iraq? And you did it again in 2011. You got rid of Ghaddafi who was our ally. We got rid of weapons of mass destruction and we now have Libya as a broken state and a breeding ground for terrorist action in the region.

So if I look to the Executive Branch for any kind of model of reasoned analysis and competence, I don't see it.

WR: So it sounds like what you're saying is that perhaps the framers' original system in which you would have the collective wisdom of both congress and the Executive Branch would avoid some of these problems. So, with that, let's go to Q&A here. So, we have about 10 minutes of Q&A to

make sure we can get some of the audience involved. So please state your name and please make it a question. Thank you.

RK: Yes. I'm Russel King. I think Vladimir Putin right now probably has more breathing space than he ever has, but there's one front running presidential candidate that says we want to let Putin bomb anybody he wants to bomb in Syria. And I think historically there have been things like operation restore democracy and people -- some people in our government want to put Zalia back into power in Honduras even though he was constitutionally removed.

But identifying enemies and friends has been a problem. What Congressional prerogatives are there to stop a president who really doesn't have a very good judgment in terms of friends and enemies of the United States?

LF: Yeah. Let me say, one of my books, I'm not always defending Congress. One of my books is Congressional Abdication on War and Spending. So Congress, I think particularly and I would say from 1950 on, has not done what the framers expected it to do. To be an independent branch with the capacity to check Executive mistakes and poor judgment.

So a lot of the problem is with a very weak Congress. I just came out with a book called, odd title, Congress Protecting Individual Rights. And the odd thing is, Congress has protected individual rights much better on women, children, blacks, religious liberty, and so forth, than the supreme court. And I think my book makes a very good case.

But then the last chapter is on strengthening US democracy. We do have an awful problem here of a so-called democratic system here where Congress is not doing its job. It has cut back on staff, members are in town maybe two days a week. Often many weeks they're not even here. So we have a real problem.

We should be the last country in the world to pat ourselves on the back about our system. We don't have a good system. Executive use is part of it and Congressional power is another part of it.

RT: I'm a great subscriber to Winston Churchill's remark that democracy is the worst form of government ever conceived of, except for all of the others. Certainly the US Constitution does not give us a veto over what Vladimir Putin does in Iran. Beyond that, I testified before Congress early in the Clinton administration. I defended

the president's powers just as I had previously defend the powers of republican presidents.

And when the hearing was over, one of the committee members I had known when I was the Acting Assistant Secondary State for Congressional Relations under President Reagan, walked past me on his way out of the hearing room and remarked in surprise: "When did you change sides?" In his view, obviously, the Constitution should be interpreted to enhance presidential power only when Republicans were in the White House. I take pride in the fact that my constitutional interpretations before Congress and in my professional writings over many decades has not shifted based on which political party occupied the White House.

The Constitution is superior to political partisanship. The man who should be our hero in this area is Arthur Vandenberg, the great Michigan senator who chaired and was ranking minority member of the Senate Foreign Relations Committee following World War II. Senator Vandenberg really created modern bipartisanship and argued that politics should stop at the water's edge.

In I believe it was a February 1949 Lincoln Day address in Detroit, he said words to the effect that "Nothing has happened to permit either Republicans or Democrats to put

their party ahead of their country." I could not agree more with that.

Certainly we have had failed covert operations. We have had some tremendously successful covert operations. From 1981 to 1984, I served as Cousel to the President's Intelligence Oversight Board in the White House.

I was regularly briefed on on every covert operation in the world that we were doing. Most of them have still not become public. I am convinced that most of them would have the approval of 85 percent of the American people. Little things like sending a team in when we learned that an Egyptian journalist was about to be killed by a terrorist.

We acted covertly in tipping off authorities in Egypt, because if American fingerprints had been on the information the bad guys might well have identified our source and an agent would be murdered—likely along with his family. So we would tell some third country to warn the guy and save his life. Things like that are covert operations, because the U.S. Government role is concealed. Overwhelmingly, these operations are good operations, they're moral obligations, and they would have the support of the American people if they knew about them.

WR: Yes. Here. In front.

DS: Hi. Declan Sullivan. I'm wondering if -- you've both referred to sort of the 1800s and older sort of discussions and debates. I'm wondering if the new environment with the war on terror on things like that, we've moved away from big wars to lots and lots of smaller operations, a lot of which are covert. Do you think there needs to be maybe an update to the rules or understanding of the relationship between the president in Congress in a clearly defined way, and what would that look like?

LF: Yeah, I don't think it's changed. Oddly, the presidents who have bypassed Congress, I think, have generally been Democrats. George W. Bush came to Congress after 9/11. There might have been an argument. 9/11 would have been a defensive operation, but he came to Congress to get statutory authority and he came to Congress to get statutory authority with Iraq.

The people who have not done that have been -- Clinton never came to Congress one time for any authority. He always claimed he had executive authority to do whatever he wanted to. We hadn't mentioned one of the covert operations, which could have gotten the president impeached, and that's Iran Conra where Congress with the appropriation power, the Boland amendment prohibited money to go to contras in Central America.

And the administration decided not to do that, and when they couldn't get the money from Congress -- I don't know what Bob would think of this, but when they couldn't get money from Congress they decided to go to private parties and get money to help the contras and go to other countries; Saudi Arabia, etc...

So I think any president who did that should be thrown out on his ear to go to bribe sources and to foreign governments for funds. And I think Reagan knew he could have been impeached, and as a result he did something that no president has ever done. He 100 percent waived executive privilege. That whatever he said at anytime, anywhere, someone could come to the hill and talk, "What did you say to President Reagan?" "I said that," "What did he say to you?"

So I think that's how close the administration violated the constitution. And I was on the Iran Contra committee and one of the things I wrote in the report was to show that the Curtiss-Wright case about the Sole Organ doctrine was a complete misconception.

