Nina Totenberg: Welcome to the last of our discussions about the presidency and the court, this one being about the presidency, presidential powers. First, I'm going to introduce very briefly everybody on the panel, to my immediate left is the inimitable and indomitable John Q. Barrett, of whom you've heard much. He's a Professor at St. John's Law School and the Living Breathing Jackson scholar. And those of you who aren't on his list, you should be, his e-mail list. And sitting next to him is John Dean who served as counsel to President Nixon, star witness against President Nixon, a distinguished Professor himself, visiting scholar at the Annenberg School of Communications at the University of Southern California. And he's written a ton of books, I'm not going to tell you what they all are, but I always tell you what the latest one is if it's just out, and this one is called "Broken Government, How Republican Rule Destroyed the Legislative, Executive and Judicial Branches."

John W. Dean: Subtle title.

Nina Totenberg: Subtle, very subtle. And next is, Beth Nolan, who is about to become counsel for George Washington University and who served as counsel to President Clinton. And sitting next to her is Anthony Lewis, who won a Pulitzer Price for covering the Supreme Court for the New York Times and went on to write one of the most notable columns for the New York Times for, I don't know, how long and I'm sure he will and can tell us. And lastly, Ambassador Boyden Gray who served as counsel to the first President Bush, has very graciously agreed to join this panel because I viewed it as a little bit politically tilted. And he was here and with no advanced warning, he has incredibly graciously agreed to be on this panel which, as I say is a little bit of ganging up on him, I think. And, he has to leave early because he has to go into the city, so I'm going to get him out of here a little early, but he has my eternal gratitude for agreeing to do this. So, just as a short overview, we don't have any long prepared stuff. I don't have to interrupt anybody on this panel, but they all do have things they do want to say. Every president in modern times has claimed significant executive power, and every president in modern times, as far as I know, has claimed more executive power than he got away with, even FDR who tried to pack the court. Truman tried to seize the steel mills. Nixon claimed immunity from the criminal justice system, Clinton from the civil justice system, Reagan from Congressional oversight, and Bush from judicial and congressional oversight, not to mention, to some extent, in terms of a new secrecy regime, public accountability. So, how much has President Bush changed the equation here? He got pushed back by the Supreme Court three times so far, but every time he's gone back to the well in Congress and he got pretty much what he wanted when he asked for it. And neither the Court, nor the Congress has really pushed back on a lot of other subjects. The administration, to site, just one example, it's small but it is, I think, emblematic, still,

has not allowed the judiciary committee of the Senate or the House to seek the legal opinions, just the legal rationales issued by the Justice Department on torture. What's more, in an era when government can tell with far more precision who's talking to whom, I would argue that, at least until recently, leaks were harder to come by. So, I have a way to start this off, which is do to the panelists think that the Pentagon Papers could have been published today. Let's assume a New York Times reporter gets hold of a report compiled by this Administration on how we got into Iraq and what our real prospects are for prevailing there. First of all, would the New York Times publish it? Would the Washington Post publish it when it caught up a couple of days later? Well, that's historically accurate. Would the Administration try to stop it? And would the Courts intervene to prevent the administration from stopping it. I think, Tony Lewis, you were actually there working for the Times at the time of the Pentagon Papers, so why don't I start with you? And then, I'll go to Boyden Gray and then come up the line, so to speak, or anybody can jump in, it doesn't really matter. I just want to get this started.

Anthony Lewis: Well, Nina, I thank you for starting with me, but I wasn't in fact there. I was in London for the New York Times. But, I've thought about it a lot since, and taught the case every year for about 25 years. So, I'm prepared to answer your question. The answer is yes, the New York Times would publish it, publish that material. There was a brief period, not so brief, unfortunately, after the invasion of Iraq when, I think, the answer might have been no. The Times and the Post were both very lax in their coverage of the process of getting into the war. And then, some months later, we both amazingly published apologies on behalf of the management for our lack of curiosity and diligence in uncovering the process that led to the war. So, I have no doubt, now, in the light of what's happened since, the reporting on matters such as warrant-less wire tapping, the existence of the torture memorandum, the existence of secret prisons abroad, which that was a great Washington Post scoop, we should give credit where it's due. And I have no doubt, now, that we'd publish. And I'm inclined to think that if the same process happened as, in the Pentagon Papers, crucially, the New York Times published for three days before court injunctions stopped us. I say it's crucial because if the Nixon Administration had known about it, didn't know we were going to publish and had stopped the publication, gone to a court before anything had been published, there would have been- it would have been much easier for the government to speculate about how damaging this material was going to be and how it would destroy the country and the North Vietnamese Army would be walking down Broadway and all of that. When three days had been published, and it was obvious to anybody who read them, that that wasn't the case, that it was history and it wasn't likely to have any effects. Certainly the trial judge, Judge Griffin thought it wouldn't have any significant effect. And, if the same process adhered here, and something had all ready been published, I think, the Courts would not sustain an administration effort to stop the publication.

Nina Totenberg: Boyden Gray, what do you think? Do you think- in my hypothetical, do you think it should be stopped?

Ambassador Boyden Gray: No, and I don't think it would be. And, I think, parenthetically, if you want to know why we're in the war in Iraq, I think there's been plenty of disclosure, not in an integrated document like the Pentagon Papers, but there's been plenty of disclosure much of it, I think, probably unwelcome by the White House. And, one issue I want to throw in here and I don't want to distract, but the reporters privilege has been watered down too, which, I think, is also a breech into, if you will, into secrecy in a perverse sort of way, but that's a factor too. And if you look at the Plame case, a lot came out in the course of that prosecution. I'm not sure it was journalism's finest hour, but it has lead to even more access, I think, rather than less, in the short run, although in the long run, maybe, Tony Lewis would persuade us that any infringement on the reporter's privilege is a long term disbenefit but, I do think it's relevant to the debate.

