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2006 NATIONAL CONVENTION:

**“SEPARATION OF POWERS: RESTORING THE
BALANCE AMONG THE BRANCHES”**

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MS. DAWN JOHNSEN: (In progress.) First, though, let me thank on behalf of all of the panelists the American Constitution Society and Lisa Brown and all the staff for including us in this exciting convention and also for all of the good work ACS does in many areas. It's a pleasure to be here and be part of this weekend.

I am going to first introduce the panelists and in the interest of time I am going to give a very barebones introduction. You all have brochures with detailed biographies, so let me just say a few things and then urge you to read the longer biographies in your brochure.

Firstly, I have Ron Weich, who is senior counsel to Senate Minority Leader Harry Reid, who he staffs on all Judiciary Committee matters. Previously, Ron was a partner at Zuckerman Spaeder, was special counsel at the U.S. Sentencing Commission, chief counsel to Ted Kennedy on the Judiciary Committee, and also an assistant district attorney in New York City.

We have Professor Harold Hongju Koh, who is the dean of Yale Law School. He was on the faculty since 1985 and Harold also served as assistant secretary of state for Democracy, Human Rights and Labor from 1998 to 2001. Harold also served at the Office of Legal Counsel. I'll just call it OLC from now on, because we have many of us up here from OLC, and also at Covington & Burling previously.

Senator Gary Hart represented the state of Colorado in the United States Senate from 1975 to 1987. He served on the Armed Services Committee where he specialized in nuclear arms control and military reform. And the Senator is currently a professor at the Graduate School of Public Affairs at the University of Colorado in Denver.

Beth Nolan had several high ranking positions in the Clinton administration, including counsel to the president from 1999 to 2001. Beth and I served together at the Office of Legal Council in the Clinton administration, and Beth also was there as a career lawyer during the Reagan administration.

Professor Doug Kmiec from Pepperdine Law School joins us as well and Doug served as the head of the Office of Legal Council, OLC, under both Presidents Reagan and Bush; currently at Pepperdine, previously the dean of Catholic University Law School, before that on the law faculty at Notre Dame.

And I am Dawn Johnsen. I forgot to introduce myself. I am Dawn Johnsen. I was at OLC in the Clinton administration from '93 to '98, headed up that office at the end of that time, and now I teach law at Indiana University in Bloomington, Indiana. Very glad to be here.

I have been given a piece of paper here to read about questions and answers. You should have note cards in your registration bag. And please during this panel be writing down your questions, and if you have one, hold them up so they will be collected by a volunteer and brought up to us and we will read them during the Q&A session.

Just a very brief introduction to our topic, implicit in the title of this panel, “Restoring the Balance,” of course, is the view that we currently in our government have an imbalance that needs to be corrected. Of course, the most striking shift in power in recent years has been the expansion of presidential power at the expense of Congress’ powers, especially since George W. Bush took office, and that will be the focus of our panel discussion. We will talk about that expansion of presidential power, especially in the area of national security.

Still, that is a tremendously enormous subject and we have lost some of our time. We’re trying to get back on schedule. It includes potentially issues like enemy combatants, military tribunals, electronic surveillance without warrants, signing statements, presidential refusals to comply with statutory requirements, torture and other extreme methods of interrogation, government secrecy, leaks, intimidation of the press. If you look in your conference brochure, it says we will talk about all these matters “and more.” We thought that was a little ambitious. You will hear more about many of those topics throughout this convention and I so encourage you to continue going to all the panels. For this panel we have decided to take the issue in basically two parts.

First, we will talk a bit about the nature of the current imbalance between the president and Congress, and focus on national security and talk about why it matters, what’s at stake. We will in particular focus on one theme of the Bush administration, and here I’ll try to be a little provocative and say I will personally describe that as a disregard for the rule of law. By that, of course, I mean President Bush’s position – repeated assertion that he as president and the executive branch under his direction have the constitutional authority to act directly contrary to the requirements of federal statutes – duly-enacted statutes.

Moreover, in many cases, the Bush administration claims it has the authority to disregard statutory provisions and not even tell Congress or the American people. Of course, it’s a little more complicated than that because the Bush administration’s initial argument typically is not the straightforward constitutional one, but instead that we have to twist the meaning of federal statutes beyond their clear meaning to match a very sweeping view of presidential power. So that will be the first part of our discussion talking about a few examples of what I view as this disregard for the rule of law.

Then we will move on to the second part of our discussion and that is, how can we fix this? What are potential remedies? What can we as a nation potentially do to constrain an overreaching president to state it again in a bit of a provocative way?

So let’s start right out. And let me just note that the panelists have agreed to keep their comments relatively brief and to allow me to enforce that, so we can get through all

this material and still have time for your questions, which you should be filling out on your little cards and holding up in the air.

Let's start with an issue that has been very much in the news in recent months: presidential signing statements, and I'm going to ask Beth Nolan to start us off. Of much in the news. Before the Bush administration, quite an obscure, I believe, document. Even now though I think many misconceptions and confusion about signing statements and if they are inherently evil things. So let me ask you to describe what is the presidential signing statement and what is the controversy all about.

MS. BETH NOLAN: Okay. Well, let's start with signing statements are not *malum in se*. They are not bad things and I am not – I don't want any signing statements out there to feel bad about what I'm going to say. (Laughter.)

There are signing statements and there have been throughout our history that are in the mode of thanks, exhortations, challenges to Congress, basically statements presidents make at the time they sign bills into law. And they can be as bland or benign as appreciation for Congress acknowledging Girl Scout cookie appreciation month and urging the Congress also give the same kind of attention to Camp Fire candy. We're not going to talk about those. Nobody really has any objections to those at all.

There are and have been signing statements by presidents that seek to announce the president's intent to interpret the law or apply the law in a particular fashion. This is an area of great controversy now, though there are many uncontroversial examples even of this kind of signing statement where the president – for instance, a statute that gives the president authority to grant a waiver when it is in the interests of a particular defined set of interests and the president announces, I am going to direct my executive branch officials to apply this – to grant waivers freely whenever these interests are present, something like that.

It's a clear announcement of how I intend my executive branch to follow this law; I have been given the discretion. Then, there is announcing an intent to interpret the law so as to avoid constitutional problems, what Dawn referred to as announcing an intent to twist the law and that is, in fact, the nub of the controversy.

Here's an example of these constitutional objections and that's what I really want us to think about, these constitutional objections. For 25 years or so now we've known that the legislative veto or at least the one-house legislative veto was unconstitutional from *Chadha*. Congress continues from time to time to pass laws with legislative vetoes in them. Presidents continue to issue signing statements saying this legislative veto was unconstitutional, often though saying I will interpret it as a report and await provision. That is, I will do my best to honor the statute within the constitutional limits that we know exist.