RT: Time is not going to permit us to have a thorough discussion of Iran Contra. I followed the Boland Amendment very closely from the White House. I am certain that it was unconstitutional. It would have been viewed as such by

the Founding Fathers. We can talk about that after the program if anyone would like—I've written about it at some length.

I will say this. Shortly after the joint congressional report on the Iran-Contra matter was released, I was invited up to Minneapolis to debate a scholar named Harlan Cleveland. You may or may not remember him. He was US Ambassador to NATO under Carter, a Rhode Scholar, president of the University of Hawaii, and Dean of the Hubert Humphrey Institute at the University of Minnesota. He later received the Presidential Medal of Freedom from President Clinton. The question was "Reesolve The Executive Branch breached the Constitution in the Iran Contra Affair."

There were two student debating societies who cosponsored the debate. It was an Oxford-style debate with cross-examinations, and when it was over the students voted 85 to 15 percent that I had won the debate. The case for the president was very strong, but almost nobody made it publicly. And that was unfortunate. I do agree the Democrats often have been worse about cooperating with incumbent presidents, but neither party's record is an admirable one since Korea.

One last thing, because we're going to get into it and that is the Korean War. Let me defend a Democrat. Harry Truman

has been accused of being an "imperial president." In 1976, the excellent Department of State series *Foreign Relations of the United States* published a volume on the Korean War 1950. It includes a whole bunch of once top-secret memoranda.

It is absolutely clear from these documents that Truman repeatedly requested to go before a joint session of Congress to address the war. He had Secretary of State Acheson draft an AUMF for authorization. He met personally twice within the first week with the joint leadership of Congress before Congress took a 10-day fourth of July recess. During the recess, Truman met with Senator Scott Lucas, the majority leader, and showed him Acheson's resolution.

And Lucas said, "I've talked to a lot of people on the Hill. They think you should stay away from Congress. You have the authority to do this under the Constitution and under the UN Charter. Go ahead and do it. We're going to support you." And Truman says, "Well, that probably depends on how things go. But if you guys don't think I should do it, I guess I won't push it." But Truman wanted an AUMF, and in fact, at one point, he said, "I just didn't want to seem to be trying to act extra-constitutionally to get around Congress."

From the record it is clear that sending U.S. combat units to fight to defend South Korea under the auspices of the United Nations Security Council was overwhelmingly supported by a united Congress. There were two members of Congress who spoke out and said there should be a formal declaration of war. One of them was isolationist Ohio Senator Robert Taft, who added: "If the president asked for it, we'll vote for it." I published any article, if you're interested, in the *Harvard Journal of Law and Public Policy* in 1996 called something like "Truman, Korea and the Constitution: Debunking the Imperial President Myth."

You can get it, I'm sure, from the Library of Congress or on Lexis or West Law if you have access. And it points out that in 1845 the unanimous House Foreign Affairs Committee and Senate Foreign Relations Committee reports on the UN Charter and the US Participation Act said the president has the authority to carry out our obligations under the UN Charter. He doesn't need additional authority from Congress.

WR: Well, that'll have to be the last word today, but this certainly won't be the last set of words on this subject. It's a great debate between Executive Legislative Relations and war powers so I appreciate that. Thank you very much.

AFPC
The Executive Branch vs Congressional Prerogatives in National Security Decisions

Part 2

HP: Herman Pirchner

MVC: Michelle Van Cleave

MC: Michael Chertoff

JK: Jon Kyl

HP: To begin our second panel, I'm going to introduce Michelle Van Cleave. Michelle is an old friend who has great experience in both the Executive and Legislative Branches of the US government. For many years, a Senior Aide to Jack Kemp on the House side, Michelle later was staff director of the senate Judiciary Subcommittee on Technology, Terrorism and Government information.

She later served as the Assistant Director of the White House Science Office and more recently as the National Counter Intelligence Executive of the US Government. Michelle, I'll welcome you begin the panel.

MVC: Thank you, Herman. I am very grateful for the opportunity to moderate what I know is going to be a fascinating discussion. But I fear if I had actually told Herman about my background in law school when I was a first-year law student and the hellacious arguments that I had with my constitutional law professor over this very subject, and

the horrible grade that I got as a result, he may not have invited me to moderate today.

But I'm especially pleased to have the opportunity to do that, and all the more so because of the two discussants that Herman has invited to address the issues that are before us today. Secretary Chertoff, Judge Michael Chertoff, served as one of the early, the second actually, Secretary of Homeland Security Department where there were certainly lots of questions that surrounded the country and his tenure about what to do and how to do it, where the questions of responsibilities between the president and the Congress were addressed in an ongoing manner.

His service also on the court and as a prosecutor and in the Justice Department gives him a rich and wonderful background for the conversation that we are about to have today.

Senator Kyl has had long service, as all of you know, in the House and the Senate. Eight years in the House, 18 years in the Senate, including his service on the Judiciary Committee, where I was privileged and honored to have had the opportunity to work for him. And his last five years in the Senate as the Whip, a position of leadership where he was rightfully known as someone who was a master of substance and a very serious scholar.

Both of these gentleman, lawyers both, are thoughtful, experienced people in the area that we are going to discuss today, and so I expect a very interesting discussion. Those of you who heard the last conversation may have noticed the richness and the depth of the legal questions that attend this challenge in the Constitution as between the responsibilities of the Executive and the Congress over Foreign Affairs and National Security.

We're going to try, in this panel, to speak to some of the current oppressing issues where those questions have practical application. But before we begin, I would like to ask each of our discussions to take just a moment, three or four minutes, to present your own perspective on where this significant framework for the responsibilities of each branch, the way that you read the constitution and from your experience.

JK: Thank you very much, Michelle. I think it is useful to look at this from an overview perspective. And since I'm supposed to defend the position of the Congress and Judge Secretary Chertoff, the President, let me lay out the thesis from my perspective. It is simply that we have more to fear from presidential outreach, or overreach, rather, than from the other two branches of government.