Beth Nolan: I wonder two things, whether, first of all, somebody who wanted to leak it would have access to that kind of information today because there's been such a much closer hold on information so that, even we know, even the legal opinions, written by the office of legal counsel at justice weren't provided to the agencies they effected. So, I think, the chances of something like that being leaked today would be quite different. And then, secondly, I doubt it would ever get to court. I think, what you'd have is the White House going to the New York Times and trying to prevail upon them not to publish. I'll accept Tony's view that the Times would anyway, but I don't actually know depending on what information the White House provided whether that would happen or not.

Anthony Lewis: Nina, can I just throw something in here, even though I've had a turn? In fact, just maybe in partial agreement, but only partial with Beth, it took the Times a year after the White House went and talked to the New York Times. It took the Times, a year, to decide to publish the story about warrant-less wiretapping.

John W. Dean: I was there. And Tony, maybe it's a good thing you weren't, because the first request I had from the President was the old 1917 Espionage Act with criminal sanctions, available against the reporters at the New York Times. I actually ended up sending that information over to Bill Rehnquist who was then, the Head of the Office of Legal Counsel. Bill was out of the Office at the time, he had a bad back and was home recuperating. So his deputy, but I'm sure Bill was involved in the sifting through of the decision. Tom Koipper [ph?] came back with a memo saying, "Yes, they probably are liable, but it's been the long time policy of the Department of Justice, not to prosecute criminally for this type of offense. I don't know if you're going to stay on this subject but, of course, that was just the opening shot, because a few days later, when Henry came

back, who had been out of town, he would change the President's mind about an awful lot of things and we would march forward to what became U.S. versus New York Times, but we can explore that if you want to.

Professor John Q. Barrett: I defer to all of this. I was a 10 year old in Milwaukee at the time.

Nina Totenberg: You rat, you are not supposed to do that on this panel, make us all feel old.

Professor John Q. Barrett: But, I read and watched them on TV. I think, Iraq in 2007 is too easy a hypothetical because we have traveled a huge distance in the public concern in the journalist culture. I think, a better, tougher hypothetical is a report concerning Iran and reports concerning, this is entirely hypothetical, I have no clearances or knowledge, ongoing covert team deployments in Iran, let's say, or let's say Pakistan, an ongoing intelligence gathering factional infiltration security leadership instability coup assessment in Pakistan. If that were the report, a front burner contemporary issue where we haven't culturally traveled a huge distance, I think, it's probably a tougher question for the New York Times. I defer to Tony and journalists on that. I think, it's probably a closer question for the Department of Justice, even with new, and I think, more capable sober leadership, today. If it pursued some kind of prior restraint, I think one more piece to add in that's significant is the new state secrets culture that is part of our litigation landscape under the Bush Administration, particularly in the context of civil cases arising against phone companies for privacy statute violations and so forth. It's not a damage assessment claim of privilege which is the kind of argument that Irwin Griswold made in the Pentagon Papers case, "That the sky would fall if the publication continued." It instead is, simply, an argument for privilege and thus immunity from judicial process based on the fact of classification. And that is not a new development. It's something that's existed in our law for 50 or more years. It came to the Supreme Court in an odd, wrongful death action in the 1950s, but it's been dusted off and used aggressively in litigation today. And so, if this proposed publication resulted in the proposed action of some kind of, and got into court, and a court was proposing to adjudicate this in a hostile way, there's a different argument to sort of shut that judicial restraint down. It's an executive branch classification power against judicial accountability and that's a very live matter.

Nina Totenberg: I think that this administration would argue that, as it has in a whole variety of other contexts that this is a different kind of war than we have ever been in before. And that therefore, the rules are somewhat different. The position of any president has to be much more aggressive. And that, a kind of secrecy that we really

haven't tolerated except in the middle of a kind of censorship kind of regime of battlefront more traditional circumstance is tolerable in our civilian court system. I'm wondering what everybody's thoughts are, on whether that's at all justified?

Ambassador Boyden Gray: Well, Nina, can I drop in here? I think we ought to distinguish between surveillance of U.S. citizens and surveillance that may take place with U.S. instrumentality of foreign potential terrorists. My memory is a little bit down, because I was given too little time, no time to prepare for this, I couldn't refresh my memory about the disclosure which caused bin Laden to stop using cell phones. But, that was a disclosure of sources and methods which did cost us an extremely lucrative line into what he was doing.

Nina Totenberg: I think that was in court, actually.

Ambassador Boyden Gray: Well, it may be, but more recently, the New York Times, I believe, rather regrettably, and I think, they've apologized since, revealed the existence of the Swift, how many people here know of Swift which is good that nobody really knows about it, because the New York Times didn't do that much damage, but it caused huge problems in Europe. Swift is a mechanism by which treasury will sift through huge amounts of commercial transactional data to try to find money transfers abroad between terrorists organizations. It doesn't really involve U.S. citizens, but there has to be some safe guard, to assure the public that that, in fact, is the case. It caused- the White House mishandled it, because they should have alerted the European authorities, where the sensitivity arose, they should have alerted that the EU authorities that this was happening, so they weren't blindsided when the New York Times published it. But, it's a very, very valuable resource. And the question that has been raised since, is how much value was lost when the Times published it. How many leads have been dried up? How many possible plots have been lost because of the publication?

Nina Totenberg: John Dean, let me ask you since you raised the subject of what happened with the Pentagon Papers, and you said, "Things changed when Henry returned?" So this is, after all a presidential library's discussion, what changed without getting into such enormous detail but what changed? And how did that play out?

