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The Commander-in-Chief Power in the 21st Century: Will There Be Limits?

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Judge Abner Mikva

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Former Chief Judge, U.S. Court of Appeals for the D.C. Circuit;
Former member of Congress (D-IL)

John Podesta

President and Chief Executive Officer, Center of American Progress;
Former Chief of Staff to President Bill Clinton

**Elena KAGAN, Dean, Harvard Law School; Former Associate Counsel to the
President under President Bill Clinton**

Thank you very much for being here. It's terrific to see you all; this is such an amazing set of panels and speakers and discussions. And certainly, we're starting off this ACS Annual National Convention with a bang, because I have in back of me here, five truly

superb lawyers and policy makers who have worked at the highest level of a few different administrations. And, who are going to, I'm quite sure, have a very stimulated, fascinating debate on the Commander-in-Chief power. That is our subject, "The Commander-in-Chief Power in the 21st Century: Will There Be Limits?"

So, let me introduce the various panelists, and then we're just going to start talking. I'm going to throw out some questions. I'm actually going to do it from down here, rather than up there, because in my next life, I want to return as Oprah...

Laughter

...and so I'm just going to join you in the audience, and throw out some questions to these quite marvelous panelists, and I hope you'll join me near the end of the session in doing so. But I'll just do this left to right. John Podesta is CEO, is that your official title?

John PODESTA, President and Chief Executive Officer, Center for American Progress; Former Chief of Staff to President Bill Clinton

It's fine. I'll take it.

Laughter

Elena KAGAN

Of the American Progress Institute.

John PODESTA

Center for American Progress.

Elena KAGAN

Center for American Progress.

Laughter

John PODESTA

We've got to get that right.

Elena KAGAN

Okay...

Laughter

Elena KAGAN

John was the Chief of Staff for President Bill Clinton. Now I'm going to see if I can get the dates right: 1999 through 2000, I guess. Is that right? Where I have to admit that I worked for him. And, before that John held various other positions in the Clinton White House, Staff Secretary, Deputy Chief of Staff. John has served in numerous positions on Capitol Hill, as Chief Counsel to the Senate Agriculture Committee, and as counselor to Senator Daschle, when he was Leader of the Senate. Would you like to say anything more about yourself, John?

John PODESTA

That's quite enough.

Elena KAGAN

Okay. Ab Mikva, you know all the people up here have had a quite amazing experience in government, but I'd have to say that Ab Mikva has probably had the most amazing experience of anybody that you can think of who's alive today, in sort of different branches of government. So, Ab started in state government where he was a legislator in Illinois for five terms, and then he was elected to the U.S. Congress from Chicago, Hyde Park District, if any of you are from there.

And then after a number of nail-biting elections, Ab decided to take a safe seat in the U.S. Court of Appeals for the D.C. Circuit, and became a judge, the Chief Judge of the D.C. Circuit for some number of years. And then President Clinton asked him to come to the White House to serve as counsel to the President, and Ab did that for a couple of years, as well. I guess I should admit that Ab, or as I then called him Judge Mikva, gave me my first job out of law school, so it's really delightful to see him here.

Neil Kinkopf is a professor at Georgia State Law School, and prior to that, worked and, sort of, was the star junior lawyer, I can tell you that from personal experience, the star junior lawyer at the office of Legal Counsel of the Justice Department in the late 1990s, working especially on questions of Presidential power, its scope and its limits. And Neil has been doing a lot of writing in that area which is quite illuminating, and I'm sure you'll hear his very interesting thoughts on the legal questions that we're going to talk about today.

Jamie Gorelick also has done just about everything that there is to do. Jamie is currently a partner at Wilmer Cutler. She was the Deputy Attorney General for five years? Four years in the Clinton administration. She was known across the administration for combining the most extraordinary legal and organizational skills. She really made that department hum. She was the general counsel of the Department of Defense. And, most recently, she served on the 9/11 Commission, which, of course, produced that extremely interesting and effective report.

And, finally, Brad Berenson. I'm just delighted that Brad is here; and very thankful that Brad is here because otherwise this would be just sort of like a reunion of Clinton administration people. Although, sometimes it seemed when you were working in the Clinton Administration, that the White House folks and the Justice Department folks may have been in two administrations.

Laughter

But... Brad Berenson is... By the way, I'm Elena Kagan. I'm the Dean of Harvard Law School.

Laughter

A lot of people up at Harvard know Brad, and everybody I talk to, just an incredibly wide variety of people, talk about Brad as just a terrific, terrific lawyer, and many of you have seen those skills, those explanatory skills when he's been on various press shows. He does a lot of media stuff. But, Brad was in the White House from 2001 to 2003 in the Counsel's Office as an Associate counsel to the President, and then, at that time, returned to Sidley & Austin, whence he came. So, this is a terrific panel to talk about the Commander-in-Chief power.

And I suppose I want to start with all of you, just by answering a question in the most sort of general way, I mean before we get to talking about when you can detain, and how you can interrogate, and whether you can establish military commissions. Before we get to talking about any of those specific questions, I thought I'd just sort of pose the question: What does the Commander-in-Chief power mean? What, sort of abstractly stated, a few sentences, what does it give the President the authority to do? Neil, start us off.

Neil KINKOPF, Professor of Law, Georgia State University College of Law; Former Special Assistant, Office of Legal Counsel, U.S. Department of Justice

Okay. Since it's an abstract question, go to the professor, right?

Laughter

The Commander-in-Chief power gives the President the power to run the military, right? And, operationally, to run the military. It doesn't necessarily do an awful lot more than that since the Constitution doesn't even require that there be a military. So, the President could be the Commander-in-Chief of his toy army guy set in the Oval Office, and no more than that. Now, as it happens, of course, we do have rather an elaborate military structure, and the President is the operational chief of that, by virtue of his Commander-in-Chief power.

That, of course, is only one aspect of the war power, and Congress itself has significant powers relating to war, including the power to establish a military, to provide rules and regulations for the conduct of the military, and to declare war in the first place. So, that

the Commander-in-Chief power, in its constitutional context, gives the President a role in and an aspect of the war power and the military power, but it's a power that he shares with Congress.

Elena KAGAN

Brad, does that strike you as too limited an explanation or a description of the Commander-in-Chief power that the President has?

Bradford A. BERENSON, Former Associate Counsel to President George W. Bush

Not really. I actually agree with that explanation, with one, I suppose, caveat. And that is that it's certainly an incident of the Commander-in-Chief power that the president has the power to commit our forces, to initiate hostilities, to defend the country when it's under attack, and so any implication that Congress' power to declare war vests in them, the sole authority to commit our forces to battle, I would disagree with pretty strongly.

The only other thing I would add is that Congress' power of the purse, even though not denominated as an express war power, is probably Congress' single, most important power, with respect to the conduct of military hostilities, because through funding or defunding particular military operations, Congress really does have the ultimate control of where we fight and when we fight.