What we are seeing now is – and I don't want to suggest that that's the only kind of constitutional objections, because there are times when presidents will in fact say I just

find this part of the statute unconstitutional and I don't intend to enforce it. That should be done in very limited circumstances where it's clear that there is in fact a constitutional problem, insurmountable constitutional problem with the statute and in situations where a veto is not appropriate for a particular reason. Perhaps it's a very small part of a big bill that the president just makes a determination he needs to sign.

That is, of course, more controversial, but we're not even talking about that kind of controversy here. What we've got with this president is, first of all, more constitutional objections signing statements than all the other presidents combined and by a good number, so a very aggressive use of constitutional signing statements, objections signing statements.

And then what we see often are two things that make it very troubling. One is very vague, unknowable really constitutional objections. My ability to supervise the unitary executive, my commander-in-chief power are the two favorites, but they're not – you don't really know what the real heart of the problem is, and then a statement that I intend to interpret it consistent with these very vague constitutional objections, so you don't really even know how the statutes are going to be interpreted.

So nobody has really on notice what the problem is, how would Congress fix this problem or – and let's put this – the last remark I want to say about this is, put it in context of you have to go back to Thomas Jefferson to find a president who's been in office this long without vetoing a bill. So the system that the Constitution set up for the president and Congress to engage about objections to legislation is, in my view, really being ignored to all of our detriments by this process.

MS. JOHNSEN: Thank you. I think it would be useful to make this a little more concrete and actually read from a signing statement issued by President Bush, and I want to ask Harold first to comment on this particular one. When President Bush signed into law, after much opposition initially, the McCain Amendment which prohibited the use by use personnel of cruel, inhuman, and degrading treatment of those who are in U.S. detention and of course that supplemented an existing ban on the use of torture, as is the subject of the infamous OLC torture memo.

So when President Bush signed this into law this is how he said he would enforce the McCain Amendment. "In a manner consistent with the constitutional authority of the president to supervise the unitary executive branch and this commander-in-chief and consistent with the constitutional limitations on the judicial power." That's rather innocuous sounding I think on the surface, Harold. What's the problem with that kind of a signing statement or this particular signing statement?

MR. HAROLD KOH: It's like *The New Yorker* cartoon where the space aliens are coming out and writing a message in the sky, and two earthlings are looking at it, and one says "I'm not sure, but whatever it means, it can't be good." (Laughter.)

The McCain Amendment is an unqualified prohibition against torture and cruel inhuman treatment, so anything that qualifies is bad. So either it means nothing or it's qualifying it, which is bad. I mean, just some basic points. The president has no duty to take care that the law is not be faithfully executed. The president has no line-item veto authority, so he can't use a signing statement as a line-item veto, and it's best said when there is no veto you can't override it. You can override a signing statement. The core of what the statement is saying is somehow there may be some reserved power as unitary executive or commander in chief to commit torture or cruel inhumane treatment.

My view is that the president has no constitutional authority to be torturer-in-chief, so he has no such reserved authority. The other view expressing the second part is that it's consistent with the judicial power means and somehow it's inconsistent with the judicial power to review the president's actions ordering torture. And again, I don't think torture is a political question. If somebody tortures somebody, it's reviewable.

So I think that at the end of the day I'm not sure what it means. As Beth says, the main purpose is to avoid predictability. It would lead to a point where there would be an as-applied constitutional challenge down the road, but whatever it means, it can't be good.

MS. JOHNSEN: And we do have some indication of what it means when we look to certainly not this signing statement, but other opinions that we've seen come out of this Department of Justice and elsewhere in the government. We have a good sense of what President Bush means when he talks about his powers as commander-in-chief.

Let me follow up with the argument that I often have heard or sometimes have heard in defense of signing statements along the lines that President Bush has used them. It's better than a veto. Then, it's actually more respectful of Congress to put into effect as much of the statute as possible, sign it into law, and just put these few limitations out there in the signing statement better than vetoing the whole thing and sending it back to Congress.

MR. KOH: Well, I was talking to an official of the Ford administration, who was telling me that Gerald Ford in his brief period as president did something like 56 vetoes. And the reason was that there was a lot of pork and he was eliminating the pork, so he would just veto it and send it back. I think that just a more upfront approach is if the president actually disagrees with something, he should veto it.

MS. JOHNSEN: Now, let's get a congressional perspective. By now, you might have noticed that this panel has twice as many former presidential lawyers than people with a congressional perspective, and that seems about right given the current balance of powers we have in our government. (Laughter.)

Now, let's ask Ron to give his perspective from the Hill on signing statements.

MR. RONALD WEICH: Well, let me say, first of all, that I agree with Beth that there's nothing wrong with a signing statement per se. And one good thing about signing statements is that it alerts everybody to the fact that the president has a view of a provision and maybe signaling an unwillingness to apply the provision as Congress intended or an unwillingness to comply with the provision altogether. So it's not the – I mean, the signing statement is the canary in the coal mine. It tells you something, but don't be angry at the canary.

But what is significant is what's behind that. Is the president saying he's not going to enforce the law? Well, how would we find that out, especially when the signing statements are so bland in their wording? We would hope that Congress would engage in oversight and yeah, that's exactly what's been lacking in the current Congress and we have two basic problems as I see it.

First of all, we have a war. We're in war time certainly in Iraq and then the president conceives of a broader global war on terrorism; and we have Congress, both houses of Congress controlled by the president's own party, and a mindset in Congress that they are teammates of the president and not a separate coequal branch that's supposed to be a check on the president. So I mean, that is an impediment at least in their view to carrying out vigorous oversight that would tell us what's behind the signing statements.

The other way we might find out if the president is not complying with the law is if lawsuits abroad and the judicial branch raise in on him, but here the McCain Amendment provides us with a textbook example of what really is a crisis in the separation of powers now, because first of all, the president says he may well not enforce that McCain Amendment. Congress doesn't do much to follow-up on that; doesn't call the attorney general up to say, "What are you doing? How are you carrying out this anti-torture provision? What exactly are the conditions at Guantanamo?" But at the same time, the Congress very soon after adopting that provision adopted an amendment by Senator Graham of South Carolina to the Defense Department Authorization Bill last year that limits judicial review of the rights of Guantanamo detainees.

So the other branch that you might hope would not be influenced by political camaraderie is itself silenced to some extent, and we'll see in upcoming cases just how silenced, by efforts to strip the judiciary of its role in overseeing presidential authority.

MS. JOHNSON: All right. Thank you. We're going to come back when we talk about potential remedies and talk in greater detail about the role of the courts and whether they've been playing an adequate role.

Just to stay a few more minutes on signing statements, I want to ask Doug to chime in here. This is not the first time we've had some public controversy over signing statements, but it certainly is at a new level. In recent memory, though, when I started at the Clinton Office of Legal Counsel one of our first requests from the White House was to reevaluate the use of signing statements, because of concern that existed on the Hill

and elsewhere about the use of signing statements in the Reagan and George Herbert Walker Bush administrations.