John W. Dean: Well, if you recall what happened the weekend in June that the Pentagon Papers were first published on the front page of a Sunday New York Times was the same weekend that Trisha had her wedding at the White House. And the President went in and looked at the Sunday paper really to see how the coverage of the wedding had been. And there, he saw this enormous column about the history of the war

in Vietnam. And his initial reaction, at least, what I was told was not that particularly negative. He thought, "This indeed might be good because it was going to make the Democrats look bad," so he wasn't concerned. And it wasn't until Kissinger started telling him that he, as a negotiator for the government, first in Paris with our secret negotiations with North Vietnam would be having trouble is the North Vietnamese did not believe the United States could keep its secrets. And the button he really pushed that got Nixon's attention was that this could, indeed, jeopardize the planned China initiative, that's when everything changed. There are fascinating tapes. The change first came to my attention when a fellow who had been assigned to my staff walked in, a former New York City detective and he was wide eyed. And, Jack Caulfield wasn't somebody who was wide eyed at many things at all. But Jack came in and said, "I just came from Chuck Colson's office, Colson wants me to firebomb the Brookings Institute." I said, "Come again, Jack." And he explained that Chuck said that, "The President believed that there were a copy of the Pentagon Papers in the Brookings Institute and he wanted- that the plan would be to have a firebomb. And when the fire department responded that Caulfield was to arrange to have burglars to go in and crack the safe." And I said, "You're not serious." He said, "Colson is deadly serious." I said, "Jack, don't do a thing." The President wasn't there. The Senior Staff was in San Clemente. So, I figured, this was going to take an eyeball to eyeball meeting, so I flew to San Clemente on the next courier flight and got a hold of Erleckman [ph?] the next morning, and explained what I had heard. And I said, "John, I said this is just insane." In fact, I had pulled the statute off of my shelf, and said, "You know, it is a capital offense in the District of Columbia is somebody dies as a result of arson." And, I said, "What if that's traced right back to the White House where it seems to be coming from?" He looked at me over his glasses and he then picked up the phone and got Chuck Colson on the phone immediately from the White House operator, and said, "Chuck, young Counsel Dean is out here and he doesn't think the plan for Brookings is very good. Call it off." And he looked at me and he said, "Anything else Counsel?" And I said, "That will handle it this morning," and then returned to Washington. That's how things changed. Incidentally, The Brookings Institute has never thanked me for saving their building.

Nina Totenberg: But, interestingly, Kissinger's objections to the publication strike me as, well, as a reporter or even a citizen, I don't buy them as a justification for a prior restraint. They are, nonetheless, not crazy concerns.

John W. Dean: No, they aren't.

Nina Totenberg: And this Administration in a really novel situation of terrorism has many concerns that are not crazy. The question is, how do you draw the line? And historically, each one of the many demarcations that we have seen, people are always

coming into new situations. I'm sure that President Roosevelt thought that the threat that Adolf Hitler posed was every bit as serious as the one that we think is posed by terrorism today. And there are some things that he did, like the interment of the Japanese that we're all ashamed of today. So how, do we know which are the things that we're going to be ashamed of, and which of the things we shouldn't do, and which of the things we should do? Let me put that to the counsels to the presidents.

Beth Nolan: I'll start. I don't think you ever know. What you have to do is have a system for decision making that takes account for everyone's constitutional role in those decisions. And that means, I think, appropriate consultation with Congress. It means getting statutory authority when you need it, as opposed to just deciding that you don't want to follow the law. I do think there are times when it's appropriate for a President to determine that a law is so unconstitutional that the President will not implement that law. But, I don't think that can be a regular, or should be a regular occurrence. And, I think, it's a matter of using the expertise in the executive branch and making sure that you're not cutting out the people who have the greatest expertise in certain areas in making those decisions. So, I really think it's a process question and you still may end up wrong, but, at least, you'll have done your best.

Nina Totenberg: Ambassador Gray.

Ambassador Boyden Gray: I agree with everything Beth Nolan says. But my difference might be that, I think, where the action is, is further up the line if you're going to try to anticipate things, you have to get back into the organizations that you're combating. And there, the question really becomes, "How do you deal with your allies? How do you share information with your allies? And then when the information comes in, how do you share it internally?" The FBI still, to my knowledge, does not have the capacity to google itself. In other words, you put in airplane flights and you can't google all of the stuff that's in the system at the FBI and come up with an ability to connect the dots. They still don't have the technology to do that, at least, they didn't the last time I looked. And if they had that, I think, 9/11 could have been averted. But, I think, the big focus is, I mean I sometimes worry that we get too obsessed with a memo here and a memo there. I'm not saying that some of these memos can justified, the White House and the Office of the Legal Counsel pulled back some of them. But, I do think that the more difficult questions come with how do you organize this with your allies? How do you do these intelligence operations abroad? I think it's true that anything that involved the placement of assets in a foreign country the President has to sign a finding and that is communicated to the top people in the House and Senate. And sometimes, they have been known to run straight to CBS and disclose it to the world, but generally speaking it's been pretty airtight. I don't know that the public should know about that. I think there are enough checks and

balances in the system, but to me, that's where the key issue is. If you're dealing with a captured agent, somewhere, and you know, you're awfully late in the game. I think, the idea really should be to organize yourself to catch this stuff as it's beginning, and that is not so exotic and not to romantic, but still extremely difficult bureaucratically.