And therefore, in evaluating any question of whether the Congress or the president has the authority, or in some cases the Judiciary, we should be more vigilant when we come across cases where the president has it sort of his authority. And sometimes it's necessary to try to take action to deal with that.

And here's the reason. The Constitution obviously sits on very general authority. And the reason it's worked so well, in terms of the separation between the branches for over 200 years, is because the branches have given the other branches difference. They have been restrained in their actions by and large. There's been a great deal of comity and usually there's been an adherence to tradition. Not always.

But to the extent it's worked, I think this is one of the reasons why. In international affairs, of course, the presidency has dominance and there are a couple of key reasons for this. First, it's a lot easier, more effective for the president to act. He's one person. Much more easy than 535 people trying to get their act together.

And the previous panel indicated some of the other reasons why it's just easier for the president to represent the American people. And secondly, I would assert that there are far few effective checks and balances on the assertion

of presidential power than there are for the other branches to act.

The last two presidencies and maybe the last three presidencies have, I think verified the validity of this assertion that I'm making. Consider briefly the checks on the Congress. First of all, you have to have both Houses to act. If you're going to pass a law, you also have to have the concurrence of the president. Maybe the person whose actions you're trying to check. That's not going to be easy.

Both political parties are represented in both branches of government. In the Executive, only one. There's also something that I think Mike could speak to much better than I, but all presidents, Democrat and Republican, have White House Councils that have one main job, and their view on that is to assert the prerogatives of the president. And they all do so very effectively and I would say with some degree of extremist.

The checks on the president are much weaker in my view. First of all, there's the [unintelligible] power of the purse. What is the power of the purse? The Congress to pass a law. Oh, to pass a law. That means the president has to sign it. So the power of the purse, which is to

appropriate money, is only effective if the president agrees to be bound.

And frequently, those are one-year obligations, so the president you're seeking to be bound is the president who would have to sign the law. So that doesn't work very well, as members of Congress have found out. Impeachment was much overrated by the founders. It just doesn't work very well and we all have recent experience as to why that is the case.

And the courts rarely want to engage in refereeing disputes between the two branches. As a result of which, really the only power or the only check is in the people. In the case of a president in his second term, there's not a whole lot of accountability there. It generally spills over into the Congressional races. So there's not real effective restraint on a president who wants to assert authority and is willing to thumb his nose at either the Congress or the courts, in order to do so.

And that's why I suggest that, if we're evaluating the question, and by the way, on virtually every one of the questions that Michelle is going to ask, one could make a pretty good argument that there is a role for both the Congress and the president to play. Sometimes even the

judiciary. And it's just a matter of the gray area in between as to who has the preeminent authority.

So my thesis is that when you're examining these questions, if you're concerned about too much authority being exercised by one branch or the other, one ought to keep a very close eye on the president. It's just a lot easier for him to take on excess authority than it is for the Congress.

MC: Great. Well, I'm not sure you're going to get a lot of disagreement on this panel, but let me give you my kind of overarching sense of the framework. If I look back at the Constitution, I see Congress' power [unintelligible] Foreign Affairs and militaries largely being money. [Unintelligible] appropriate. The rules that set up the organization of the military, that create the Army, the Marine Corps and the Air Force, and the structures within those military departments. And the ability to confront personnel.

Those are the three major leavers. They're both, rather -- I wouldn't say clumsy, necessarily, but they're kind of big leavers. They don't lend themselves to fine tuning. On the president's side, I think the president gets a lot of deference with respect to the actual operational execution of Foreign Policy and Military Policy.

And just to give you a couple of cases, and this is probably going to exhaust the limit of my scholarship. On the issue about declaration of war, it turns out that when you have a fairly serious conflict, including conflict that we would currently describe as asymmetric, the [unintelligible] as having a regular power to act autonomously.

In a classic example, this is the prize cases, which had to do with the blockade of the south by the president during the Civil War, who was challenged, ultimately, in court. And the court said that the president had the authority to exercise military force against the south, even though the south was not recognized as a nation and even though there had not necessarily, at the time that the cases arose, been a declaration of war.

Likewise, we expected a recognition of foreign governments in the contact of diplomacy Goldwater versus Carter. Made it clear that the president really has plenary power in those areas. So to me, the Congress sets the table in terms of money, organization, and personnel. And the president really operates most through the leavers of actual execution.

I think there are occasions when both branches have worked well together, and the example I use is 9/11. I was the

head of the criminal division at the Department of Justice. I was very much involved in the immediate response. We spend a lot of time on the hill. We passed the Patriot Act, and there was virtually unanimous support in Congress for what the president was doing.

In fact, I would argue that a mistake the Bush Administration made was, some of the things which were done by executive action, could have actually been done with a Consent of Congress, which would have, first of all, eliminated some of the illegal uncertainty, which you read about with respect to surveillance. And also it would have created kind of a political basis of support that I think would have stood the president in good stead as time passed and we moved out of the initial sense of solidarity into a little bit more politics, as usual.

But I would also say that Congress is often relatively dysfunctional and exerting its power. For example, even the power of the purse, forget about what the president does in terms of veto. Even getting budgets passed has been very difficult for Congress. We often wind up with hostage taking, where one party says, "If you don't give me everything I want, I'm not going to let anything pass."

And that, of necessity, drives the president to take action on his own, particularly when you're dealing with dynamic

circumstances. So I think that we're at a stage now where there's been an accretion of history that's been built up over time. I do think if we could move back to a regular order of Congress where Congress could really pass budgets and use the appropriations power more effectively, that would actually both restrain the president to some extent and also encourage the president to deal with Congress more in dealing with some of these issues. Particularly regarding use of military force.

MVC: So that gives me a perfect lead-in to begin to ask the questions. Both of these gentleman have agreed to allow me to present questions, which they will answer. I think it's a tribute to leap year and leap day, so that's what we're about to do. So let me pose the first question and perhaps start with you, Senator Kyl.