And yet you, I know, have been somewhat critical of the current administration's use of signing statements. I'm interested in hearing how you view the current administration's use compared to how OLC in the White House use signing statements and many of us here have drafted signing statements when you are heading up that office.

MR. DOUGLAS KMIEC: Thank you, Dawn. I am, I suppose, intended to be the counterpoint here today, and so I'm coming out firmly against anything about Camp Fire Girls being set out further in signing statements. (Laughter.)

The signing statement initiative in the Reagan administration was not discovering or inventing something new as everybody said. Signing statements go back to the 19th Century, but they had as their primary purpose allowing the president as the chief administrator, the person who does have that constitutional obligation to take care that the laws are faithfully executed, to be the first one to say something about provisions in the law that obviously need further elaboration and would need that elaboration by someone if it wasn't the president, usually someone much less visible than the president who wasn't directly elected and who would issue rules and regulations or some type of commentary.

In addition, the purpose of signing statements was to have some level of mutual understanding memorialized in the context of a signing statement at the time the law was going into effect. So notice how – I doubt that any of us up here would fault those two purposes. Where we start to be concerned is where the president is not giving direction based upon the words of the statute or not giving direction based upon a mutually accepted understanding of the statute at its time of passage, but is attempting to say something else, but as Dean Koh suggests we're not quite sure what they're saying.

On the Detainee Treatment Act in particular I think that signing statement that you referenced, Dawn, is not just about the McCain Amendment per se, but is about accompanying the entire act. And so to some degree one would have to even examine the entire act to know what that particular provision was attempting to say.

My own view on these cryptic signing statements is they're not helpful because they're a puzzlement. They're a puzzlement to the people on the Hill, they're a puzzlement to the people in the executive branch trying to follow the president's direction, and therefore instead of building a shared relationship against a common external enemy, they raise doubt and distrust which is unnecessary.

And indeed, there's a parallel in the legislative process and we know about the parallel. It's report language. Right? Report language is always that language that various members didn't succeed in getting the rest of the membership to agree to incorporate in the legislation, but they did have the helpful ear of a staff member to write something into a committee report or a conference report. And some members – no

member that's here of course – some members would occasionally use report language as if it was legislative language, and that's a parallel kind of mischief in the separation of powers dance that goes on in our constitutional history.

But I think Ron actually brought us to something that is most important and that is what underlies all of the issues, Dawn, that we have here today is how we view where we are as a republic. Are we at war leading to a series of conclusions and arguments that says the president's commander-in-chief authority and constitutional authority is robust in light of that war-time condition or are we at peace and therefore one wants to assert very carefully, very scrupulously the protections for civil liberty.

And in fact we know we are both at war and at peace, which is this kind of strange nature of the war on terror, and one of the things that one has to admire about Senator Clinton, this morning, is that she was trying to navigate her way through both aspects of that problem. And so when we talk about signing statements, we do want to be both praiseworthy of presidents who use them properly to have the laws faithfully executed and, at the same time, raise a question flag when unnecessary language is added to a signing statement that undermines our ability actually to effectively fight the war.

MS. JOHNSEN: I would say that clearly President Bush believes we are at war. I'm not sure if he would say we're at war and at peace. I think he would say that the fact that he is a war-time president permeates all of his authorities. As Beth mentioned, one of the most common references in the signing statements is to his authority as commander-in-chief. Doesn't explain what he means there, but we do have as I mentioned descriptions of his view of the commander-in-chief power in other documents. I'll use this to segue and then I'll let you respond to –

MR. KMIEC: All right.

MS. JOHNSEN: – just inject beyond signing statements.

Our next topic is the president's occasional disregard for statutes that are already on the books, long on the books. Just mentioned the precursor to the McCain Amendment, of course, was the federal statute that prohibited the use of torture. I bet this audience is very familiar with OLC's now withdrawn torture memo that had a whole section that, after narrowing the reach of the torture statute beyond recognition, said the president could violate even that, if he believed it would further his role as commander-in-chief and protect the national security.

One more example throughout there is the McCain Amend – I'm sorry – the FISA statute and the NSA's domestic surveillance programs. Doug, you seem to want to say something more.

MR. KMIEC: I'm bursting forth with information, but they – absolutely correct on the issue of the number of signing statements issued. One of the things that Charlie Savage at the *Boston Globe* has documented, for example, is the increased usage of this,

but in terms of the things said, there's more commonality across administrations than one might otherwise think

President Clinton, for example, issued a number of signing statements that almost use exactly the language you quoted from the Detainee Treatment Act, except the context was the president's ability to put American troops under foreign commanders, which was a hot topic during the context of the Clinton administration, the ability of the president to introduce troops into Kosovo and into Haiti, and to some degree that depended upon OLC advice that those weren't really wars. They were something less than wars. And so presidents have this habit of using that language, though President Bush has been using it with greater frequency.

On the issues –

MS. JOHNSEN: Can I just say one more –

MR. KMIEC: Sure. Go ahead.

MS. JOHNSEN: Can't let that get by. You're absolutely right. I think if you line up the language there are similarities across administrations and certainly references to commander-in-chief power. The problem is we know what is behind President Bush's reference to his commander-in-chief power, because we have lengthy OLC opinions and White Papers from the Department of Justice on the NSA Domestic Surveillance Program in which we see that the current president's view of his commander-in-chief power is not comparable to the view that we held when we were in the Clinton Office of Legal Counsel.

MR. KMIEC: Well, as a formal matter, the OLC memo that you alluded to was withdrawn prior to the time the president issued his signing statement on the Detainee Treatment Act. So I suppose if I was wanting to be legalistic in a group of lawyers, I would say that we don't really know that the president is endorsing anything that was in that prior August 2002 memorandum since it was withdrawn, and it was withdrawn in a way where the president reaffirmed what is, of course, true and that is our agreement to the international conventions that preclude cruel, inhumane, and degrading treatment.

The business about judicial construction I think is an attempt to raise the issue of how directly enforceable international agreements are in terms of individual enforcement in court as opposed to diplomatic enforcement. So I don't think anything in that statement was intended to be an endorsement of torture. And I think one of the things that John McCain, and Senator Graham, and the others who went to the White House when they read the cryptic statement and like the aliens in – or the people looking up at the aliens in Dean Koh's story said, "well, what's that mean, it can't be good", went and got a White House reaffirmation that in fact they were raising more of these niceties of the question about the scope of international enforcement as opposed to reendorsing or making any kind of endorsement of torture.

MS. JOHNSEN: Harold?

MR. KOH: We don't need graffiti on the McCain Amendment. It's clear. Once it's there, don't add anything. If you're adding anything, you're trying to modify its effect. Why are you trying to modify its effect? I think one point I just made to what Doug said is the issue of contemporaneous legal opinions.

When we were in OLC, the deputy assistant attorney general told us "If you would renege at the opinion if it appeared on the front page of the *New York Times*, don't adopt it in secret." And the 2002 torture opinion once it came to light they had to back away from it, because it was so patently false.