Nina Totenberg: Well, the way we were organized for quite some time was repudiated by the Supreme Court in Hamdi and Hamdan and Rasul. And Hamdi probably is the quintessential case because that involved an American citizen actually captured on the battle field in Afghanistan. He says he was turned over for bounty by some warlord. But, whether or not he was is, in some respects, irrelevant because we let him go, eventually, once the Supreme Court said you're going to have to either come up with the evidence in some fashion or let him go. We let him go. There have been a lot of extraordinary assertions of executive power, and limited to very few people within an inner circle in the White House. And the question is, how much we can allow that, as a free society to go on, and still call ourselves a free society, Tony Lewis?

John W. Dean: Do you want the counsel to finish on…

Nina Totenberg: I thought you all ready said what you said?

John W. Dean: No, I hadn't.

Nina Totenberg: Okay, all right.

Anthony Lewis: I wanted to say something about the previous. Could I say something about the previous question, before we get on to your important new question? I think you gave Henry Kissinger a free pass, quite unjustified. I think Kissinger's expostulations about the need to go after the Pentagon Papers and the New York Times were outrageous and motivated by factor that had nothing to do with the national security. The Haldeman Diaries said that he said, "We might as well give up our government and turn it all over to the Soviet Union. We can't keep a secret, Mao will never talk to us now that he sees the New York Times publishes everything we do." Now, I want to ask you, Mao Zedong changed a policy of his entire life and decided that it was in the urgent national interest of China to engage in the United States. Is he going to look at a headline in the New York Times and change that? That's a joke, that's just a joke. And furthermore, six months after the Pentagon Papers was decided by in the Supreme Court, the toughest man in the Justice Department, the Head of the Internal Security Division Robert Mardian, prosecuting Daniel Ellsberg asked the Pentagon for some backup on how serious this violation of classification rules was and the leakage of the secrecy. And he

wrote a memorandum to Attorney General Mitchell saying, "The Pentagon answered my question. It's all rubbish. There are no secrets. They can't tell me anything." That was the great secret of the Pentagon Papers. And we've got to be skeptical, ladies and gentlemen, when they claim the house is about to fall down or the sky is about to fall, check it out.

John W. Dean: As the solicitor general, himself, later learned he regretted having argued the case as aggressively as he had. We were following up along on the former White House counsel…

Nina Totenberg: I'm losing control here.

John W. Dean: On this question on process, you were really raising, but really it's a policy question too, of how we would deal today with the situation of terrorism. And is there the justification? Well, obviously, I think, Borden [ph?] is correct, a decision has been made at the top this time. The process that Beth mentioned has not been employed. And the decision has been we're at war. That we haven't even looked at the other alternatives and we classified this as World War III for all practical purposes. I'm not so sure that's a correct classification. Most of the reading I do, a lot of experts in this area seem to think it isn't - you can't end terrorism with war. You can't kill gnats with cannons; you need very effective law enforcement and you need very effective diplomacy. This is a very wide spread problem and to make the decision based on the fact that we're at war makes it very easy. And then when you look at the memos that are justifying the actions, based on the fact that we're in an emergency situation, that we are at war, and I'm thinking, specifically of the memos that people like John Hu cranked out early and justified things like torture, going to war in Iraq, getting around the attorney general and back channeling it right into the Vice President's office, you know, these are really quite extraordinary documents not only, in the procedure and process that was followed but in the content that was involved in them. They border on fraud as far as intellectual honesty.

Professor John Q. Barrett: Let me take a quick historian's cut on Nina's question. How do we know today if a proposed executive action is justified or will be one of those disasters that we regret? And, I think, the short answer, I don't mean to be flip about it, is we won't know until later. It really is a process and risk question now. And it is an executive branch responsibility of great wait and hopefully great sobriety and expertise as those decisions are being made. I think the process is not simply the first decision, but also the reassessment process, the closing of a coarse of action. For example, and I think this is not controversial in the historiography of the Japanese-American interment. It is easy to look at that story in 1944 and be horrified and say that, "It had become

indefensible." And guess who said that first? It was the Roosevelt Administration through the War Department, that announced its closure of the camps on Sunday, December 17, 1944, which is the day before the Supreme Court decided the infamous Korematsu decision and the completely forgotten Endo decision. It's the slow and refusing to reconsider course that is, in history's eyes, a serious process problem.

Nina Totenberg: Do you think that was really relooking at it? Or do you think that they were worried about what the Court would do?

Professor John Q. Barrett: I think they had a leak and they were getting out ahead of the Court, if only by a day. The Court, as few member, actually struck down the interment system, that's what that Endo case is about. A conceitedly loyal American, no evidence of her disloyalty and the court holds unanimously that her incarceration is illegal. What the Court is upholding in Korematsu, three years into this horrific system is the exclusion that through young Fred Korematsu out of San Francisco and sent him to a race track to report for further shipment inland to an interment camp. And that was not a real question in 1944. It may well have been, or a curfew may well have been in the second, third and fourth weeks of December 1941. And where an executive branch feels, I think, is when it stops looking at its watch. When it says, "We're on a course, this is our course, forever, the stakes are always the same." The stakes change. And history will look back on a process that hasn't recalibrated and find a disaster much more than it will look back on a careful ongoing process because that will be more sophisticated and careful.

Nina Totenberg: Well, hasn't this administration, in fact, to some extent done that? I mean it got worried about in Hamdi that he hadn't seen his lawyer for the whole time he'd been, then suddenly the case goes to the Supreme Court, the Court surprisingly agrees to hear it, and "Hello, you can see your lawyer now." I mean it's very much the same kind of thing, isn't it?