Elena KAGAN

So, you used the phrase, "commit our forces" but is there more to it than that?

Bradford A. BERENSON

Well, you have to think about, particularly in the context of the current war, our intelligence services as well. It's not strictly the uniformed military that's embraced by the Commander-in-Chief power. Executive authority, under the Constitution, unlike Congressional authority, which is expressly limited, in Article Two, the Vesting Clause, says that the executive power of the United States is vested in the President. And so there's no attempt by Congress to limit or enumerate that.

And over the years, as the Supreme Court has interpreted Presidential powers, and war powers, and foreign relations powers, and Commander-in-Chief powers, the Court has recognized that the President has a really wide array of unilateral authorities to conduct our relations with foreign countries, to protect the nation from attack, to gather intelligence, and use intelligence to try to reduce our enemies to submission, whatever kind they may be, wherever they may be.

So it's a very broad and very, very flexible power, which embraces more than simply issuing orders down the chain of command, you know, with respect to traditional military engagements.

Elena KAGAN

So, a wide array of unilateral powers, very broad... Ab...do you agree?

Judge Abner MIKVA, Former White House Counsel under President Bill Clinton; Former Chief Judge, U.S. Court of Appeals for the D.C. Circuit; Former Member of Congress (D-IL)

I do, not always because I want to agree, anymore than I always wanted to agree on the limits on the President's powers when I was White House Counsel. It's the one area of the Constitution where the founders were deliberately vague. I can't tell you about it from the records of the Constitution because I don't read the right dictionaries, but clearly, the founders did not want to identify this war-making power as specifically as they identified other functions of government.

For instance, it started out in Article One, all legislative powers shall belong in the Congress, no ifs ands and buts. That's where the law-making power is. But when it comes to the war power, they're very fuzzy, and I think deliberately so. They say Congress shall have the power to declare war. You know that Congress has the 'power of the purse,' but the President is Commander-in-Chief, and as one of our previous panelists said, it doesn't even speak of military in the Constitution, and yet they describe the President as the Commander-in-Chief. They don't describe him as head of the White House, or as the head of West Point, but he's the Commander-in-Chief. And it has become, over the years, the power that the President is strong enough to exert, and that the Congress, and to a lesser extent the Courts, are willing to let him exert it.

My best job that I ever had was my first one out of law school, clerking for a Supreme Court Justice during the time of Youngstown Sheet and Tube, the great steel seizure case. We didn't think it was that important a case as clerks because...just a passing case, but the concurring opinion of Justice Jackson has become sort of a...the description of how ephemeral that power is, not how ephemeral, but how unspecific that power is. It can be what the Congress lets it be. If Congress says, the President cannot do this, even in wartime; he can't seize the steel mills. If the Congress is silent on something, he can do just about anything that fits his fancy.

And, sometimes the courts get involved, and usually they aren't very effective when they try. We all know about President Lincoln being able to send troops to keep the Maryland Legislature from meeting, so that they couldn't secede, even though the Supreme Court of the United States had said he shouldn't do that, he went ahead and did it. And lo and behold, his Commander-in-Chief sword was mightier than their word.

So, I would say I have to agree, the President's power is pretty vague and pretty much what the Congress and the courts will let him get away with. Currently, that plays out that the President has insisted he has the power to hold people without charges, indefinitely.

The courts have said, well, maybe not indefinitely. And, we'll wait to see what that means.

Elena KAGAN

So, so far we seem to have a lot of agreement that these powers are very broad, that they're not particularly constrained by the Constitution, by its text, by its history, by its structure, and that we really can just...the only thing we can do is to let this play out in the political process, and maybe we'll find the right balance. And maybe if the president goes too far, other institutions of government will, and particularly Congress, will check him, but that there aren't really any legal constraints. So that sounds a little bit scary. Is it right? Have I just stated it too broadly? Have I overstated what people here are saying? Jamie?

Jamie GORELICK, Partner, Cutler Pickering Hale and Dorr; Former Deputy Attorney General of the United States

I think you've overstated it some. I think that it's very important to have a bit of a practical overlay on this construct, and I wouldn't disagree with anything that any of my colleagues on the panel have said. But, clearly, when there is a sense of urgency, when there is a substantial degree of fear in the nation, when there is high level of complexity in the circumstance, by the very nature of the three branches of government, power shifts to the President, because the executive can act with agility, with alacrity, with force, with clarity, in a way, frankly, that the other institutions, by virtue of the way a case comes to the judiciary or by virtue of the sheer number and overlapping jurisdictions in Congress, the other two branches can't.

When those factors recede, power can shift back, and Congress can assert itself, whether it's by oversight, whether it's by 'power of the purse,' whether it's by any of the mechanisms that Congress has established to say, 'well, yes, you can commit our forces, but only for a period of time,' and then you have to make a certain certification, or a showing, and in some way, bound the President's powers.

Similarly, one could posit that the Supreme Court's view of the President's powers, with regard to enemy combatants or the seizure and interrogation of people, might have come out differently had those challenges been in the immediate aftermath of 9/11, rather than substantially thereafter, when that sense of urgency and chaos had receded.

Elena KAGAN

John, your turn. Any and all of the above, comments.

John PODESTA

Probably we're being entirely too agreeable here, I think.

Laughter

Judge Abner MIKVA (?)

Go, John, go.

John PODESTA

I fundamentally agree with the sort of way the conversation has been channeled. I think that Elena, you probably overstated the case, and I think that the Hamdi case and other cases stand for the proposition that there are some limits that the court is willing to place, and perhaps that even the Congress is willing to place on the President's exercise. But the President has the capacity, I think, in the exercise of the...to get specific, and maybe even get out of Iraq, and reflect back on our time in office, because he is a unified, single leader of the executive branch, I think he can act in a way that's very different than the Congress.

When the President made a decision with NATO to go into Kosovo, for example, one day, shortly after the bombing campaign started, the House of Representatives voted to disapprove that action and the next day they voted to fund it. So, I think that there's an inability really, I think, particularly at times in the early stages of some of these operations, there's an inability for Congress, if you will, to kind of get its act together. They tend to be, and particularly now, I think, under the circumstances, where you have one party control in both the executive branch and the Congress, where oversight is rather minimal, the President has tremendous power to use the awesome power of the military in support of that, of the Commander-in-Chief power.

But, my view is that, you know, the Constitution's made for difficult times, and if you suspend the Constitution, you suspend judgment also, so that you can make, in that exercise of zeal, you can not only overreach from a legal perspective, but you can overreach from a perspective of judgment. And I think the circumstances in Abu Ghraib, which now lead directly back to the circumstances in Guantanamo, I think are probably one of the most apparent examples of that. And one, which I think, have done the country a great harm for a very, very long period of time.