And on the NSA spying issue, I still haven't seen a contemporaneous justification. Once it came to light, they came up with a White Paper and then that looked pretty unconvincing, so then they came up with a double-length White Paper. But you know, that's –

MS. JOHNSEN: I thought that the White Paper is something that – I don't remember from our days in the Department of Justice, but what we had was this lengthy legal analysis justifying the NSA program unsigned by any individual or any component of the Department of Justice, which I find very troubling.

Now, that lengthy analysis does repeat much of the same kind of view of the commander-in-chief power that we saw in the infamous now withdrawn torture memo. I want to ask Senator Gary Hart to jump in here now that we're talking about the NSA Domestic Surveillance Program, and I don't think I have to explain what that is to this audience. I would like to ask the senator to lead us off in the discussion of that part of this panel. The senator, as many of you might know, has been very vocal on this issue and I've heard him speak and read his writings on it, and he brings a very important historical perspective to the issue from the time he served on the Church Committee in the 1970s when he first went to the Senate. Would you, please, talk about some of the parallels to –

SENATOR GARY HART: Well, I will like for all of you to assume a situation in which a president is presiding over a war and where it is alleged that members of the citizenry are aiding and abetting the enemy, that we have to find out who they are, and that very quickly expands to those who are opposing our involvement in the war. And that, then, leads to increased surveillance, wiretapping, letter opening and so on, and resistance to oversight by the Congress, resistance to intervention by the courts. You would be probably thinking this is the administration of George W. Bush. This is, in fact, the administration of Richard Nixon.

And the abuses of executive power in the period of the late '60s and the early '70s during the Vietnam War became so egregious. And through an aggressive press, a much more aggressive press than we have today, these abuses of executive power became public, and the public began to insist on Congress doing its job at overseeing what was

going on indeed finding out what was going on. That led to the appointment of the Senate Select Committee on Intelligence Oversight, called the Church Committee after the late senator Frank Church who was its chair. An 11-member committee sat for almost two years and out of that committee came, among other things eventually, the Intelligence Identification Protection Act against revealing the names of covert operatives violated by this administration, came the Foreign Intelligence Protection Act, the Surveillance Act violated by this administration.

And this committee was sitting during the presidency of Gerald Ford. Now, two key members of that administration were a chief of staff namely Richard Cheney, and an Office of Management and Budget director and eventual secretary of defense named Donald Rumsfeld.

Now, they thereafter believe that those reforms, including, by the way, a requirement by the president to sign a finding for any major covert operation which in effect defeated a doctrine up to then which had been called plausible deniability, whereby a president could authorize overthrow of the government or assassination of foreign leaders and the CIA would be held culpable if, in fact, it went bad.

We required that the president sign a finding, and indeed it was that finding that eventually caused Ronald Reagan to have to admit that he had in fact authorized the Iran Contra mess. In any case, these two individuals particularly believe that those reforms had led to the weakening of the presidency, that in turn through, I think, a variety of sources including the Federalist Society and so on led to a doctrine or a theory called the unitary presidency. And it is that background that brings us to today. And all of this pattern, not just signing statements, but a whole variety of actions, the NSA wiretaps, and so on are a part of an effort in the minds of these people to restore what they believe to be the rightful powers of the executive.

Now, I can't speak for anyone else. I read the Constitution's first article as the legislative branch passing the laws and overseeing the second article executive branch administering the laws, and the legislative branch being held responsible under the Constitution to see that those laws are faithfully executed. That has not been happening.

One final note – two final notes. I think the key, as someone has mentioned, was the declaration of war on terrorism and that led to then the opening up the doors for this so called unitary presidency restoring, and adding to the powers to the presidency that President Nixon and others had sought to acquire to themselves in extra constitutional ways. It enabled us to create a category, the president create a category called “unlawful detainees,” which skillfully avoided both the Geneva Conventions and international law on the one hand and the criminal justice system of America on the other, and then open up all this panoply of presumed presidential powers in war time.

The fact to the matter is terrorism is a criminal act and it should have been treated as a crime and not as a war. Now, the world joined us in the rightful invasion of Afghanistan to get rid of the Taliban, root out al Qaeda. Unfortunately, we abandoned

that in an effort to go back to a neoconservative agenda laid out in the 1990s to overthrow Sadaam Hussein and use Iraq as our political military base in the Middle East. That's what – this predated 9/11 by six or seven years and that's a matter of public record.

Finally, we are headed towards a constitutional crisis, because many of these cases including the unlawful detainees, executive authority, and all variety of signing statements, and all the rest of it most they are going to head the Supreme Court. And I think my party made a big mistake in the confirmation of Justices Alito and Roberts by focusing most of our attention on the question of preservation of *Roe v. Wade*. The real issue is executive authority under the Constitution. This is a constitutional crisis.

(Applause.)

MS. JOHNSEN: I think that's a great transition to our discussion of potential remedies, but first let me – and talking about the courts and judicial nominations, let me first see if there's anybody who would like to say any final words on that NSA domestic spying program or the president's disregard for statutes.

Beth?

MS. NOLAN: What I would like to say is a more general comment about – Doug is right that this president has used many of the same phrases and words as other presidents, including such things as commander-in-chief, but it really is very important that we think about the spirit in which these kinds of statements and actions, because it's not just signing statements. NSA domestic spying didn't come with an announcement that it would be done. The spirit in which these things are undertaken and whether the president is really respecting the coordinate branches of government just as those coordinate branches of government must respect the executive. And I think the constitutional crisis we are facing really does come from a real imbalance in that respect and effort to give each branch its due under the Constitution, which is after all what our separation of powers or balance of powers are about and ultimately they are there to preserve our liberties.

MS. JOHNSEN: Doug?

MR. KMIEC: The radical that came up with the unitary executive idea was that rascal Alexander Hamilton – and can you say *Federalist Papers* here? And *Federalist* 70.

MS. JOHNSEN: We read those, too.

MR. KMIEC: And, of course, he says in the context of that that the unity of the executive is conducive to the energy needed to repel foreign attack, decision activities, secrecy, and so forth is what's necessary, but Senator Hart puts his finger on exactly where there's the divide among us. And if you view this as the pursuit of a Mafioso, a crime family, someone that can be brought to civil order and to justice by means of the

criminal justice system, you get very different answers than if you view it as a war. And I think one of the difficulties I have just in terms of trying to think this through myself on that topic is the nature of the enemy we confront.

What we know about this enemy is that they are radicalized in a way that doesn't respect any human condition, including the condition of their own human life, that they often phrase the taking of other life including civilian life. And while there is international difficulty with coming up with a category of unlawful combatant, the notion of extending international protections to a group of people that target civilians, that fight out of uniform, that hide their weapons, that aren't subject to a command-and-control system is an extraordinary proposition and a difficult one for us to confront with in terms of bringing order.