Professor John Q. Barrett: Yes, it is. Although, in today's war on terror, I would say that the legal issues the Supreme Court has dealt with really nibble around the edges of the major executive policy questions. The purchase that the legal system and the courts has been able to get is on the enemy combatant designations, Guantanamo as a facility and the availability of Habeas Corpus. That doesn't get to the huge questions, Iraq troop surge or withdrawal, military attacks, closing Guantanamo, ceasing rendition, torture if we're doing it, et cetera. Those aren't questions that the Court can touch. The Court is out on the periphery but the President is at the core. And so, those are things that, I think, this process question that, Beth and the other White House Counsel has spoken to is really focused on.

Nina Totenberg: Let me ask Ambassador Gray something, before we lose him in about 20 minutes. Jack Goldsmith's very interesting book draws a parallel between or a contradiction, really between Roosevelt and President Bush and says that, "Even thought President Roosevelt did a lot of things that are sort of right on the cusp of legality, lend-lease, and a couple of other things, he does everything - and the destroyer thing - he does everything his power to get the other branches to sign on. And to make his administration as bipartisan as possible." So he brings republicans into top jobs in administration as Secretary of War, Secretary of the Navy, et cetera. He consults, extensively, with Congress in a bipartisan fashion. He threatens Congress. He basically says, "You do this, if and you don't do it, I'm going to do it." But he plays all of the angles in a way to achieve some sort of a bipartisan consensus that allows him to do what he think is necessary for the national security. And Goldsmith faults his former boss, the President of the United States, President Bush for not doing that, for limiting, in fact, to the tightest group possible in the White House these decisions, for not really consulting Congress, for not bringing in people from the opposition party into the administration, for not even consulting the JAGs about key things involved in everything from Guantanamo to the way questioning people who are captured. He faults this president for not following the Roosevelt model, and thereby it's his argument, Boyden, that this president in the last analysis injured executive power. Is that unfair?

Ambassador Boyden Gray: I've been, maybe blissfully, out of the country for much of this. But, I mean it's a very good question. My experience was, and we have a Senator here, and he's not going to be able to be allowed to speak unless you give him the microphone, which I think would be a good thing to do, right now.

Nina Totenberg: When you leave, we'll get him up here.

Ambassador Boyden Gray: In recent years, which I don't think happened in the Roosevelt years, in recent years, this has been a pattern of Senators getting these very, very good nuggets of information and then leaking them. You know, don't ask me to give you chapter and verse, but once Senator, I think, was relieved of his, I won't go into it. But it has happened too many times. So, I am, in some ways, quite sympathetic to the President not wanting to share information. Now, were some of these memos overdone? They were overdone? And is Goldsmith right? That it ended up - the backlash ended up doing more harm than good. I think, on some aspects of that from what I've known and from what I've been able to read, Goldsmith is probably right. But people do make mistakes and nobody is immune. If you really look at the big picture, though, I mean I'd like to ask the people up here, the panel up here, especially the Professor, do we have two professors? Beth are you a professor?

Beth Nolan: Not anymore.

Ambassador Boyden Gray: You know, Ex parte Quirin, where he took the German saboteurs and that was pretty rough. Maybe Ex parte Quirin has not been overruled. I could never quite figure out in trying to read the Hamdi decision whether the current Court has overruled Ex parte Quirin but that's a pretty tough thing as was the resuscitation yesterday by Justice O'Connor of all of the laws but one. In time of war, in time of stress, the presidents have done some pretty rough things. And if you take the suspension of Habeas Corpus, you take Ex parte Quirin, I'm not sure that anything President Bush has done is as sweeping as either of those two assertions of power.

John W. Dean: I've been given permission to follow up to ask you a question about when you were there, I'm thinking of when Bush I went to Kuwait and the way the process was followed there, and indeed, a strong coalition was assembled, a lot time was taken. And a Secretary of Defense by name of Cheney was arguing to the White House, maybe to you, maybe to the President, directly, we don't need the permission of Congress to do this, we don't need this coalition to do this. In fact, he was trying to sell a secret plan around the Joint Chiefs. Is this the sort of thing, can you tell us anything about how this was rebuffed and how the coalition was built?

Ambassador Boyden Gray: The coalition was built by the President, almost from day one with the grand assistance from Secretary Baker and Pickering at the U.N. I mean I don't know anything about this secret plan. It is true that Gates did not want to go to Congress to get advanced approval, authorization to use force, but neither did Sununu, neither did Scowcroft, neither did Baker. The only people who wanted to do it were the President and Quayle and me. But we did it, and it was very, very close, as you probably know, 51-49 or something like that, but it was a great, great thing to have done. And the President was quite determined. I mean he wasn't going to hear no from anybody and no came from almost everybody. And there are some great scenes, I can remember being dispatched to go down to the Hill to meet with Dole who was in, I guess he was Minority Leader, we didn't have control of the Senate. But everyone in his caucus was there, everybody, all 46 whatever Senators there were, what to do, where were we. And so, Skowcroft and it's Gates, and it's me, little old me…

Nina Totenberg: Gates or Cheney?

Ambassador Boyden Gray: Excuse me, Cheney. And, permit me to tell this anecdote. So Dole says, "All right, here's the state of play, we have the Solarz Amendment which authorizes the use of force. That's passed the House. We have the defeat in the Senate

of the Nunn-Mitchell, I had the votes to defeat Nunn-Mitchell in the Senate which would deny the use of force. Right now, I don't have the votes to get Solarz to authorize positive use of force, but I don't have the votes yet, I don't think I can get them but I have defeated the negative. And, I propose gentlemen, that that's enough. And is that not enough for us to go forward?" And I looked at Skowcroft, and I looked at Cheney and neither of them said anything, and the seconds ticked by. And, what am I going to do, because I hadn't discussed this with them. So, I say, "No, Mr. Leader, that's not enough, we actually have to have law here and the Solarz amendment has to pass the Senate. And without any hesitation, he slapped his knee and said, "Well if that's the way it has to be gentlemen, that's what we'll try to do." And did Cheney sit there and say, "No, no, no," and start screaming? No. So I don't know what you're talking about.