Jamie GORELICK

If I could just jump in here, and actually pose a question to Ab, which I'll premise with a story. I think that the executive branch can overreach to a point where, quite apart from politics, the institutional concerns of the other branches are triggered. So, before the trilogy of cases before the Supreme Court, were argued, I was on a panel with Paul Clement, who was then Deputy, and is now Solicitor General, and he was talking about the argument essentially, that the administration was going to make to the court, to the Supreme Court, which is that, 'you have no role. You have no role with regard to any of these issues.'

And the speech was to a convention of women judges, so there were about almost a thousand judges in the room, from a variety of courts, state and federal, all different levels. And as Paul was speaking, and he made a very good argument on the law, but as he was speaking, you could see them physically recoil, because they were basically being told, you know, you're chopped liver. And, you could tell that they didn't like hearing that. And afterwards I said to Paul, I said, 'did you see that? How are you anticipating that argument in its expression before the Supreme Court?' And he said, 'well, we have the law on our side.'

I think at some point, institutions refuse to accept the proposition that they're chopped liver, and I think you're seeing that now with Lindsey Graham and Senator McCain on the detention and interrogation issues. And, so quite without regard to politics, there is a certain way, just on a human level, that the institutional roles tend to emerge.

Judge Abner MIKVA

Well if your question to me is do I agree with you...?

Elena KAGAN (?)

Did you feel like chopped liver?

Judge Abner MIKVA

Yes, sometimes, but it depends who's chopping.

Laughter

If the President is a very strong person, that unity that John described, of being able to speak with a single voice, makes a huge difference. Let's go back to, we're all old enough to remember, the situation that existed when President Roosevelt decided that all of the Japanese Americans should be interred in camps in California. Now, I doubt that there's a lawyer here that would say that comes within the power of the Commander-in-Chief. And isn't it amazing that there wasn't a lawyer then, who said it didn't come within the power of the Commander-in-Chief.

And, indeed, even the Supreme Court, many years later, didn't say that he didn't have that power. They upheld the power. Why? Because the urgency was strong, we were at a war, we were scared, and this was a strong President who was chopping the other branches of government off.

Now, can a president who is being threatened with impeachment make that same kind of muscle? I don't think so. Can a president who has put us in the middle of a very unpopular war, where over 50% of the American people think we shouldn't be there, make that kind of muscle and make it stick? I don't think so. So, I think it turns on the time, and you know, the mystical thing is that I really think that's what the founders had

in mind, because they didn't know how to answer the problem. So they said, well, we'll see.

Laughter

Elena KAGAN

Let's get a little bit more specific here, and let's do it...actually Brad, if you would just remind us what the Bush administration has asserted Commander-in-Chief power with respect to. When has it said, 'look, we can do this because of the constitutional Commander-in-Chief power.' With what sorts of activities (unintelligible), and remind us of which have been the more controversial ones?

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Bradford A. BERENSON

Well, there's a whole range of them. Obviously, going into Afghanistan, and pursuing Al Qaida, and committing our forces without a Declaration of War was not especially controversial. Indeed, a week after September 11th, Congress passed an authorization for the use of military force against Al Qaida and anybody harboring and assisting it, which remains in force today, and in fact, remains part of the basis for the powers that the President is exercising around the world.

More controversially, he expanded his powers to block and freeze assets and financial transactions of those associated with terrorists and terrorist organizations. On November 13th of 2001, he signed the military order, which authorized the Department of Defense to stand up military commissions, to try suspected terrorists for violations of the laws of war. That order also formalized what had already been informally in place, just as an exercise of the inherent constitutional power, namely to capture and detain our enemies. That's an intrinsic incident of war fighting. But, you had military commissions.

Probably most controversial of all, have been the assertions of the President's power to capture and detain enemy combatants in two general categories. One, alien enemy combatants, that's essentially the Guantanamo situation, plus many other places around the world. And then, probably the single most controversial assertion of power that there has been, which, this was just argued in the Fourth Circuit I believe yesterday, was the assertion of the power to capture and detain U.S. citizen enemy combatants, those fighting against us, with Al Qaida or with the Taliban, but who are nonetheless U.S. citizens. And to capture and hold them in the military system, outside of the civilian justice system, just as you would with anyone you capture in a war, not charging them necessarily with any particular crime, and holding them until the end of hostilities.

Elena KAGAN

Now, let's get some terminology straight. When you say, "enemy combatants" what does that mean?

Judge Abner MIKVA (?)

Good question.

Bradford A. BERENSON

All that means is an enemy fighter, someone on the other side, who is fighting against you as part of a military campaign being waged against your country. It was defined in the Quirin case in the 1940s by the Supreme Court. It's been further defined in some orders coming out of the Department of Defense, and more limited really to Al Qaida and Taliban. But, basically, it's a catchall that means anybody fighting against us.

The important thing is not that category or that umbrella label, but rather the sub-categories. What comes underneath that? Who among those enemy combatants is, for example, a lawful combatant, who might be entitled to POW status under the Geneva Conventions? Who, under that broad umbrella, in the context of the current war, is an unlawful combatant, and therefore not entitled to POW status, and enjoying many fewer rights under the international laws of armed conflict? Citizens versus non-citizens. So, enemy combatant just means someone fighting against us.

Elena KAGAN

So make the case for why it is that the president does have the authority to capture and detain enemy combatants, both alien and U.S. Citizens. And let's say, make the case outside of any Congressional authorization.

Bradford A. BERENSON

Right. Well, with respect to alien enemy combatants, it's really pretty straight forward. The president is empowered to use force against alien enemies who may be fighting against us. That power, if you want to be just absolutely blunt about it, includes the power to have somebody shot and killed, with no warning, no due process, no nothing. Capture and detention has always traditionally been seen, under the international laws of armed conflict, as simply a lesser use of force, of the exact same category but just less deadly.

So, I don't think anybody seriously questions the President's power to capture and detain enemies. There are questions that arise after you capture and detain an alien enemy, what sort of treatment you must then afford them. And that gets into questions involving the Geneva Conventions, involving interrogation, involving preemptory norms of customary international law.

With respect to citizens, I would say that there is no distinction whatsoever, not even in the Geneva Conventions, between a citizen fighting against you, and a non-citizen fighting against you. Indeed, in the Civil War, we held 200,000 American citizens, President Lincoln did, pursuant to his war powers. (Unintelligible). The Confederates

were not regarded as...an alien enemy...but were regarded as disloyal U.S. citizens. They were all captured in the course of battle and detained without charges. Two thousand of them were tried before military commissions.

So, fundamentally, the President's power to detain citizen enemies, is really the same as his power to detain alien enemies, with one important difference. Citizens have more recourse to the courts. They have, at least until the Rasul decision, a right to seek a writ of habeas corpus from a federal court. Again, lots of complicated questions about what a federal court does in the course of a habeas proceeding, challenging the detention of a citizen enemy combatant. But our own citizens do have a more robust recourse to the courts than aliens.

Elena KAGAN

Now, do we still have broad agreement on this panel, or have we found some fault lines?

Laughter

Male speaker

I was going to wait until he'd finished speaking...

Elena KAGAN

We've found some fault lines.