In terms of using the criminal justice system, I greatly admire the efforts of the federal prosecutors in the *Moussaoui* case to try and conduct that with some semblance of order. I think you have to have great honor for the jury that served in that extended period of time and neither honored Moussaoui's radicalized idea to die a martyr, nor fell for the thin theory of prosecution that the prosecution had, namely that if he had only spilled his guts earlier we could have avoided 9/11 altogether, that just didn't simply bear out on the evidence. But one real risk of the *Moussaoui* trial was that we bent so many aspects of the Fifth and Sixth Amendments to get it concluded that we've done real damage now, it seems to me, to the criminal justice system.

We've watered down the compulsory process guarantee in the Constitution. We've watered down the witness confrontation requirement in the Constitution. And the *Moussaoui* case now becomes a precedent for other areas and I worry about that. And one – say what you will about military commissions and tribunals, and I suspect we'll say a lot of nice things about them – the one good thing that seems like a bright line to me is that it segregates, if you believe we are at war, these difficult prosecutions into a different category so that the democratic underpinnings of our society are not harmed on the long term.

MS. JOHNSEN: Doug, can I ask you a follow-up? Actually don't follow your – I don't think it's just consent to whether you think we are at war or not, because in many of these instances we're talking about federal statutes that as soon – they will be applied during times of war. Many of the arguments you are making I think are good policy arguments, maybe convincing to some. The question is who should make those policy choices. And when Congress has made a choice, for example, that FISA shall apply, after – FISA, as many of you know, has a provision that says if we're at war, there's a declared war, the president has 15 days during which he need not comply with the war requirements. He may go back to Congress and seek an amendment. So I don't really see how the – whether the at-war-or-not distinction answers the question there.

MR. KMIEC: That's an excellent question and it fits nicely with the very helpful background that Senator Hart gave us about the FISA statute.

There was an enormous abuse of presidential office, exactly along the lines you described. In the name of national security, this outrageous domestic spying against political opponents was the genesis of trying to get that back into constitutional order. And, of course, the key decision which was also a bit of an impetus to the drafting of FISA as well, where Justice Powell basically says in the context of domestic national security acquisition you might want to create a separate system. Notice what Keith doesn't do and what I didn't hear Senator Hart's backgrounder do and that is it wasn't an invitation to say the primary concern is seeking to acquire and identify foreign agents – to acquire foreign intelligence information and to identify foreign agents and foreign powers who seek to harm us.

Now, admittedly the line starts to blur in these questions and Congress tried to handle both issues. On the 15-day exception if you look at the legislative history – and I'm not Justice Scalia so I can look at legislative history – Griffin Bell, a very intelligent, plain-spoken attorney general came and said this is going to be a constitutional problem in war time. And very thoughtfully, the Congress created a 15-day exception not anticipating that a war could be fought in 15 days, but that specific legislation could be passed governing the type of intelligence gathering that would be needed in war time.

I think the president looks at the sweep of the language used in the authorization for the use of military force to say that is that legislation. Now, we know that members of Congress say they weren't thinking about that, but we also know that the Supreme Court of the United States in *Hamdi* allowed that language to authorize detention of combatants, even though that wasn't specifically provided as in Justice O'Connor's words the "universal understanding of what it means to authorize the use of military force in war time." And so by process of analogical reasoning, it seems to me that's where the argument is made for intelligence gathering as well in part because we have all of these examples of Wilson, and FDR, and so forth engaging in that behavior in the context of war time.

MS. JOHNSEN: Prior to FISA.

SENATOR HART: Could I respond?

MS. JOHNSEN: Yes.

SENATOR HART: First of all, happily Madison's view of the checks and balance system prevailed over Hamilton's unitary presidency and on the use of radical –

(Applause.)

The use of "radical" was your word, not mine.

Second, the idea of treating terrorism as a crime rather than an act of war isn't just to use the criminal justice system; it's to use criminal suppression measures. The 82nd Airborne Division and the 1st Marine Division are not going to root out the center of

gravity of the Jihad now, which is in Europe. It's going to be the German, French, Italian and Spanish intelligence and security services hopefully, when we reconstruct our shattered alliances who will work with us, to find those cells, penetrate them and crush them. That's the idea.

So if you declare war on terrorism, you immediately believe that by taking out Sadaam Hussein you're going to defeat terrorism. And even the president himself now recognizes there is a difference between insurgents, which represent 90 percent of those attacking our forces, who are not going to follow us home, and that fewer than 10 percent of those attacking us were foreign Jihadists who are going to follow us home.

And the whole idea – what I'm arguing here is that by declaring war on terrorism, that was a smoke screen for going back to '75 and picking up this notion – or '95, whenever, this notion of restrengthening the presidency. I think that's what it was all about.

MS. JOHNSEN: And back to –

MS. NOLAN: Support – oh, sorry.

MS. JOHNSEN: Harold and then Beth.

MS. NOLAN: Yeah.

MR. KOH: To try to get to the question of remedy, there are two quotes from the Nixon era that are relevant. The first, President Nixon's statement to David Frost, "If the president does it, that means it's not illegal." What's distinctive about what's been going on in the last couple of months with regard to torture, NSA spying, signing statements is the claim that the policy justification provides the legal justification and that's what Alberto Gonzales said to Russ Feingold. Russ says to him, "Can you – can the president violate a statute?" "And he says "You can't do anything that's illegal." "Then, well, what if the president authorizes it?" "Then it's legal." So that's what's distinctive is the notion that the president's action is a law unto itself.

But the second quote, which is more relevant to this situation, is Henry Kissinger's who said "The illegal we do immediately. The unconstitutional takes a little longer." (Laughter.) And that is because I think the checks and balances have been stunningly supine, particularly Congress here.

Doug and I testified on the FISA issue and the NSA spying and they were talking basically about how quickly can we ratify the illegality which is going on without our knowledge for the last three years. And then in the middle of it they said well, we've got to take a break and go vote on reauthorization of the Patriot Act and my question was what's the point? The Authorization of Use of Military Force Resolution under the theory being put forward has already reauthorized the Patriot Act, so doing this is pointless.

And I think the key point is that Congress needs to step up and then legislate, and the courts need to step up. On the military commission point, the president to my amazement the other day said Guantanamo detainees should have their cases heard in court, which is essentially what people have been arguing all along. Then, after it pointed out that was inconsistent with their position in *Hamdan* the next day said, oh, they should be tried in a military court. But clearly they've given up on Guantanamo and military commissions.

MS. JOHNSEN: Beth?

MS. NOLAN: I just wanted to say that it's important to remember that these – the use of the signing statements and the president's assertion of broad executive power is not occurring just in the national defense area, commander-in-chief area. It's occurring with respect to inspectors general and other kinds of laws that have nothing to do with this, so it really just supports this idea that we're talking about a broad attempt to expand presidential power.

MS. JOHNSEN: Yeah, right. Let's now go back to – or forward to focus more on potential remedies. What can be done about this? So Harold, you mentioned the reauthorization of the Patriot Act. Congress has tried to do something. We talk about why it hasn't tried to do more, but Congress really is hampered when you have a president who ignores statutory provisions or reserves the authority to do that.