John W. Dean: He was just telling the Senate that the President didn't need to have the authority that you were telling him they needed to have.

Ambassador Boyden Gray: Well, I don't know that he was telling the Senate. I don't know when anyone ever told the Senate that he didn't need authority. And the President sought authority and his son did it twice, both for Afghanistan and for Iraq. Now, you can argue well, "Gee whiz, maybe there's some misleading in there," and I will say that the yellow cake [ph?], the 16 words, all of that, we've been through it all, there's no reason to go over it. But, I would also remind people that there were 17 U.N. resolutions that were in violation, including the cease fire arrangement 10 years before of the First Gulf War, and there was plenty there to justify the use of force. Whether it would have gotten the votes it got, I don't know, I mean wasn't counting votes. But, I mean, I think we can go overboard in testing all of this. To me, the big issue is, well it's the gathering of intelligence, and, I think, generally speaking, that involves things a lot more boring than torturing people. And, I don't think you need to do that, but if it had to happen, as Dershowitz wrote recently in the Wall Street Journal with certain safe guards, there isn't a president who wouldn't do it if he thought it would save lives. And there's no reason why a president shouldn't be able to do it, if you knew you were going to save lives. But the big issues are whether to deploy, put people in harm's way, soldiers in harm's way. And that is not something the Court is ever going to get into, in my opinion, at least not the Supreme Court. And, I think, one district court did during the First Gulf War. But there, it's a political question. And, I believe, the current White House has done it fairly above board and perhaps too effectively for some of the people in this room. But Congress was never able to get its act together to cut the funds recently this last summer and fall in Iraq. And - but I don't think you can say that's abuse of power. He's doing that openly in negotiation, in bargaining and a back and forth with the Senate of the United States quite openly.

Nina Totenberg: Do you think that the Senate and the House, when they authorized the use of military force in Afghanistan and later, in Iraq, do you think that they thought they were actually authorizing the other attendant policies that the administration now, claims were authorized, everything from warrant-less wire taps, to certain interrogation techniques to, you name, it the administration claims that the authorization of use of military force encompassed a great many things that a lot of the people who voted for it apparently don't think they voted for.

Ambassador Boyden Gray: That's a very good question, but authorizing the use of force, I think, subsumes within it the tension, the attaining, the gathering of intelligence necessary to do it in such a way as to be successful and to save lives. So, intelligence is the critical aspect of war making. And now, in some of the places where you have extent law, and you're ignoring that, then you're in trouble, unless you are really on solid ground. I have no doubt that if you parse through all of this, that the White House has made its share of mistakes, but no more, I think, than any previous administration. You know, maybe Beth can talk about- one of my I sort of thought was amusing, I think the, correct me if I'm wrong Beth, and I don't know if you were there at the time, but the Balkans, there was no use of force. In fact, I mean no authorization for it, they just went in and used it. And my recollection is reading one of my former staff showed it to me, the justification for avoiding an authorization to use force. They went under the War Powers Resolution which allows you to deploy force for 60 days before getting permission. And after 60 days, you've got to pull them all back, which is kind of why it's sort of a goofy law, which is it's never really been applied. But, as I'm told the Clinton Administration employed the doctrine very elegant of intermittent hostilities, which means that the 60 day clock starts running every time a shot is fired and then there's a gap between the next shot. And then the 60 day clock starts again. It's a doctrine of intermittent hostilities. Now, maybe I'm making stuff up, but there was no authorization.

Nina Totenberg: How about it Beth, is he making stuff up?

Beth Nolan: I wasn't there. I think that's a little clever…

Ambassador Boyden Gray: But you agree there was no authorization to use force.

Beth Nolan: I think that you're turning the question around, though. Because, I think, what's important here is not the- as you said, we're in Iraq, we got there, that's done, as you said earlier. The questions, I thought Nina was asking, which I think is a really important one for us is what happens now, with all of the collateral decisions that have to be made with respect to the war on terror? And, I think we have to understand, first of

all, the President has a terrible burden in dealing with this. I wouldn't want to be President, I wouldn't want to have that burden. And, I think, we all have to respect that and understand that very hard decisions have to be made. But they're being made for our country, and they are being made for our country in ways that may effect our country forever. And the questions to me, the important questions are, how do we make sure that our constitution is honored in making these decisions, and our constitution, by our constitution being honored, I mean how do we make sure that to the extent possible, the relevant constitutional actors are playing their roles? And one of the things, Nina, you mentioned, Jack Goldsmith's book, I thought one of his really telling points was, and we heard this earlier, I think, from Heather, too, about the President and the Court have to act in some ways. Congress, both because it's a large body that doesn't act by itself but has to act with agreement Congress, often has to be pushed to act. And, I think, the description of what Roosevelt did, in a way, is that he understood that was his responsibility and his role. And, I don't think, that President Bush has been working with Congress in the same way.

Nina Totenberg: Tony Lewis, you had something you wanted to say.

Anthony Lewis: Several things, by now. First of all, I wanted to say something to Boyden Gray about Ex parte Quirin whether it's good law, I don't know, but in his concurring opinion in, I think, Hamdan case, Justice Scalia said of Quirin…

Ambassador Boyden Gray: Not a high point.