We'll alternate on addressing these questions, but it is raised by Secretary Chertoff's last commentconcerning the use of military force. Today, do we need a new authorization for the use of military force, with respect to prosecuting the actions against ISIS and ISIL?

JK: That's a good case to illustrate the reason why we need some degree of deference and comity. This president wants a declaration, or an authority to use military force that is greatly constricted. That would limit a future

president dramatically. The republican members of Congress do not want to do that, so you have a conflict between the two branches, as to what kind of declaration would be appropriate.

Yes, it would be useful. One can argue that under the general construct of the Constitution, it's really necessary in one form or another. And probably that latter requirement is satisfied by the original declaration, which everybody sort of agrees is generally applicable, although it would be nice to have something a little bit more specific.

So both branches are moving forward, even though I think both of them recognize it'd be better to have something more up to date, because they recognize that politically, this is just the way it's got to be.

MC: I think it would actually be helpful, but I agree. I think we're in an unusual situation where it looks like the president wants something that is more constraining, particularly for future presidents. And the issue he's having with the Republican Congress is that they want to give more latitude. But in general, I would say that if you're going to engage in persistent long term use of military force, getting Congressional support, you can

debate whether it's legally essential, but I think it's politically helpful.

MVC: So it sounds like you both have the same perspective on this. That while it would be useful --

JK: And I'll even go one step further. Though I was a strong supporter of the Executive's authority and the Bush Administration, and I told Michael outside, on these general issues of the respective powers of the president and the Congress, it's pretty much where you stand is where you sit at the time.

We've almost all been on both sides of the issue, depending, but I very much agree with Michael. That in the case of the early actions in response to 9/11, it would have been preferable, had the administration been willing to engage Congress. I think Congress would have passed something that was very workable. Would have been find with the president and would have saved some trouble later on.

Probably wouldn't have avoided all of the issues that arose later on, but it would have been a tidier application of both party's power under our Constitution.

MVC: Well then picking up on that theme, let me change subject on you and ask about the agreement with Iran that was

concluded recently. There was a lot of back and forth as to what the appropriate role of Congress was in reviewing that agreement. It came down to a resolution that brought the agreement before the Congress, but there's also a Treaty making clause and Treaty making powers that are in the US Constitution.

And I guess a generic question, as we begin to discuss the Iran agreement is, when does an international agreement fall under the Treaty making powers conferred by the Constitution? How do you delineate that?

MC: Okay. Not trying to be a scholar, I would say this. A treaty is a law. So, for example, if you have a treaty and it follows a statute, the treaty trumps the statute and therefore it has the force of law. An Executive agreement, as I understand it, does not have the force of law, with respect to statutes. Under the Supremacy Clause, it probably preempts state action, but therefore it has limited utility.

I think in this case, it's an example of the fact that without a treaty and without congressional support, this agreement is very weak and it is subject to being revoked on the first day of a new presidency. So if you're trying to make decisions about investing in Iran, putting aside the wisdom or lack of wisdom of doing that, the ability to

depend upon the existing state of legal affairs in the absence of a treaty is very fragile.

And I think we've seen, in a lot of respects, we've seen Executive action that, because of the fact it doesn't have the durability of a statute or a treaty behind it, winds up being very fragile and therefore it's not something people can count on.

JK: Yeah, I agree. I don't think that there is any case law that defines this question of, where is the bright line? To say that that's a treaty and that isn't, and therefore you have to have two-thirds concurrence in the Senate for this, but you don't over here. You also have, in our history, a variety of ways in which these questions have been dealt with.

Sometimes Congress, both Houses have passed something. And that's exactly what they did here. They kind of flipped it and basically said as long as the president can get one-third plus one of both Houses, he can veto whatever Congress should do, contrary to my will here. So you've had everything from a requirement of a treaty with two-thirds concurrence by the senate to Congressional action of one kind or another, with the participation of the president, to nothing.

And I think the enforceability and the desirability is almost in inverse proportion there to what we talked about. At least if you're talking about a very serious matter, and I think that you could clearly say that the Iran deal was serious enough to have risen to the level of a treaty. It would have been desirable to have the Senate approve it.

But the Senate wasn't going to approve it, and so the president decided to do something much less than that. So he should, and the people who support him should be not surprised if later a president tries to undo a great deal of it. But here's the point that I would make. In the meantime, one could argue that some damage is done.

Now, first, I'm not arguing that this was a treaty that had to be submitted to the Senate. But I'm saying a very good case can be made for that proposition. I don't think there is law that decides it one way or the other. But I also fear presidential action, which time and time again, over a long period of time, will search the ability to do these kinds of things, changes the circumstances on the ground, and makes it very difficult for a successor to try to do something different.

Because history is being made in the meantime. Relationships are established, circumstances change, commitments are made, allies are trying to rely on you,

maybe. And it makes for a very messy understanding of how the American government is going to act in the future. It would be better if there were a little bit more deference and adherence to a little bit clearer set of rules by presidents in both parties.

MVC: So I'm left with something of an uncomfortable sense that -- listening to both of you -- that the constraints on the president's discretion to decide whether or not a particular agreement meets the standard of submitting to the Congress or not is plenary. And that, other than the political checks on his discretion, there are no statutory or other checks on his discretion.

JK: Well, there could be some statutory. Remember, all legislative power resides in the Congress. There's not a distinction between legislative power relating to international affairs versus legislative power relating to domestic affairs. So as Michael pointed out, Congress does have some rather blunt instrument power in making, in setting up some legislative constraints or legislative authorizations.

In this case, there are already preexisting laws relating to existing sanctions and how those sanctions can be removed or not removed and so on. So Congress still has a role to play here, but it makes it difficult for Congress

to do that. So I think it gets back to the central point here. That the framers left --

First of all, I doubt that the framers really even anticipated some of these things. But what they did anticipate was, human nature being what it is, presidents and members of Congress being what they are, there are going to be gray areas here. And they counted on people with goodwill to work these things out and to exercise deference.