For example, the reauthorization of the Patriot Act tried to inject additional oversight reporting requirements, president signed it and said I don't have to comply with these. I'm going to ask Ron and then the Senator to start us off on what can Congress do in this kind of climate?

MR. WEICH: I'd just note, Dawn, that the original Patriot Act had very strict limits on the detention of people that have not been charged with crime but are suspected of terrorism, and it was the subject of intense negotiation and then Jose Padilla finds himself in the brig for years in blatant violation of those positions. So you're right that the Congress passing the law in this context doesn't achieve the goal and Dean Koh says, you know, Congress needs to step up and the courts need to step up and I say yes, but easier said than done.

I think a Congress that was really wanting to assert itself in this arena would have to resort to the power of the purse. It's not enough to pass a law that says you shall report to us or you shall only do this for 15 days. They need to then follow-up, bring administration officials up determine if those limits are being complied with and if not withhold funds for various activities. That's a very, very difficult thing to do in a political environment when we are at war. And I don't mean to step into the deeper profound dispute between Senator Hart and Doug about what's the nature of the war. We're at war in Iraq at least, and then the global war on terrorism is what it is, and it's at least a very precarious moment in the nation's history, and 9/11 happened. And as a

result members of Congress are loathed to withhold tools that may be necessary for a future 9/11.

What can Congress do short of the power of the purse? Well, go back one step in my little analysis and say at least hold oversight hearings and find out what's happening. To the extent that those hearings touch on national security matters, there are mechanisms for having closed hearings, and we need to kind of resuscitate a process of congressional oversight outside the public view in certain areas. And then I come back to the notion that the courts have a role to play here, but they are under siege really. And I think that the court-stripping measures of recent years, even before the Bush administration going back to 1996 with the Prison Litigation Reform Act and the restrictions on habeas corpus, and the Antiterrorism and Effective Death Penalty Act are very, very dangerous and need to be the focus of the attention of groups like the American Constitution Society, as I know they are.

Lawyers need to rush to the defensive judges, because they are not well suited to defend themselves, but we are going to have a weakening of the most important check on executive power, which is judicial review.

MS. JOHNSEN: Senator?

SENATOR HART: I think it's pretty obvious the answer is that Congress should do its job. It's not doing its job. Its job is to oversee the execution of the laws by the executive branch. It's not doing that. It's not doing that because both houses belong to the president's party and the members of the majority think they took an oath to support the president when in fact they took an oath to support the Constitution of the United States and they haven't been doing that.

(Applause.)

To my knowledge, there has not been one hour of hearings in either branch of the legislature on the conduct of the war in Iraq. If I'm wrong, straighten me out. But it was a Democratic Senate that held hearings on Vietnam beginning under a Democratic president that brought the Vietnam War eventually to an end. I cannot see Senator Frist or Mr. Hastert or any others holding hearings that are critical in the best sense of the word of the conduct of this war including the equipping of the troops. We're not just talking about is the war right or wrong. We're talking about how it's being done.

Why are we building 170-acre fortress in downtown Baghdad when our troops don't have adequate equipment?

(Applause.)

MS. JOHNSEN: So let's assume that after November we do have one house in the hands of another party. What do you think we can expect or hope for then? Ron?

MR. WEICH: Maybe I'll get a better office, I don't know. (Laughter.)

MS. JOHNSEN: That's a start.

MR. WEICH: I think there would be more vigorous oversight. I agree with Senator Hart that this Congress is falling down on the job. As he well knows, the chairman of the committee calls these hearings. Democrats have tried – and I don't mean to be an apologist, but there are Democratic policy committee informal hearings on the war in Iraq, the Halliburton overcharging, all kinds of whistleblower things, but it's not sufficient. We do need Democratic chairmen, or let me say chairmen – maybe there are Republicans out there somewhere willing to do this – but someone needs to call these hearings. Whatever hearings there have been have been insufficient and you don't have to go to impeachment. I know that's been what Republicans want to say Democrats would do if they controlled one or the other body. Far short of impeachment, we could have serious oversight.

MS. JOHNSEN: Yeah, I just want to say, since you mentioned impeachment, Senator Feingold didn't call for impeachment, but in his speech proposing censure of the president – very controversial obviously and a mine field I probably shouldn't raise – but the content of his speech is incredibly powerful talking about how what we have is – going back to the *Federalist Papers*, a situation that the constitutional framers believed or hoped would be where Congress would step up.

When you have a president saying he is going to act in direct contradiction to federal statutory requirements, I mean that is serious. And going back to what the senator said, Congress is not doing its job, whatever it thinks about the policies behind what the president is doing, if the president pursues those in violation of federal statute just the principle behind that is so important I think for the Congress to defend. Doug and then Harold.

MR. KMIEC: I appreciate senator's reference to Madison on the Helvidius Pacificus debate or the Madison/Hamilton debate, I think that one is going to be always with us. Justice Jackson said in the *Youngstown* case, hours of research can produce apt quotations on either side and leave you as lost as the person trying to discern the dreams of the pharaoh, that they were as enigmatic. I think that's just simply we have to figure these things out in each contemporary circumstance ourselves. But they're the healthy bookends of that conversation in the same sense that Curtis Wright gives this enormously strong endorsement of presidential power drawing upon John Marshall's statement of the president being the sole organ in foreign affairs and then *Youngstown* pulls that back that there is this constant "ambition checking ambition," to quote Madison.

I do think the Congress is getting a little bit of a bad rap here and I want to come to their defense. The Detainee Treatment Act itself was, I think, Congress saying we want to bring some order to the process by which these detainees held in Guantanamo are going to be treated. We're not comfortable just having the review of their status determined by the military alone. We want to provide for an Article Three court, in this

case the United States Court of Appeals for the District of Columbia Circuit, to have review in that circumstance and we're awaiting the Supreme Court's decision as to whether or not that's going to – that congressional will be vindicated.

But it seems to me that whether you agreed with Congress's choice there or not, they were an active body responding to both what the president had created in terms of military tribunals, responding to what the Supreme Court had said in *Rasul v. Bush* in terms of opening the habeas store and then trying to channel the habeas store to a particular court to bring some clarity and orderliness to the process.

I give them half credit on the FISA problem. Dean Koh mentioned that the two of us were privileged to give some thoughts on the FISA issue as Senator Specter was propounding a legislative structure to bring the current proposal within the structure of the FISA court. Senator DeWine was there. He has an alternative proposal. Those proposals shouldn't languish. Those are – we can debate the policy merits of it another time between the two of them, but the fact of the matter is that there was very, very responsible congressional proposals to increase legislative oversight with respect to that question and hopefully it will see something enacted.