Anthony Lewis: "Not this Court's finest hour." So that sounded pretty strong to me. Then, I really carrying on from where Ambassador Gray and Beth Nolan left off, I want to point out what seems to me the real difference between what this administration has done, which, I think, is a greater difference than Ambassador Gray acknowledged, and the Roosevelt example which, Jack Goldsmith did indeed, emphasize. It isn't only that the present government, executive branch has been slow, it has positively resisted the idea of consulting Congress. That's the point of the Goldsmith book. When Jack Goldsmith, as Assistant Attorney General proposed to Vice President Cheney, they were the decisive factor, Vice President Cheney and his then counsel now Chief of Staff, David Addington, that they go to Congress about warrant-less wire tapping or go to Congress about other such issues, they said, "No, we don't want to go to Congress. We don't want to indicate that they have any power in this at all. We want to do everything on our own." Now, that's the very attitude that Beth was, I think, implying but perhaps, out of politeness did not actually come out and say. Respect for the separation of powers. Respect for the constitutional order. And, the irony is and this, Goldsmith is certainly right about, had they asked Congress early on for the power to amend the Foreign Intelligence

Surveillance Act and go for a warrant-less wire tapping, Congress would have approved in five minutes, under the impulse of 9/11. If they had asked for other things, Congress would certainly have approved it, in my judgment, and even today far down the line, Congress is mostly saying yes to the requests of the Executive Branch. And it's that attitude that, it seems to me, is so different. We want to safe guard our own power, we don't even want to ask their permission.

Nina Totenberg: I want to go back just a little bit to an interview I was once did with a very distinguished fellow by the name of Boyden Gray, in which he described how for decades, post Nixon, nobody wanted to use the words "executive privilege." It was like a dirty epithet because of Watergate. And now, there seems to be in the last few years, even the Bush Administration really hesitated for a while, now it's "Katie, bar the door" and I'm wondering what this panel thinks about the next President? And let's just say for the sake of argument that she has a rather large penchant for secrecy. Do we really think, that she's going to go back to the notion of "open government, big Freedom of Information Act, come get them, I'm not signing executive privilege because it might be difficult." Or do we think she's going to build on, should it be a she, the past six or seven years of greater secrecy, greater condensation of executive power, and sort of a new era? What do you think, Boyden, before you leave here?

Ambassador Boyden Gray: This goes back, again, about what I was earlier about the reporter's privilege and all of that. I just don't know how all of that is going to sift out. What made executive privilege a dirty word, John Dean can tell you why that is.

Nina Totenberg: He's next.

Ambassador Boyden Gray: And over time, generations get older and generations come into play who we weren't around, they were only 10 years old or whatever and who don't know what executive privilege once was and now can deal with it again, and so it comes back to life. But, I don't know that the Courts are going to give this Administration on executive privilege integrated birth, and I don't know that Fred Fielding [ph?] is having any more success or doing anything differently than Beth did or I did trying to reach a combination with Congress, you know, lowd words shouted in the press back and forth. It's all part of a marvelous game of chicken.

Beth Nolan: I know that he's doing something different, because I testified several times as counsel to the President.

Ambassador Boyden Gray: Well, why don't you take over?

Beth Nolan: So his assertion of privilege is quite different from what we were doing. But, since you were there for the last Supreme Court case…

John W. Dean: Which was a very narrow decision as to it really only said that Nixon had executive privilege vis-à-vis having to require - being required to turn over information to a grand jury. That's not very broad. It acknowledged the existence of the privilege on the basis of the separation of powers, but it was pretty narrow. He never did turn the documents over to the Congress, the Senate Watergate committee, nor the House impeachment committee didn't get anything. So, he was ready to still play hardball. I think when Boyden was there, there was great- I marveled at the excuses they had to not turn over information without using the word executive privilege, it was really very creative. And we've seen that again in the Bush II, not to the same, of late we've certainly seen it. And the bottom line has always been to me, yes it is a political process, how much you can get the public even interested or educated but we now have come down with the new attorney general, to the very clear position that as attorney general, he will not have his U.S. attorney, for the District of Columbia not withstanding the statute to the contrary prosecute any contempt of Congress case. If the Congress doesn't dust off some rather rusty machinery where they are able to hold their own trials and at least have sanctions within the terms of the- of any given Congress, there may be no remedy for contempt of Congress, because this administration has taken a very hard line that they will not take it to a grand jury. So, that's where we are. There's no sanction for violation of executive privilege. In fact, they don't even honor subpoenas. They won't respond. They won't come before the Congress. It's just an in your face attitude that defies any respect for a co-equal branch, if you will.

Beth Nolan: That position, the position that the Justice Department will not prosecute a contempt of Congress for an official who asserts executive privilege at the direction of the president, is actually from a 1984 Office of Legal Counsel decision, so it is quite long standing in the executive branch, the theory that an executive branch official who's directed by the president to assert a privilege should not be subject to criminal penalties for following the president's direction. That's OLC.

John W. Dean: But that's OLC and OLC, no court has ever ruled on this.

Beth Nolan: Absolutely not.

John W. Dean: And OLC can overrule its decisions at any time. OLC is making political decisions. They have the best interest of the president in mind. So it's a very self serving

decision that OLC, I'm very familiar with the case and the decision. And it's a pretty thin bit of legal rationale.

Ambassador Boyden Gray: But it is almost 25 years old, 23 years old.

Nina Totenberg: It doesn't have to be criminal does it? Couldn't the Congress simply say, which it hasn't, "That we have the power to seek a civil contempt," and that would have an enormous PR value.

Beth Nolan: I think only the Senate has civil contempt and it's not available for executive branch …

Nina Totenberg: That's right. But there's nothing that says they can't change that.

Beth Nolan: They could, yes, they could change the law.

Nina Totenberg: All I'm saying is they've sat there and let it be either an atom bomb or a nothing, it doesn't have to be that. It could be a carefully aimed shotgun.