And all I'm seeing here is a case where probably, at least in my view in a perfect world, the president went further than he should have.

MVC: So, Judge, would a future president have the unilateral authority simply to terminate this agreement, as some of the candidates have suggested they would?

MC: I think from a US legal standpoint, you could terminate the agreement. I think the issue then becomes from an international standpoint. I think part of what the people who supported the agreement were thinking was, once this is established, just a unilateral [unintelligible] of the agreement would cause a falling out with our allies.

And so I think, as Jon said, sometimes this is an effort to create facts on the ground, on the theory that, although

the next president is not bound by the agreement, it becomes difficult, given international relations with allies to simply abandon it. So I think that's really the dynamic here.

MVC: Well, let me change the subject on you and ask about something that's very much in the news, but has long been something President Obama has made a hallmark of his presidency, his objectives. His second day in office, he issued an Executive order entitled, "Closure of Guantanamo Detention Facilities" and has recently put forward a plan in order to carry that out, which I guess the Congress is now considering. And so let's talk about that subject, if we might. I am curious about a number of things. For instance, I'd like your views on whether the Congress has the power to decide where detainees may be held, or when they're brought to trial, whether the courts of jurisdiction should be military or civilian, and if there are any limits on the president's authority to release detainees, as he may choose.

MC: So let me try to deal with each of these in turn. I think the president's ability, as a legal authority to release detainees or transfer them overseas is pretty plenary. Because I don’t think Congress has laid down a requirement or statute that says, "You can't ever have anybody leave

Guantanamo." Different story when it comes to bringing them to the US.

As I understand, the law is quite clear the president does not have the authority to bring any of these detainees to the US and, in fact, there's a prohibition against him spending money for that purpose. And that brings me to one of what I think are the powerful tools Congress has, which is the appropriation power and the anti-deficiency act, which says if you spend money in a way that's not appropriated, it's not only an administrative violation. It's potentially a criminal violation.

And my recollection when I was in the Executive branches, people took that pretty seriously. One of the things that a subordinate officer would not do would be to carry out a violation of the anti-deficiency act that would expose him or her to actually being prosecuted. So I think it'd be very tough, giving the existing state of the [unintelligible] the president to bring or transfer any of these detainees into the US.

As to whether to choose to bring them into a military commission or a federal court, again, I think the structure for these is largely set by Congress, which does have the authority explicitly under the Constitution to set the rules for capture and land in Naval Warfare.

But I think as between those two venues, the president has the Executive power to decide where he's going to try somebody. I think the effort to bring some of the 9/11 defendants into New York, however, ran into a political buzz saw as a practical matter. And that's why I think that's not going to happen.

JK: I'd like to -- really two questions here -- start with the anti-deficiency aspect of it and Congress limiting the president's ability to expend funds. In this case, to transfer prisoners. That was accomplished by virtue of an interesting political process. Both the Congress and the president needed to have a final appropriation bill for the year to fund the government, and there were a lot of trade-offs in the bills or the continuing resolutions. It's gone now for several years.

And the political exigencies were such that the president was willing to sign that legislation. So he was willing to bind himself not to expend money to transfer these prisoners to the United States. And that continues because of the continuing resolution which was passed. So if all we do is pass another continuing resolution, that limitation continues to apply.

So on that, the president is bound. I would raise the interesting question, even though the members of the

administration that Michael served in took this seriously, should President Obama not take it as seriously? Would his Attorney General decide to take it seriously or not? See, it does depend on other people taking action to enforce the law.

And under current circumstances, you can ask a question as to whether that would be done or not. The second interesting aspect of this is the Congressional authority to deal with the capture of forces on land or sea. The prisoners of war or the people that are captured in a conflict.

At the end of the day, Congress, after the court said that some of the things the Executive was doing were unconstitutional, did set rules for the detention and interrogation and treatment and appeals of habeas petitions and the like, for the people at GTMO. And that's probably, at the end of the day, the way that it should be. That is to say it started out with President Bush just using his Commander in Chief powers to take these prisoners, interrogate them, put them someplace, and so on. And have eventually declared military commissions that took a long time to get off the ground.

He can't do all of that. It's better that the Congress set the general parameters for the president then to execute

the laws and further of that. And the court had to get involved in this, as well. So you could see how, again, it would have been better had the Congress been willing to assert its authority early on, had the president been willing to go to Congress and try to work that out.

I don't remember whether he could have done that at the time, politically, or not. But in any event, he took unilateral action. The court, in part, upheld it. In court, said no, there have to be some habeas procedures here, and then Congress stepped in and provided what those habeas procedures were to be.

So it's really a case book example, in two different respects, of how all three branches have to work together in some of these areas and eventually we sort of get it right, even though there may be some missteps along the way.

MVC: So just to be provocative before we move away from this question. If, hypothetically, President Obama were to decide, notwithstanding this conversation we just had, that before he leaves office, he is going to close the facility and he's going to transfer or release those detainees, is there anything the Congress could do at that point to stop him?

MC: I'm not sure Congress could stop it, but I do think what would happen is the subordinate officer who would be required to expend the money would ask themselves whether the next president is going to honor that, and whether the next Attorney General might prosecute them. And I think you might have a situation where people would decline to execute.

JK: I think one of the questions that's not -- I can't answer it, is whether expenditure funds to transfer out of the country trumps the, I would say, pretty plenary authority of the Commander in Chief to deal with the people that he's captured and held, although that is still subject to a plenary plenty authority of Congress. But Congress I don't think was explicit saying, "And by the way, you also can't transfer anybody to Saudi Arabia." It hasn't done that.