Judge Abner MIKVA

I want to exercise a point of author's pride. There's a section in the United States Criminal Code, which says that no citizen shall be held under any federal institution, except pursuant to a statute of Congress. That passed in 1971. I was proud to be the prime sponsor. It was long before 9/11. We were more really trying to undo some excesses of the McCarthy Era. But that section is on the books. It has been upheld. Of course it referred to it as giving a distinct limit to the power of the president to deal with citizen enemy combatants differently than as far as aliens are concerned.

Microphone problem

Laughter

Bradford A. BERENSON

Although that statute, I think you're referring to Section 4001?

Judge Abner MIKVA

Four-oh-oh-one, right.

Bradford A. BERENSON

Was part of what the Supreme Court examined in the Hamdi case, and the Supreme Court did uphold the president's power to detain militarily U.S. citizens, notwithstanding 4001 in Hamdi.

Judge Abner MIKVA

We weren't in a fighting capacity. Now, they didn't do that as far as Padilla was concerned. That was...on that one, they said, he's got to be treated through civilian processes, and that's going on. Now, they've left some fuzziness around it, but...

Neil KINKOPF

They also upheld the President's authority only because they regarded it as having been authorized by statute.

Judge Abner MIKVA

Correct.

Neil KINKOPF

Had the President been operating solely on the basis of claimed constitutional authority, I think the case would have come out very differently.

Bradford A. BERENSON

It might have.

Neil KINKOPF

The court says, 'we're not precise in that.'

Judge Abner MIKVA

They interpreted the resolution authorizing the action in Iraq and in Afghanistan...

Bradford A. BERENSON

As a statute.

Judge Abner MIKVA

...as a statute which met the requirements of 4001.

Bradford A. BERENSON

That's right. But they never reached the core constitutional question which would have been, in the absence of the congressional authorization for the use of military force, would the President nonetheless, have been empowered to capture and detain someone like Hamdi, who, for people who aren't familiar with these cases, was essentially a Taliban soldier. An American citizen, by accident of birth, who lived here two or three years, when his father, a Saudi, was working in the oil fields in Louisiana, but he was a soldier for the Taliban. But if someone like him, or someone like Padilla, who is essentially an Al Qaida terrorist, while...

Judge Abner MIKVA

Well, Padilla...Padilla is a...all we know for sure is he was a Chicago gang-banger...

Laughter

...who was picked up coming off a plane at O'Hare Field, and, that's all we know.

Laughter

Bradford A. BERENSON

With respect to Padilla, we know quite a bit more than that, unless you believe that officials of the Defense Department are lying under oath to the U.S. Courts. I know...

Laughter

...there are probably some of you here who don't find that difficult to believe, but I suspect a lot of my co-panelists share my unwillingness to believe that.

Judge Abner MIKVA

I don't have to say they're lying, I just have to say they're still allegations, until they're proved in a court of law.

Bradford A. BERENSON

Well, but there's a declaration, under oath, that's on file with the court now in the Padilla case, as it's working its way up through the Fourth Circuit yesterday, and maybe eventually the Supreme Court, which talks about the fact that Padilla left Chicago, innocent gang-banger though he may have been, once upon a time...

Laughter

...went to Afghanistan, was in Al Qaida training camps in Afghanistan, evaded capture during our war with the Taliban, personally met with Abu Zubeda, Khalid Sheik Mohammad, and Ramzi Binalshibh, three of the most senior leaders of Al Qaida, and was sent by those men, back to the United States to plan another mass casualty terrorist attack on us.

Judge Abner MIKVA

And therefore, has violated the following laws, right?

Bradford A. BERENSON

Well...

Judge Abner MIKVA

And that's what's missing...

Bradford A. BERENSON

Well, you are not...you are not obligated though, to charge someone in the criminal system. The President has the power, either to deal with someone through the civilian justice system, and charge him with crimes, or through the military system, the Prize cases back during the Civil War essentially said that just because someone is a criminal, doesn't mean he is also not a traitor, and the president has the ability to decide how he's going to deal with that and make that election.

Elena KAGAN

So I want to get into those cases, and the area of military commissions, but John, you were trying to get in.

John PODESTA

I was going to make the same point Neil was making.

Elena KAGAN

Okay. How does this play out in terms of interrogation and treatment? What are the big issues there? What powers does the President have?

Neil KINKOPF

Well, last year, this convention was held a little earlier. It was in June, and not long after the Justice Department's memos on that issue leaked, and I think it's fair to say the conference was abuzz with outrage over the content of the Justice Department's torture

memos, which, I think ends up illustrating one of the limits on presidential power, and that is public involvement, because that outrage forced the Justice Department to withdraw those memos. Although, interestingly, in withdrawing the memos, the Justice Department did not repudiate the legal reasoning of the memos on this point, so that it is at least possible...

Elena KAGAN

On the executive power points?

Neil KINKOPF

...on the executive power points. And the point made in those memos is that the President's power primarily as Commander-in-Chief is impervious to Congressional regulation, with respect to interrogation techniques, and therefore, even though there is a specific statute making it a crime for U.S. personnel to engage in torture, the president may, nevertheless, order torture, and then, that statute does not apply.

Elena KAGAN

And where would you find the limits from, Neil? You say that in a skeptical way. Where would you see the limits?

Neil KINKOPF

Deeply skeptical way...

Laughter

| Where I would see the limits, first of all, would be in the Constitution, and sort of the construct I set up at the beginning. The Constitution authorizes Congress to provide rules for the regulation of our military forces. And that's exactly what the torture statute is. It's such a regulation. And, to say that the President's Commander-in-Chief power sort of reads that language out of the Constitution is to, first of all, it just goes way too far.

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Sort of the more technical reason for why it goes too far is the Justice Jackson Steel Seizure opinion, an opinion that wasn't even distinguished in a footnote in the Justice Department memos, it wasn't even mentioned. Once you accept that the Constitution, in fact, divides power between Congress and the President, or rather than divides it, sort of makes it share, between Congress and the President, I think you inevitably see that Congress has a legitimate role to play, and that its torture statute, in fact, is an effectuation of its role.

Elena KAGAN

John?

John PODESTA

Well, I think that Jamie already mentioned this, but you see that playing out this week again, with Senators McCain and Lindsey Graham, I think. Trying to create a zone of regulation on interrogation, which, in my view, is fully within their power and authority to do, and the administration resisting on the basis of, that Neil suggests, which is that they have no authority to do that.

But, I come back to the point I made earlier in the conversation, which is, unchecked power leads, not only, I think, to a constitutional problem, but it leads to a very practical, real problems of judgment. I wonder whether the administration today, would stand up and defend, not only the legal basis upon which they carried out the interrogations, but the judgments about whether they were wise in the first place. As I said, I think they've done...I think that that's what Senator McCain and Senator Graham are after, which is that, we have got to put this back in a box that we can live with under our constitutional principles.