Two other quick points. What to do with Guantanamo. We do seem to be hearing a great deal of let's close it down. We hear that now from the president. We hear it from the international community. I am – we will need some mechanism to judiciously handle the various sets of detainees that we have. We clearly have some bad actors who ought to be tried for war crimes. We're going to disagree about how they should be tried, whether in a military commission or not. One thing that ought to be explored, it seems to me, is an international tribunal of the ad hoc type that was created for the former Yugoslavia, which would I think go at least some steps in the direction of demonstrating to the world community that some of the people we are holding are in fact entitled to a trial of the type that the world community itself condemned in the same sense that Nuremberg condemned the proceedings of the Holocaust.

Now, a good many of the people being held are not of that level and those merely require us to release these individuals in conformity with international standards so they're not being returned to countries where they're going to be tortured or killed or otherwise harmed. And I think we're going to need some real international help on that score, so the countries that have been so quick to tell us Guantanamo is a bad idea also need to demonstrate a willingness to take some of these citizens and welcome them back.

And then lastly, one thought on the Office of Legal Counsel, which we are also fond of up here, it used to have as its role being the conscience of the executive. That was its informal title. It was the one place where you could go in the executive branch and not hear a policy suggestion, but hear the best judgment about what the law requires in light of what Congress has written, about what the courts have construed. That needs to be returned as a standard to the Office of Legal Counsel.

(Applause.)

And there have been suggestions I have seen in writing that says in war time, in order to maintain the balance between national security and civil liberty, it might be useful to have an Office of Civil Liberty that almost does civil libertarian impact statements, if you will, of the kinds of actions that various government actors are taking, in my judgment, on the office that you and I were privileged to inhabit and that others of us here were privileged to inhabit was designed to be that office.

MS. JOHNSEN: I agree with you on that, absolutely. And I think that when we talk about potential remedies, looking within the executive branch, it is important as well – it talks about Congress, what can Congress do, the courts. I think we want to say a little more about that because several of these questions go to why aren't the courts playing a greater role.

But then also looking within the executive branch and many of the panel here have talked about the role of government lawyers, the appropriate role of government lawyers, and written about that and also military, career military officials. Let me continue this discussion by calling upon Harold. I know you had something to say, but I would like you to also in your comments answer the first of our questions which gets us back to the role of the courts. What are the opportunities and obstacles to judicial review of the president's abuse of signing statements?

MR. KOH: Well, a couple of things. First, I do think that Congress has a bipartisan interest in oversight information and withholding money when money is not being spent for the purposes that they're being told. There may be a disagreement about censure or other things, but there shouldn't be disagreement about that.

Whatever you say about the Detainee Treatment Act that was added in the conference committee, there were no hearings held. As the Senator said, Congress was not holding hearings to perform its basic oversight function and I think the statement I made earlier that they are stunningly supine is the most accurate description of what's going on.

MS. JOHNSEN: How did we get the McCain Amendment?

MR. KOH: Well, I think –

MS. JOHNSEN: That might give us insight into what more can be done to constrain the –

MR. KOH: I do think that there are two things that you are pointing to. One is government career lawyers in the JAG corps and the professional lawyers protesting and getting issues into the public domain through the press is a big factor, and that should continue, because they have an institutional interest in maintaining regularity of government behavior.

And then also individuals and interest groups, the librarian protesting against the Patriot Act and other average citizens drawing things to congressmen's attention. So I think that that has to continue.

MS. JOHNSEN: Mm-hmm. Senator?

SENATOR HART: I'd just add I think the McCain Amendment was passed because John spent five and a half years in prison being tortured and he had moral authority to get his, I mean, even override the White House resistance.

MS. JOHNSEN: So it requires that kind of leadership from somebody with the moral authority as well as –

SENATOR HART: It doesn't – it's not an argument for torturing members of Congress, though. (Laughter.)

MS. JOHNSEN: Only if necessary.

SENATOR HART: Except in a few instances. (Laughter.)

MS. NOLAN: But speaking of which, there is an argument for making sure that whatever is being done affects Congress and I think the congressional response to the search of congressional offices which was swift and outraged at this invasion of privacy is the perfect example of that.

MS. JOHNSEN: Yes. Ron?

MR. KOH: And I'd just add on that? Congress was not upset enough to reenact legislation about the warrantless wiretapping of thousands of Americans, but it moved swiftly to protest a warranted search of somebody's office in the face of a violation of the subpoena, so they can be agitated when the time comes.

MS. JOHNSEN: Next question. So, Harold, you mentioned the importance of the public acting through advocacy groups and other vehicles leads my thinking to this question. How do you bring these issues to the attention of a disinterested, skeptical, and uninformed public?

For example, when the president claims authority under the war powers, how can you relate that argument without – or rebut that argument without the debate becoming too academic? How do we reach the public on these issues?

SENATOR HART: I mean, the First Amendment was – protection of freedom of the press was not enacted so that Rupert Murdoch could make money. It was enacted so that, according to Thomas Jefferson, the people of the United States would know about the public's business. There is no other way. Members of Congress have obligations to – and the president – to educate the people on these issues in language they can understand,

but that's often not enough. Now, I know newspaper readership is going down and people are going to reality shows and all the rest.

At the end of the day, a citizenry that does not care or does not want to listen is – that's their fault, but the press is not doing its job these days.

MS. JOHNSEN: So you mentioned the press and Congress have a role in informing the public and that could help. Harold?

MR. KOH: But there are some basic legal arguments that people understand. It doesn't say that people shall have the right to be secure in their homes except when the commander in chief orders. We have a Fourth Amendment because, as Senator Clinton said, we resisted general warrants which allow you to rummage through people's information without probable cause.

It doesn't say nor shall cruel or unusual punishments be permitted except when there is a war on terror, so you can just make these obvious points and people will get it.

MS. JOHNSEN: I'm going to disclose a personal fantasy I have about fidelity to the rule of law thinking about this panel. My family and I traveled from Indiana, along with a million people, for the March for Women's Lives two years ago here in D.C. I think it would be great if we can think about how can ACS or similar organizations motivate people to care about these issues so that we can have some – I don't know about a million, but some credible showing at a march for the rule of law in D.C.

Going back to judging, what more can we do to make these issues to convey what's at stake why people really should care about having a president that disregards or at least asserts the authority to disregard federal statutes? Often, we don't know exactly what it is he is doing, and that raises this whole issue of secrecy, which I think merits some more discussion.

MR. WEICH: Can I? I think it's tough, because the concepts are very abstract. Separation of powers, rule of law, but I also think there's kind of an inchoate sense out there that the president – that there isn't sufficient constraint on this president's authority. And it will be interesting to see whether that finds a voice in the November elections.

You know, individual citizens in a specific congressional district may say, my congressman is okay, he's doing just fine, but maybe we need a congressman who would contribute to more congressional oversight. I mean, it's not anything that's going to motivate any voter. There are no single-issue voters on separation of powers, I don't think.

MS JOHNSEN: Not yet.

MR. WEICH: But in a rough aggregate sense whether the American people are looking for more balance in the federal government's approach to these questions.