MC: Yeah. I may be wrong, but I think the prohibition is against transferring into the US. I don't think there was -- and I think there might have been a constitutional issue prohibiting the transfer out of the US. But I think certainly prohibiting the transfer into the US is, I think, constitutional.

MVC: Let me try one that maybe is a little easier. With respect to recognition of foreign governments, last year the president opened up diplomatic relations with Cuba, which

had been severed since 1961. So should the Congress have had any role in that decision, whether under the Constitutional allocation of its responsibilities or politically? And does the Congress have a rule in its implementation?

JK: You win this one, Michael. Go ahead.

MC: Well, I think Goldwater versus Carter makes it clear that this president is unconstrained in his ability to recognize a government. But I think when it comes to lifting the embargo, there are certain parts of the embargo that are statutory and certain parts that are not. So I think the president has the power administratively to modify those things that were administrative action, but does not have the ability to change elements of the embargo that are part of what Congress has previously enacted, which is why I think he's arguing that Congress ought to change the law.

JK: Are you going to get into the requirement that the state department note the birthplace of Israeli citizens in Jerusalem? Are we going to talk about that?

MVC: I think we're talking about it right now.

JK: Well, okay, because this would be a good time to bring it up. Congress passed an act called the Jerusalem Embassy Act in the early '90s, which -- well, mid-'90s. 1995, I

think, maybe 6. Which said that the US Embassy in Israel should be relocated to Jerusalem. There was a presidential waiver that was required to get the bill passed, and every president since has taken advantage of that waiver not to do what Congress mandated that he do.

Again, but legally because there was a waiver provision in there. The Congress then declared that because a person born in Jerusalem, Israel would like to declare on the passport birthplace Jerusalem, Israel that we'd have to recognize that and the state department should issue the passports that way. And the court -- I think it was 63 decision appealed the power of the president to ignore that. And Roberts wrote a descent, which I thought was pretty powerful.

But there you have an interesting question of, in the sort of lesser issues, not recognizing another country but administering some laws here, was the president correct in ignoring this law? It also gets a little bit to the question of signing statements. Because the president signed legislation, but after criticizing President Bush for this horrible practice of making signing statements -- namely, that I'm going to sign this but I think parts of it are unconstitutional and I may not enforce them if I ever get to that point.

This president did exactly that. And it's an interesting case. I think it's six to three. I would have been on the side of the three, because I helped pass the legislation. But it's another illustration of how you've got a real tension between the two branches here. Get into fairly minute details and there's no real, easy answer.

MC: And this may be a rare area where we disagree. I think I'd probably go with the six on this, because I think the question of how you denote something in terms of whether something is recognized to be part of a particular geographic region or not does have relational impact, in terms of our foreign relations and our dealing with other governments.

This comes up often with the issue of Taiwan and China, which is where Goldwater and Carter came up. Because they are, if you were, for example, to -- I don't know what the passports look if you're born in Taipei, but I could easily see a similar issue arising. And that, to me, strikes me as the kind of micromanagement issue that really is committed through the president and not the Congress.

JK: Let me -- since we finally have one little teeny area of disagreement here, I'm going to carry it out. We'll melt this one just a little bit. But here's the argument of the other side. All legislative powers, not except in

international affairs, are set forth for the Congress. The president has no legislative authority.

His authority is to take care that the laws are faithfully executed. Congress passed a law. The president didn't faithfully execute it. Did it, or could it have relational impacts, or I forgot the elegant way that Michael put it? Yes, absolutely. Did it complicate the president's dealings with countries that would disagree with this proposition? Complicate maybe his dealings with the country of Israel? Yes.

Should that matter? The president is not dictator when it comes to international affairs. The president is supposed to carry out the laws passed by the Congress in this relationship. Even if it may be uncomfortable for the president in carrying out what everyone would acknowledge are very legitimate functions of the presidency, which in many respect are, as I said, more defensible, particularly in this era of such globalization and need for speed and need for unitary action.

Nobody can argue the president shouldn't have predominant action. But does the president, any more than the Congress, care about these relations? We have a Foreign Relations Committee, an International Relations Committee. Congress spends a ton of time dealing with other

governments and trying to help set foreign policy. Foreign policy isn't just set by the president. So I think you can argue that one both ways.

MC: I think the issue would be probably the people in the Executive branch would probably say the question is, would it be Constitutional to prescribe the way the passport has to be written? And that's the issue of there is clearly some constitutional limit on Congressional power in this area.

MVC: So to push the envelope on this one, if a future president were to decide to recognize a Palestinian state, would the Congress have any say?

MC: Well, I think that's, if I'm not mistaken, I was [unintelligible] in the year Goldwater was [unintelligible]. I think that's what Goldwater v. Carter was. It was basically, there was a restriction on the president's ability to, in terms of how we dealt with Taiwan and the president ignored it and went to the Supreme Court. And I think the Court refused to, actually upheld the president's power. I think, wise of unwise, I think this would be the president's prerogative.

JK: I think that's probably true, because there's no real, easy way to check it. That one -- so, what would the standing question be to challenge it in court? Who would have --

MC: Yeah. There's a standing issue. Some of it's a political question issue. I'm trying to remember the various opinions in Goldwater versus Carter.

JK: Yeah. I don't remember the standing question. At least recently, the court seems to have grappled with this question in one context and said the body itself might have a standing but an individual member wouldn't have a standing to certain things. But maybe not in this particular question. Congress would, of course, have some power of the purse issues there, but again, the president would still have to sign the legislation.

But there would be enough other blunt instrument. Michael mentioned the blunt instrument checks. These are not ones that you like to use, but refusing to confirm Executive branch positions or ambassadors, that kind of thing. You don't like to do it. It is a really blunt instrument, but sometimes it's done and sometimes it can work.