And in that regard, I would add that the JAG lawyers, in all the services, resisted the interpretation that the Justice Department was making for the very, again, practical, real reasons that these decisions affect our men and women in uniform when they're out on the battlefield as well. So, I think that...to go beyond, to view your power as completely unchecked, to take the position that they're taking on Capitol Hill, is not only a Constitutional error, it's...maybe that's paramount, but it's a substantial error of judgment, which has caused great harm to the country.

Jamie GORELICK

I would like to follow that if I could, because I think those points are very apt, and return to the comment I made earlier about the sort of institutional ballast. I think that one of the things that is motivating Senator McCain and Senator Graham is that the current state of affairs puts, not only military lawyers, but interrogators, in an impossible position, because they have no assurance that what they're doing is lawful, let alone good for their institutions, whether the institution is our military serving abroad, who might be subject to the same set of vaguenesses about what can be done to them, or, in the instance of the FBI, deep institutional concerns about whether that organization, which is viewed as trained up in and saluting the Constitutional constraints on the way in which we treat people, would be in jeopardy.

So, here you have, and it's taken a long time for it to be expressed because a lot of it was not public; people had these debates in the privacy of their institutions, but what you see being expressed here, are the institutional problems created by essentially unilateral rule-making, in contrast to the normal way in which we do things. So, the structure of the McCain-Graham proposal is simply to codify the rules of interrogation extant at the Defense Department. They're not doing anything new. And I think that that's very

interesting, because it's to give some sense of settled, understood, agreed upon procedures that everyone can follow.

In the 9/11 Commission Report, we recognized that the traditional prisoner of war category, to Brad's point, doesn't really fit a lot of the people whom we are facing on the battlefield. They're not in uniform. They don't belong to a state actor. The category doesn't work. And so it is appropriate, in our view, to say that they are not traditional prisoners of war.

So we challenge the administration to come up with a different rubric, and there actually is in the Geneva Conventions, another model, in Section Three, but to have an agreed upon set of rules is critically important for us and for the way in which we are seen, and the jeopardy in which we place ourselves when we are abroad.

Bradford A. BERENSON

I actually agree that engagement with Congress and the passing of a statute to regulate some of these detention and interrogation issues, maybe even relating to military commissions as well, and the conduct of proceedings in military commissions, would be a good idea. I believe the President has inherent authority as Commander-in-Chief to set the rules in all of these areas, but, as a matter of policy, I think it would be wise for the administration to engage with the Congress on these subjects for this reason: The administration's initial position, in court, on these cases that ended up in the Supreme Court, was essentially that the executive branch has unilateral authority to set these rules without judicial involvement. That position has now been rejected.

So, where we are today is, there has to be an inter-branch dialogue over these questions. Right now, that dialogue is occurring between the executive and the judiciary, and in my mind, that is the wrong conversation. The judiciary is institutionally much less well suited to arriving at intelligent, sensible answers to these questions than the Congress would be. And particularly where both houses of Congress are controlled by the President's own party, the downside risks of engaging in a legislative process from a policy perspective, seem to me to be much less.

So this is one area where I'm not sure that I agree with what the administration is doing; I think a statute on this subject could be passed, and it would not derogate from President, from the intrinsic power the President has under the Constitution. It could say that expressly.

Elena KAGAN

I have a limited question for you, and then a broader question for the whole panel. The limited question for you is just to, you know the people in the administration better than most people in this room do. What do you think is going on? Why do you think that they're up on the Hill lobbying so vigorously against this?

Bradford A. BERENSON

There's an ideological component and a practical component. The ideological component is that the administration's lawyers, the political appointees, whether in the White House, or the Justice Department, or the Department of Defense, feel very strongly about the institutional powers and prerogatives of the presidency, and not just in the context of war or war powers. The dispute over the Energy Task Force records, that made its way up to the Supreme Court, is another instance of this.

In large part, the reason that the lawyers and the administration feel this way is because the President, himself, feels this way. He came into office saying that he wanted to leave the institution of the presidency in better shape than he found it. Now obviously, there were a lot of blows suffered during the Clinton years for reasons we all understand, to the powers and prerogatives of the presidency. So there's an ideological component here, which says that public safety and national security ultimately are guaranteed by the President. It's his responsibility. He's the one person that the nation looks to, and he's got to have robust authority to deliver those things to all of his 300 million or so constituents.

The practical aspect here is what I call, "the Forrest Gump Factor." When you go to Congress for legislation, it's like Forrest Gump saying in that movie, "Life is like a box of chocolates. You never know what you're going to get." And, you know, Congress is capable of doing very, very sensible things, and Congress is likewise capable of doing some things that are not so sensible.

And, you know, anybody who has been through the legislative process start to finish, on a significant national issue, which I was when I was in the White House with respect to the creation of the Department of Homeland Security, and really sees how the whole process works, has some natural unease. And the stakes are perceived as being so high in these questions, that the risk of the thing running off the rails, and something really foolish being enacted, is a risk that a lot of lawyers in the administration just feel they shouldn't take unless they absolutely have to, and I think they're not convinced at this point, that they absolutely have to.

Elena KAGAN

I guess I have to call on Ab, after that.

Judge Abner MIKVA

Well...obviously, I don't know many Presidents that thought Congress was a swell place to go if that's your point...

Laughter

...and what you said about this particular area is true of all of the areas in which the President either has to get his power from the Congress, or enhance, or state his power

from the Congress. There's nothing, there's no more controversial piece of legislation anywhere along the line than the War Powers Act. I've never known a President that thought it was anything but a piece of junk. And, I've never known any legislator who didn't want another crack at it, to make it even tougher. And, in the meantime, it's a very big bowl of mush, as far as you know, and as far as we all know. And, nobody really knows what it means, and no judge really wants to get their paws into it to tell somebody what it means.

So that's true of all these areas, these delicate areas particularly where the president is seeking to exercise a strong power. But, I rely on a variation of what Justice Black used to say about the First Amendment. Congress isn't the first branch of government just by accident, and if you really want to get a solution that works, you have to go through that messy process.

Elena KAGAN

When Brad was talking about his own views, he said he'd rather see a dialogue between the President and Congress, than a dialogue between the President and the courts, with respect to these subjects. And, so, do other people agree with that?

Jamie GORELICK

Well, I certainly do. I think that Congress has largely, to use the vernacular, been able, on a critical set of issues. I mean, just looking at the issue of interrogation techniques alone, it has a very powerful impact on the way in which we're seen abroad, on the moral fiber of our country. There is a wide variety of views to be heard, to return to John Podesta's point, from military lawyers, from people who are expert in intelligence gathering, from people who are expert in law enforcement, there are the foreign policy expressions here, and this debate just hasn't happened.

And, yet, we have been acting, as a country, in a way that has given a tremendous boost to Al Qaida's recruiting. You can't be outside this country and watch television, and not see the impact that the way in which we treat detainees has on the standing of the United States. I'm not saying that we should make our foreign policy based upon, or any of our policy, based upon how a television station in the Middle East reports it. But, you need to understand how our country is being viewed.