MS. JOHNSEN: Do you think that the public opinion polls that showed dissatisfaction and low approval ratings in part reflect the concern about the separation of powers?

MR. WEICH: I do. Yes, it plays a role, I think.

MS. JOHNSEN: Others? Senator?

SENATOR HART: We salute the flag of the United States of America and the republic for which it stands in, probably not one in ten Americans can tell you what a “republic” is. Here I’m critical of my own party.

We have been the party – the Democrats have been the party of rights to the benefit of the nation in the mid late 20th century, but we have not emphasized it, with the possible exception of John Kennedy, the role of duties. Democracy is about the right to vote and republic is about the duty to vote, and I think political leadership of both parties in this country ought to reemphasize the duties of citizenship including, by the way, in the law school.

Being a graduate of Dean Koh’s law school, that was very much emphasized at least when I was there and I think –

MR. KOH: Still is. Still is. (Laughter.)

SENATOR HART: Now, if you could – to answer your question, how you get this million person march, maybe every law school dean in America ought to make it a matter of graduation for all law students to participate in the march.

(Laughter, applause.)

MS. JOHNSEN: Doug?

MR. KMIEC: I had a similar experience to yours, Dawn, in traveling here about thinking about this. What triggered it was my flight was rounded through Atlanta and throughout the Hartsfield Airport in Atlanta there were men and women in fatigues in full battle gear. And I looked at them and I talked with them. That’s the consequence of the decisions that are or are not made. That’s the reality of lives seriously affected by the rule of law and the separation of powers.

This country has not always had an imbalance between Congress and the president on issues of war. It’s sometimes said by scholars that that has been true, but in fact it’s a modern development began in Korea, not declared, continued in Vietnam, not declared, continued in Kosovo, not declared, continued in Iraq and not declared. And yet, those men and women that I saw in that airport were as real and as flesh and blood and as committed to the republic that the senator learned so well at the Yale Law School.

When we ask for that supreme sacrifice, I don't think it's too much to ask the Congress of the United States to ask for decent reasons and to explain them.

(Applause.)

MS. JOHNSEN: We have time for just a couple of more quick questions and this is more a comment, though that anyone may respond. If this president has abused signing statements, and has violated the FISA act, and has violated laws barring disclosure of covert operatives, and conducted illegal spying on citizens, and ignored statutes, and says I don't have to comply with any law I don't want to, then why is there no call for impeachment?

(Applause.)

But that strong statement deserves to be read. Now, in the federal – yeah –

MR. KMIEC: When the president's popularity gets to about 19 –

MS. JOHNSEN: Yeah.

MR. KMIEC: – there will be calls for impeachment.

MS. JOHNSEN: There are several questions here about the issue I'd like to end on, the role of the courts. Have the courts been playing an effective role and can we expect them to become more involved and what should they be doing here? Who would like to start us off on that? Harold?

MR. KOH: Well, in the war on terror, the strategy of the government has been basically to bring the cases in the Fourth Circuit. Go forth in the Fourth. (Laughter.)

One of the results of the *Padilla* case is that enemy combatants can be held wherever the executive branch wants to hold them and that's where they filed their habeas petitions, so they put them in the Fourth Circuit, which concentrates the litigation there.

So I think that the courts have been in part excluded because of government strategy. Litigants have to have the opposite strategy. Now, there have been two very troubled district court opinions in the Southern District of New York in the last couple of weeks, one by Judge Trager, one by Judge Gleeson, so it's not only the Fourth Circuit, but I do think that a strategy of more litigation by private groups has to be the way to go.

MS. JOHNSEN: How about judicial nominations? That's an issue that Ron raised and the senator mentioned that it would have been better of the Alito and Roberts hearings had talked more about separation of powers, presidential power issues. And I

think there was a fair amount of that, especially in the Alito hearings and I know Beth was one person who testified on those issues.

Can we – what role did future judicial nominees play and the judicial nomination process play in both educating the public and also hopefully moving the courts to be more responsive on these issues?

MR. WEICH: Well, Dawn, since I think that the judiciary does have a very important role to play in all this, they are the referees in the back-and-forth between the executive and the legislative branch or something of keeping the executive within its constitutional boundaries. How you choose the referees is pretty important. And I hope everyone agrees with me that a very disturbing episode in recent American political history happened last year when the Republican Senate threatened to unilaterally change Senate rules without using the process by which Senate rules can be changed to alter the role of the Senate minority in debating and ultimately helping to confirm or not confirm judicial nominees. That's change in the rules.

I'm sure there's some sports fans out there. If suddenly one team said we're going to play this baseball game with two outs instead of three, we're going to put 10 players on the field, and the other side only have 9, I mean, that wouldn't be a very good baseball game. And it's not a very good constitutional system if the rules are being manipulated in that way.

I think Senate Democrats are very comfortable playing within the rules. Recognizing that the power to block a judicial nominee should only be used under extraordinary circumstances, but that right has to be there. It's well grounded in the history of the Senate, and I am proud that some Democrats turned back that effort and that there are still some judges who President Bush would like to see on the bench who will not be on the bench because of some Democrats.

MS. JOHNSEN: Doug?

MR. KMIEC: I don't think we can count on the courts, nor do I think we should expect them to come to our rescue. That's not their function. Their function is to vindicate individual rights as those cases are brought and to the extent –

MS. JOHNSEN: Well, then how about cases like FISA violations? Specific cases that do involve individual rights?

MR. KMIEC: Well, I don't want to get into a debate about standing at this point as to whether or not they have it. I think there is arguments on both sides of that question. My larger point is to draw Justice Jackson's observation in *Youngstown*. Jackson – I'm sorry, not in *Youngstown*, but in the Japanese internment cases.

Jackson said one of the things you really have to be curious about is why you would want to assign these questions of war and peace to the branch that has the least

direct constitutional assignment on that question and has the least access to the best information on that question. So much of what determines the outcomes of those issues are not legal questions, but policy and international diplomacy questions and therefore they are beyond the can of the judicial personnel.

Jackson said a military order that is contrary to law is a transient thing, but if I give it deference and affirm it in anyway, it then lies about like a loaded weapon to be used on other occasions to do even greater damage. And Jackson used that as an admonition to himself to say, I ought to be very careful about judging matters I don't have complete information about. I don't think there's any –

MS. JOHNSEN: Well, how about – I'm going to go back to – my question was where Congress has weighed those policy arguments and set out a statute. We don't talk about FISA in particular, but where they have described legal protections for individuals and it is in the context though of war or some kind of a war on terror. Is that a reason for the courts to get out of the business and protecting the rights that Congress has outlined in its statute?

MR. KMIEC: Congress has clearly conferred an individual right that is enforceable by the terms of its statute in court. The court has every responsibility to address that case, but it has to be careful to segregate that case from the conduct of foreign policy.

MS. JOHNSEN: All right. Well, that will have to be the last word. I want to thank the panelists for –

(Applause.)

(END)