MC: By the way, that brings up a notable decision in the Supreme Court on the [unintelligible] power that presidency [unintelligible] appoint people without confirmation, which

came up in the, I guess, National Labor Relations Board when a whole bunch of people were in there and the court [unintelligible] they didn't really, they had [unintelligible]. So I think there is a little bit of a ying yang to this relational thing between Congress and the president.

MVC: So let me move onto something that's near and dear to my heart. A question of intelligence collection. There's been a great deal of conversation about NSA and various permutations of that discussion I think are worth having, but let me start with a foundational question that asks, under the Constitution, does the president have inherent authority to authorize intelligence collection against foreign entities operating physically or virtually within the United States?

MC: So I think operating physically within the US, Congress can limit that and that's what [unintelligible] and that was the Keith case. I guess US versus US District Court. I think if you're dealing with foreigners overseas, I think the president's basically got plenary power, and I think there's a [unintelligible] case called [unintelligible] that says that.

And then you get into kind of a murky area domestically. Particularly in the area of virtual activity, and that's a

lot of the debate you see now, with respect to metadata collection and whether it violates flies. And I think most presidents have taken the view that they will follow statutes related to collection within the US. Whether it's a foreigners or US persons or overseas if it's US persons.

I'm not sure they would take that position with respect to foreign collection against foreigners.

JK: I agree and I don't think they should. I think the president does have plenary authority there. This is one where I'd rather switch sides with Michael, but I think he's certainly stated the law well. And by the way, [unintelligible] Chertoff was a witness before Congress, before the House Judiciary Committee last week on this exact subject. You might ask him a little bit about that.

MVC: You are so asked.

MC: Yeah. So the issue there is, which is whether under ECPA, the Electronic Communications Privacy Act, the US government can directly issue a warrant against a provider in the US for emails that are held in a server overseas. And it's an area where it's currently being litigated.

Putting aside how that case action comes out, the view I took there is that, as a matter of comity, international comity, we ought to take the position that it's similar to

searching a safety deposit box held in a bank in Ireland. While a US court should be able to subpoena a bank for the bank's own records, searching the safety deposit box in another country, I question whether a court has the authority to issue a warrant to search something Ireland.

I think the Irish authorities would laugh at the [unintelligible]. So the question becomes, can you work out an arrangement with treaty process where, if it's at least a non-US person, you have to go to the authority in the country where a server is located and use the Mlag, hopefully more efficiently in order to get the information.

If it's a US person, you could presumably proceed directly against the US person by way of something more akin to a subpoena, although you're there going to have fifth amendment issues and things of that sort.

The issue is complicated by the fact that the government claims that while the particular computer may be located in another country, all that has to happen is for the recipient of the warrant to press a button in the United States, and the computer coughs the stuff out. So it's -- the fact that these things are now, they're getting so technologically integrated worldwide, is creating a whole new set of issues that are really interesting.

MVC: So at the heart of the conversation about NSA's collection of metadata here in the United States under the 215 program, when that was initiated it was initiated pursuant to what the Bush Administration asserted was its authority to begin that program for the purpose of looking for terrorist footprints, if you will, in that matrix of billions of digital numbers collected by those computers.

Since then, there's been a great deal of conversation back and forth and different movements by the Congress to restrict or condition that authority. I wonder if I might ask each of you whether you think we've reached the appropriate equilibrium and your view of that debate.

JK: I think no. I think we've gone beyond what was the appropriate equilibrium. I am much more concerned here, not about the overreach of a president, but the under reach of the country as a whole, when it comes to authorizing data collection for intelligence gathering, to deal with the subject of terrorism. I think there are things that the president had the authority to do that were constrained by Congress that didn't necessarily have to be constrained by Congress.

Presidents were willing to abide by that, and there's a rather elegant process in place and I wish people appreciated the elegance of that process. The checks and

balances that are involved. And the great care that's been taken to protect the privacy. I think if you ask the average young person, in particular, they'd say, "Oh, no, our government wants all our stuff and it can get it if it wants it," and so on.

That's just not true, and I think we've gone too far toward creating roadblocks to the gathering of data, which is, the government is only interested in, with respect to terrorists, or under proper procedures, criminals. It just isn't interested in some 18-year-old's text to her boyfriend. That's just not the case.

And too much [unintelligible] has been based upon the proposition that it is or might be.

MC: I was involved in the negotiation of the Patriot Act. This was actually authorized under section 215 of the Patriot Act, which allows you to basically get records, business records. And metadata are business records of the providers. It's not like your safety deposit box, like I talked about. This is like the bank records or the telephone company's records.

And the bulk data collection was [unintelligible] application of 215. There was a lot of controversy about whether this went beyond what the statute intended. They

subsequently declassified the court opinions, [unintelligible] declassified the court opinions, as well as some of the members that were written to Congress. And I must tell you, anybody -- this was pretty fully disclosed to Congress, to the relevant committees, and to the court. The court upheld it repeatedly.

And the members of congress -- let me put it this way. It was available to them. And again, this is all declassified. It was available to them, at the time, in a classified setting to see what was being done. So the kind of the scene out of Casablanca where they come and they go, "I'm shocked. Gambling." Is a little bit like your reaction to the metadata collection.

I will also tell you metadata collection is hugely useful. Because the rules -- and I think Jon is right -- the rules, which were [unintelligible] were not obeyed, did not allow you to inspect the metadata unless you had a predicate to do it. But what you needed to do was to collect it so that you could have the haystack when you want to look for the needle in the haystack. Now, the current law changes that by having the metadata held by the companies themselves.

I think you can look at that if you have two conditions met. One is you have to build a platform that allows you to search not only within each of the companies, but among

the companies. And that's a technical issue. And the second is there has to be a requirement that the data be held for a certain period of time. Right now, I think it's a matter of course. It's usually held for about 18 months or so.

If someone were to say, "We're going to not hold the metadata. We're going to immediately erase it after the billing cycle." I think that might be an area where Congress would have to step in and say, "Whoa." So in many ways, I actually view the preservation of access to metadata as more important from a security standpoint than the decryption debate, which is what's currently captivating everybody in Washington and Silicon Valley.