So, I would say, in addition to the narrow reason, which is that the President is not going to be able to sustain the unilateral assertion of authority in the courts without a partnership with Capitol Hill, the broader question, which I think John has been trying to put on the table, of sort of blindness to consequences. And a real examination of what works and what doesn't, and what are the full implications of adopting a set of techniques described thusly, or not, has to be examined in a public fashion with all the voices being heard, in order to have a sensible policy. So I think for all of these reasons, it's actually been astonishing to me, even with an ingenuous government, that we haven't had a debate on something so fundamental up until now.

John PODESTA

Well, just to pick up on the point, I think that this plays out across a range of different issues, and it really is a question of your attitude, I suppose, about checks and balances. I think it's a very good thing that that was enshrined in the Constitution more than 200 years ago. Other people may disagree with that, I guess, if you've kind of followed Brad's – not what Brad said about his own views – but Brad's logic about what drove the ideological motivation of the administration forward. But you see it played out, not just between exertion of authority against the Congress, but exertion of authority against the Judiciary.

I think that, Brad and I actually got together with several other, former administration officials from Democratic and Republican administrations on the expiring provisions of the Patriot Act. What we found, sort of amazingly, was that we actually could come to agreement on the expiring provisions of the Patriot Act, in part because of two things I think. Maybe, Brad, we had agreement, we'll get to disagree at this point. Because of two things: one is that the authorities were needed and necessary. But two: that they needed to be, particularly with respect to having thought about them for three years, they needed to be adjusted, and those adjustments really were to give, not just exclusive authority of oversight to the executive branch, but to look to the courts to provide a sort of balance and check on the system.

So, while these weren't monumental, the expiring provisions are relatively narrow as people in the audience know, as opposed to the entire Patriot Act, the 16 provisions that expire, but that that tendency to say, 'we can do it ourselves, all the checks should be in the executive branch, just Justice Department oversight, get rid of any court review,' is very strong, ideologically, within the administration.

But I think, again, it leads to bad judgments, as some of Glen Fine's reports, the Inspector General, at the Justice Department, who has kind of courageously taken on the administration in some of their – not just in the Patriot Act context, but in the round-ups that ended up coming in the immediate aftermath of 9/11 – have shown sometimes a check beyond just your own good judgment and your own smarts, which I think is what the, particularly the vice-president seems to want to rely on, is really important structurally, and it really, and it leads to better outcomes.

Neil KINKOPF

I agree that it's crucially important for Congress to get involved, and Congress has been largely, either AWOL, or worse, regarded itself as the President's subordinate and water carrier. The recent revelations from Senators Graham and McCain are encouraging on that score, but they come right after last weekend, Senator Roberts announcing that his response to the Plame affair would be to investigate whether or not the CIA is too generous in granting covert status to its agents. That's the kind of oversight we get. I can't imagine those kinds of hearings in the Clinton administration. The first week of

office, the Senate Armed Services Committee, at the time, in a Democratic majority Senate, held hearings, very politically embarrassing hearings on the gays in the military.

So, this Congress doesn't seem very interested in performing that kind of oversight role, which points back to the importance of the courts. Even if that dialogue takes place, between Congress and the President, it remains crucial for the courts to have a meaningful oversight role. And that, I think, points to the centrality of the nomination of John Roberts to the Supreme Court, and I certainly hope the Judiciary Committee will give the issue of executive power the central importance that it ought to have, in its consideration.

Elena KAGAN

So, how should the courts see their role in this area? How much deference should they give to executive assertions of authority? How much deference should they give to agreements worked out between the executive branch and the Congress? What's the judicial role here?

Judge Abner MIKVA

We have to defer to the judge. Justice Jackson said that when Congress, I'm talking about the concurring opinion in *Youngstown Sheet and Tube*, that when Congress and the Executive agree on a particular exercise of power, that's when the President's power is at its greatest, and the court should be very wary of interfering with that. When Congress has remained, when Congress disagrees, at least I read his opinion to say that, Congress in every instance, or almost every instance, will triumph, that Congress is the first branch of government, and they can, within their ambit, prohibit the president from exercising any particular power.

The problem occurs when Congress has been silent, and the President's on his own, and there I agree, that the courts really, I kind of wince when the word, "oversight," is used; that's not what the courts do. Courts don't oversight the other branches of government. Courts make a decision, involving a particular piece of the policy that the other branches have made, and apply it, retroactively, to the facts of the case that's before them.

They can't adjust, they can't do any of the tweaking that John Podesta was talking about, they can't say, 'well, we don't like it this way, but if you change Section Three to say so and so, then it will be okay.' Those aren't the things that courts do. Courts treat every case that comes before them as if there's only one decision and it came from on high. And, that's not the way the legislative process ought to work. It's not the way policy ought to be made. So, I think that the courts are the last place to look to do these fine tunings. I think that the courts should be there to tell either branch of government, particularly the executive in what we're talking about, 'you've gone too far, we're saying you can't do it.'

But, it's up to the President and the Congress to find accommodations and make the particular policy that will meet all of the needs of domestically and abroad. And, that's something that will happen when a President either is willing to deal with Congress, or feels he has to deal with Congress. Presidents haven't always loved Congress when they have good relationships, and sometimes they've been forced to deal with them.

I'm not sure that President Clinton loved the Congress, but he knew that he had to get their accord on some of these things like gays in the military or whatever, if he was going to move the country forward in the direction he wanted it to go. So, I would like to see Congress be much more active, whether it's because the President encourages them to, or whether they do it despite him.

Elena KAGAN

Other views on judicial role? What should the Senate ask John Roberts with respect to these issues, with respect to how he'll approach assertions of executive authority?

Bradford A. BERENSON

Well, on the subject of the judicial role, generally, I think that Youngstown Sheet and Tube is one of the important reasons to go ahead and engage with Congress and try to get a statute regulating some of these practices. Because, I agree emphatically that the courts are really the last place that these issues ought to be umpired. And I'm not so sure that our current judiciary does a terrific job with them. And there are a variety of reasons for that.

Some are just reasons of institutional competence. The court is confined to looking at whatever factual record has been assembled by the advocates in front of it, and a couple of 50-page briefs. They are not capable of understanding the potential implications of some of these issues in all of their nuance and complexity, the way they may ripple around the world, in foreign relations and the rest. That's part of the reason why, traditionally, the courts have been extremely deferential to the executive branch in the area of foreign relations and war powers.

And this, whether you're in Youngstown Sheet and Tube Area One, where Congress has legislated, or whether you're in Area Two, where it's simply been silent, and the President is doing his thing, the courts need to be very, very careful, and very, very humble in their approach to reviewing these things. Because, they just don't have the necessary tools to always make the right judgments.