MVC: Thank you. I'm going to ask one last question and then, subject to Herman's guidance, open it up to the audience for further questions. And I'm going to take the prerogative to ask a question that's a little broader than the foreign policy and national security issues that we've been discussing but certainly encompasses them.

It is the president's principle responsibility to take care of the laws we faithfully executed. If any president were to commit treason, bribery, or other high crimes and misdemeanors, the Constitution provides for impeachment and removal from office. Here is my question. Are there other

remedies, short of impeachment, to ensure that the president upholds the duties of his office? And who has standing in court to challenge a president's over reach or his failure to take care that the laws be faithfully executed?

JK: Well, the Court -- the US Supreme Court has raised that at least one -- well, I guess the full court asked for briefing on the question and this is in the immigration deferral of prosecution case where the court has said, "We'd like to have you also brief the faithfully execute the law's clause here." So I think we're potentially going to see some law made on that.

But it will always raise some very interesting standing questions and even if you've got somebody that can initiate the lawsuit, will there be a political question or some other [unintelligible] factor that causes the court to withhold getting involved? It is not easy. Let's put it that way. And I guess, should there be other political remedies?

Well, the only other political remedy is the accountability for someone in office. But again, if you're in the second term of presidency, that's kind of hard, too.

MC: I agree with that. The only thing I would add is I guess if you get by the standing issue and the political question issue, I guess, in theory, a court could issue an injunction, although it's easier to have a negative injunction than a positive injunction. It's not clear to me to what extent a court could require you -- take the issue with the immigration. I'm not sure the court would have the power to issue an injunction saying, "You must deport people."

On the other hand, the court might have the power to say, "You cannot give people the work authorization." And then, of course, the burden would fall on the lower officer, who, if the lower officer defied the injunction, would then be faced in contempt of court. And I think, as you see with the anti-deficiency act, often putting aside the kind of atomic bomb of impeachment, the real leverage against the Executive branch a court has is the ability to essentially pressure lower officer who don't get the protections that a president has, in terms of their own personal liability.

MVC: Do we have questions? We have maybe time for one or two questions.

MC: There's someone over there.

MVC: Okay. Well, okay. This guy's a ringer. I've got to tell you right now.

Unidentified Man: I apologize. I really would like for each of you to reexamine a comment you made. Senator Kyl, with your case, you twice said that all [unintelligible] powers were vested in the Congress. But if you read Article 1 Section 1, it says all legislative powers herein granted and with respect to foreign law making, that really comes under Article 2 and the treaty making power, which the Senate has a negative, but this is really a presidential power of secondary trade-off. You refer to the Keith case.

JK: Can I just interrupt?

Unidentified Man: Sure.

JK: The president calls it a treaty and a Congress two-thirds of the Senate then has to agree to it. If the president doesn't call it a treaty, then he's gotten away with doing something. I don’t know whether it's legislating or not, but it may be contrary to what the Congress had in mind.

Unidentified Man: The bigger point, though, was that Article 1 does not give all legislative powers to the Congress. The states have a [unintelligible] powers. It says all legislative powers herein granted, so you have to find a clause in Article 1 Section 8 to justify saying what the

Embassy, or what the capital of a foreign country is, I would think. Which is what the Supreme Court ultimately held, what, two years ago?

Secretary, you referred to the Keith case, and I thought that you referred to that as saying for the president to spy on foreign nationals in this country, it is regulatable by Congress. It requires a warrant of something like that. And Powell and Keith twice emphasized we are not making any decision on the president's power regarding foreign meetings.

MC: In précising that, Keith opened up the door to the FISA Act, which then ultimately did lay down requirements, with respect to surveillance of anybody in the US. But I know Keith itself dealt with domestic security issues.

Unidentified Man: I worked at FISA. I was a staff member in '78, and my view, Powell had clearly said we were not limiting the president's power. The FISA [unintelligible] review in 2002 noted every [unintelligible] the issue said the president has independent constitutional power to engage in [unintelligible]

MC: And I think [unintelligible] may have said foreigner in the US is not covered by FISA.

MVC: [Unintelligible] do I have a last question out there? Otherwise I'm about ready to -- yes.

H: Question. Back to the Guantanamo Bay issue. My name's Hilary. But back to the Guantanamo Bay issue with the whole standing issue. It's a question that my boss has had and I know a couple people have raised it with him. If the president should decide to move detainees into the US or even just [unintelligible] notification requirements and the House were to file a lawsuit against the president, I heard that the Congress would not have standing in order to pursue that lawsuit. What would your thoughts be on the house having that standing? Because you would have to show harm, all that kind of stuff.

MC: I can't say I'm an expert in this issue. I think there's an argument if the House were to have standing as a body. I think there's also an argument that perhaps an effected geographic area would have standing to raise it. And then again, at the end of the day, the anti-deficiency act means a subsequent administration. If they chose to punish somebody for violating that low, then they may be able to bring a case that way.

JK: It's interesting that the court granted standing in this immigration case on what I thought was a pretty thin read, that a state would have to provide some educational and

other benefits to illegal immigrants if they were allowed to stay here, even though they perhaps should have been deported and would have the cost of having to issue driver's licenses or some such.

So standing sometimes can be based upon a pretty thin read. And I think Congress, if a body were willing to vote to file the lawsuit, that'd be a pretty direct -- I think it'd be hard for the court not to grant standing in that situation. But with standing, if you follow Constitutional law, when you've got fights between the branches, the court -- and this goes back to the original point made about deference -- the court almost looks for ways not to get involved.

So maybe they're standing but maybe it's a political question. And they can just decide. If it's a political question they don't want to answer, they're not going to answer it.

MVC: So I have standing to invite everyone to express their appreciation for the wonderful job [unintelligible].