And I think one of the problems today, given our current legal culture, is that the courts are probably way too self-confident in reviewing some of these issues. Now I'm sure lots of people here will disagree with that assertion. But, particularly when you see what some of the judges at the District Court level have done, or, to my mind, if you look at the Supreme Court's resolution of the Rasul decision, that's the question of whether habeas

corpus rights are available to alien enemy combatants being held abroad, I think you do see the courts rather blithely overstepping their bounds.

Elena KAGAN

So, Neil gave Congress a failing grade. Brad is giving the courts a failing grade. Do people agree or disagree? Jamie.

Jamie GORELICK

Well, I would like then to give the Executive Branch a failing grade.

Laughter

Applause

And the reason is this: I wouldn't like to go back to my vision of this room full of judges recoiling. I don't think the judges want to make decisions where they do not feel, and they have not historically been on firm ground. And I think that they jump in, or go in that direction when they feel there is a vacuum and they are the last resort. When you have Congress in a highly deferential mode; you have the press really not an effective check because the flow of information is so curtailed; when you have the internal institutional checks very limited, as you can see from the OLC opinion on torture; then what are you to do as a judge when you feel that our government is going off a cliff?

I think that judges are human, thank God, and are affected by those perceptions of what the other institutions of government are doing. They are, in the end, the last grown-up. And if I were sitting on the bench, and saw that all the decision-making was vested in one place, essentially unchecked, I would be more inclined to venture, perhaps where my institutional competencies are weak, than I would if I had some confidence that either the internal checks within the executive branch were working, or that the conversation with the legislative branch was meaningful.

Elena KAGAN

John?

John PODESTA

You put a different question on the table. I fundamentally agree with what Jamie just said. You put a different question, which is, what does John Roberts think about all this? Which I think, given the posture of the administration with respect to a difficult, complex, and controversial question of how we're going to know what John Roberts thinks about anything, is going to be a very challenging question.

Most of the discussion, really, has been around his views of individual rights, and particularly the right to privacy, and his views around Congressional authority,

particularly with respect to the Commerce Clause. But this is obviously an area that is making its way to the Supreme Court. Maybe it makes it because so many of these cases are...because of our situation with the war on terror, with the war on Iraq, are making their way up through the court system, it's one of those places where he'll be able to conveniently say, 'that case may come before the Supreme Court.'

But I hope, I hope that he would be open about actually discussing these matters, at least in the context that Brad has been free to do here this morning, so that we get a sense of whether he is in that box of ideology, which views the executive branch sort of *uber alles* or whether he is more flexible on these questions.

Bradford A. BERENSON

There are two interesting footnotes to that, John. Judge Roberts, sitting on the D.C. Circuit, hasn't had much occasion to deal with the death penalty or gay rights or abortion, but he has had occasion to deal with these issues, twice. Once in the *Acree* case, which related to whether the President had the power to take Iraqi assets away from plaintiffs who had won judgments against the former Saddam regime. And then, most recently, the *Hamdan* decision, which is the decision right now on the lawfulness of military commissions as they've been constituted.

With respect to those cases, if they were ever to come before the Supreme Court, Judge Roberts would be recused, those particular cases, since he participated down below. And, so, I don't think he wrote, he certainly didn't write in *Hamdan*. I know Judge Randolph and Judge Williams did. I can't remember whether he wrote in *Acree*, but nonetheless, both of those decisions were decisions affirming relatively robust executive authority in this area. I think both were unquestionably correct and can easily be defended on the merits in the context of a judiciary committee hearing, but that should provide some fodder for questioning him and having a dialogue with him on these particular subjects.

Elena KAGAN

Neil, would you say a little bit more about *Hamdan* and what Judge Roberts signed on to, and whether people should feel comfortable, or not comfortable, and why?

Neil KINKOPF

The *Hamdan* case involved the question of whether or not the President could establish military commissions to try enemy combatants, and the D.C. Circuit, in an opinion by Judge Raymond Randolph, held that they could. Judge Roberts concurred in that opinion, but didn't write separately. So, to what extent we can attribute that to him, and what we should read out of that is a difficult question, and one worth going into in confirmation hearings.

And the reason it's worth going into in confirmation hearings is, is what *Hamdan* looked at was the authorization of use of military force, which is Congress' statute authorizing

the President to go to war in Afghanistan, in essence. And so there we have a situation where the court was able to say, as the Supreme Court had said in Hamdi, 'Congress has spoken here. And so, Congress has actually authorized the President to do what the President has done. We don't need to answer the question.' Which seems to me an important one: what is the nature of the President's power on his own?

The other set of questions that it raises, that I think Congress, that the Senate Judiciary Committee really ought to go into, is how to read statutes relating to Presidential power. Because a lot of our discussion about abstract presidential power is just that, abstract. There are lots of statutes out there, some of which were written by Representative Mikva, that limit presidential power, and it's going to be a real question in cases going to the Supreme Court in the future, from which Justice, if he is that, Justice Roberts, wouldn't be recused. 'Do you defer to the executive's own construction of his own power under statutes?' There are passages of Hamdan that apply administrative law principles, of Chevron deference to executive power in the military context, and that strikes me, if Judge Roberts really believes it, as deeply troubling. Because if the court does that, the court will be saying, 'we're chopped liver, and we're going to let the President do what he wants.'

Judge Abner MIKVA

I'm inclined to agree. I think that the Senate's role is going to be very, very difficult and delicate, particularly since I don't think they can count to 60. I mean, I don't think that the opponents can count to 40 or 41 under any stretch of the circumstances. I think the kinds of questions that are asked requires a real delicate brush, and that's not something that members of the Senate are always known to wield.

Laughter

John PODESTA

This is from someone who's been confirmed.

Laughter

Judge Abner MIKVA

I don't think any mileage is going to be obtained by asking, I'm sure it will be asked, 'how do you feel about Roe versus Wade?' Or, 'how do you feel about Brown versus Board?' Or, 'how do you feel about the capital punishment?' If he answers them, the answers will be fuzzy and don't really make much difference.

But, I think it would be useful to find out how he feels about what went on in Youngstown Sheet and Tube. That's long enough ago that he doesn't have to say, 'well, it's established law, and let it go at that.' I think he ought to be asked to say how he feels about Justice Jackson's concurring opinion; how he feels about Ex parte Milligan; how

he feels about the Hamdan case; how he feels, generally, about construing; about whether there is any deference that should be given to executive interpretation of statutes. Maybe even ask him how he feels about the Chevron principles, after they've been playing out for all these 25 or 30 years, about the deference being given to executive agencies, generally.

He's a very bright man, I understand, and he certainly...he even went to a good law school...

Elena KAGAN

Fine law school

Judge Abner MIKVA

...That's what I heard.

Laughter

You know it's hard for me to get those words out.

Laughter

But, I think that these are things that perhaps there can be some thoughtful dialogue on, which may one, help to illuminate these very complicated areas of law, and secondly, perhaps, indicate that there ought to be some restraints on the way he approaches this job, of being one-ninth of all the judicial power in the country.

Elena KAGAN

So I have one more broad question for the whole panel, and then I want to get a few questions from the audience before we conclude. My broad question is just this: Crystal ball this for me: Tell me what happens from here, to the Commander-in-Chief power – the Commander-in-Chief power in the 21st century, where are we going? What are we likely to see in the next several years at least? Are we going to get the dialogue between the President and Congress? Are we going to get the dialogue between the President and the courts? Is...

Judge Abner MIKVA

Well, Elena, tell me how the 2006 election has come out in the Senate and then I'll answer your question. Are there going to be more McCains and Feingolds and others who are vigorous about these questions, and are going to press the executive branch to get authorizations, and to limit inherent authority exercise? Then the answer is that the executive branch will go back to that level that they should be exercising their powers at.

If we're just going to get all the incumbents reelected and a few more besides, not much will change.

Jamie GORELICK

I think a lot depends on whether we have another attack on the United States. I think that, I started off by saying, and I'll close with the same view, that the degree of executive power is almost directly related to the perceived need among the people for strong, executive leadership. So, without regard to whether the President and the Vice President came in feeling that President Clinton had ceded, frankly because of Republican efforts, ceded too much executive authority, if they hadn't had the event of 9/11 to pivot off of, they would not have been as successful as they have been in that assertion of executive power.

And, so I think that we will see the same kind of trend that we have seen in the recent past, which is Congress gradually reasserting itself, which would be accelerated if there were one of the Houses were to go Democratic in the 2006 election, but if we have another attack on us, I think we will return to the notion of a very strong, and not quite totally unencumbered, but largely unencumbered executive authority, particularly on security issues.

John PODESTA

I think that, again, Jamie's probably put her finger on the most important question, in terms of expansion of the authority. But I'm going to give you a policy answer rather than a legal answer, which is, I think, reflects on the war in Iraq, which is, I think the conduct of the war has put unbelievable strains, some would say that it's near breaking the ground forces of the U.S. military, both in the army and to some extent in the marine corps, and I think that the Congress has to respond to that.

And so I think the general kind of toady nature of the majority party in the Congress that we've seen over the last several years, I think may give way to really understanding that that's a fundamental problem that Secretary Rumsfeld's conduct and the decisions about how to conduct a war as well as whether to conduct the war, have put tremendous strain on the U.S. military.

And I think Congress is going to jump in and demand some answers, probably, actually do some oversight, one would hope at least. And I think that in the end of the day, during the remainder of the Bush administration, they're going to have their hands full I think dealing with that question, and dealing with Congressional reaction to those questions.

Elena KAGAN

Good. We have time here for just a couple of short questions. Yes.

Audience Member

Do you think there has been a confusion between the exclusive power of the President for foreign affairs, under the Sole Organ Doctrine, and his power as Commander-in-Chief, which is limited by Congress' right to prescribe rules for the armed forces and to declare war, and that the justifications both in academic writing and court cases, seem to merge as if there were no difference between the Commander-in-Chief and the chief diplomat?

Elena KAGAN

You want to take that, Neil?

Neil KINKOPF

Sure.

Judge Abner MIKVA

In 20 seconds.

Neil KINKOPF

In 20 seconds. I think those powers do have a tendency to merge, and it is important to keep them straight where they can be, but the problem is war and diplomacy aren't really separate things.

Elena KAGAN

That was 20 seconds; that was pretty good. Yes.

Audience Member:

I think just a few months into the 21st century, we were hit by what appeared to have been civilian combatants, and for the first time, encountered a kind of war where there's not an identified state sponsored, uniformed combatant, and there's not an identified battleground, but rather there's an identified form of battle that has become the target of the war.

In a war on terror, where are we headed in identifying who are and are not combatants? And what is the battleground? If a United States citizen flies through London, and Frankfurt, and visits a mosque in one and family in another, does a little training in Afghanistan, comes back, and starts talking up bad talk, without ever engaging militarily, is that person an enemy combatant? We're operating under a whole new set of rules and I'd like to hear the panel's thoughts on where we're headed.

Jamie GORELICK

That is a very complex set of issues that you've raised. But I will make a couple of points. One: it is a misnomer to say that this is a war on terror. Terror is a tactic. It is not an enemy. And I think the administration had been wrong, factually, and tactically, and strategically in calling it that way, because it distorts what you do as a consequence, and that was one of the conclusions of the 9/11 Commission.

We have an enemy, which is a group of loosely identified, and loosely organized Islamist jihadists, who have a point of view about us, and they're going to be very difficult to dislodge because the Al Qaida that existed in the months leading to 9/11, has metastasized into this again very loosely knit group of people who share a point of view, a training ground in either Afghanistan or Iraq, and ideology. So I think the rules are going to be changing. I mean, in Great Britain, you now have a, in the aftermath of the London bombings, a move to create as a fundamental crime, the incitement of terrorism, an advocacy of terrorism, it's a way of dealing with the advocacy in mosques of violence.

Those kinds of questions, as Brad pointed out, are not ones that are best suited in the first instance to debate in the judicial branch. They are best suited, in the first instance, to a debate in the more democratic branch of government, which is Congress, and we need that, desperately, because there are dozens of questions. This is a war with no physical boundaries, and no time period, so our doctrines about time of war and powers of the executive branch in a time of war, and in a place of war, really are inapt. And so these are issues that must be discussed, and they are broad and deep and go to very fundamental issues of our values, our traditions, and our laws.

Bradford A. BERENSON

I would say, though, that it is possible to overstate the extent to which this war is different than previous wars. I suspect there are people in the room who don't accept the characterization of this conflict as a real live war. I certainly do. I believe the much stronger argument is that this is a deadly serious war, truly an existential threat to this country.

And we have fought irregular warfare before, on many occasions, whether it's the Barbary Pirates back in the early 19th century, or going after Pancho Villa, some of the wars on the frontiers as the west was being settled, there are plenty of precedents if you look to the opinions of the Attorney General, and you look through the case law, for dealing with a war against a non-sovereign actor, a non-state actor, where it's difficult to identify friend from foe.

But that's not to say that there are no differences. I mean, I think it's easy to overstate them, but there are some, and Jamie's aptly pointed out a few, and they do create real difficulties because this war is fought almost entirely, in essence, behind our own lines, that is, it's all, in meaningful terms, even though we have had active hot wars in Afghanistan and Iraq, as we think about combating terrorism. And I agree also with Jamie that this is not really a war on terror as such, it's a war against a religiously

inspired fascist ideology, and whatever the terminology, I think all the policy makers in the administration understand that very well.

But as we really try to combat terrorism, what we're talking about are rooting out a fifth column in the west, whether they are here living now, or whether they infiltrate for purpose of committing these acts, the key thing to do is to stop things such as those that happened here on 9/11, or more recently in London, and that does raise difficult questions about identifying the enemy.

Elena KAGAN

With that, we've run out of time, and I just want to thank this panel for really an extraordinary discussion.

Applause