John W. Dean: Well, there's even Supreme Court dicta, Scalia has said, "Every branch has within its power the ability to enforce its own rules and regulations." So, I think it's pretty uniformly recognized. And they've just been out, the Congress has just been outfoxed by the Bush II Administration on this issue based on this prior incident where the head of EPA almost was ready to go to jail for honoring executive privilege at the request of the president.

Professor John Q. Barrett: But in the end, that is separation of powers. I think, talking about it as a branch decision is more apt, than talking about it as a self serving executive position for the U.S. attorney general, not to authorize a U.S. attorney to prosecute the White House for pursuing a policy that the attorney general has advised the White House that it has the constitutional prerogative to pursue. It does put the weight on the…

John W. Dean: Nixon needed you for Archibald Cox, that was his argument for firing Cox.

Professor John Q. Barrett: Fighting words. But, I want to put the focus on Congress, and there is a reality that November of 2007 is very late in a second term presidency. And for whatever political considerations are in the mix, the branch decision by the Congress is not to pursue the additional legislation or an aggressive use of the existing tools. And frankly, that is the way separation of powers is supposed to work. I mean, it goes back to Madison and the clash of ambition against ambition, but Congress has made this choice.

Beth Nolan: I do think it's very interesting, as we're talking about this, how little Supreme Court precedence there are for many of these incredibly important executive, congressional battles that most of this has not been decided and is not going to be decided by the Supreme Court. And the role of the Office of Legal Counsel in the Department of Justice has, because of that, very significant importance and enhanced importance in this area of presidential power as compared to any other area in which it might opine.

Ambassador Boyden Gray: I have to leave but I want to say something and give Beth a chance to respond back. Most of these things get worked out and it's a game of chicken. The Congress could vote contempt and then you have the political fallout of that, regardless of whether it's actually implemented in some way that Congress can or cannot do by changing its own internal rules. But it's a game of chicken and you really don't want to get to the courts because you don't know how much you're actually going to lose if the courts actually get their hands on it. I think we always regretted that, because we use this -- I don't know if you're involved in this with Walsh -- we were able to claim -- we did, without ever having it adjudicated -- attorney/client privilege, which in some ways has a deeper, longer, more historical roots, even against the advice of the Office of Legal Counsel that someone who works in the government doesn't get attorney/client privilege. We still used it and used it effectively.

Beth Nolan: We lost that case.

Ambassador Boyden Gray: They took it all the way and lost it so now that's a little gimmick that's no longer. So just to go back to your original question, one of your original questions, Nina, one of the reasons why you hear more about executive privilege today is because we don't have attorney/client privilege anymore.

John W. Dean: Incidentally, Nixon claimed both executive privilege and attorney/client privilege on my testimony. I reminded him that attorney/client privilege doesn't apply to criminal activities. He said "Oh?" and executive privilege, he decided to waive it.

Nina Totenberg: Boyden, I'm going to let you go so you don't miss your train. Go. Thank you. I remember that some of the law clerks who worked for Justice Powell at the time of the Watergate case and the Nixon Tapes case going to the Supreme Court said they knew that President Nixon was going to lose that case when Justice Powell stopped referring to him as President Nixon and simply referred to him as Nixon. Having known Justice Powell, I think that was an accurate assessment. But I wonder how many of those cases, the outcome of those cases, turned to a significant degree on the character of the president involved. I told that that story for a reason. He loses an executive privilege case that some other president might succeed in. The same thing happened to President Clinton who was involved in his Monica Lewisinki problem and therefore, he loses a rather important privilege that had been used by previous presidents and that was attorney/client privilege. In many regards, it's gone now for the ages as they say. One wonders whether the character of the individual president doesn't determine for other presidents what happens to them.

Anthony Lewis: Nina, I think that's a very good question. In my mind, I'd like to talk a bit not about if what you meant was determines judicial decisions. It has an impact on the whole situation. I've always thought that the whole course of the Pentagon Papers case, going back to the Times' decision to publish it after having the documents for a month, turned significantly on the character of Richard Nixon and his relationship with the press. The New York Times and its leaders, Washington correspondents like James Reston and so on, had a very close personal relationship with the President, the Secretary of State and all those people. They were on the phone not with the President but the Secretary of State. The Secretary of State came to dinner, all that sort of thing. Then something secret came up. Their actual deepest instinct was to go to the White House and say, "Is it a good idea that we publish this? Is it okay if we publish it? What harm will it do?" Not only did the Times not do that with the Pentagon Papers documents, it held them in a room at the New York Hilton Hotel under armed guard for a month, making sure that nobody in the administration would hear about it. It was the exact opposite and that I think was partly due the nature of the Vietnam War which had taught us that we couldn't trust the government to tell the truth. But it also had something to do with the bad state of relations and lack of respect for Nixon as a truth teller in the White House. I don't know how much of that carried over into the judicial process, maybe not, but I just feel certain without being able to articulate it that if somebody else had been President when this happened, the case would not have developed as it developed.

Nina Totenberg: John Barrett -- I wasn't even 10 years old when Truman was president. I don't know how he was viewed but my sense is that he wasn't viewed as a crook or as a liar and still, he lost the Steel Seizure case from his friends on the court.

John Q. Barrett: This issue of presidential popularity or perceived presidential caliber is in the mix in judicial decision making. Actual, in spring of '52, when the Steel Seizure case came to the court, Harry Truman was very damaged goods; his popularity was in the 20s. He had announced that he was not seeking an additional term in office and the Korean War, which had been raging for two years, was deeply unpopular. That is the context of the Steel Seizure Case. The court in the end treats it as domestic property seizure but the Truman security argument was that he needed to keep the mills running to produce the steel to arm the forces that were fighting under UN auspices in Korea. It is very much in the mix for the Supreme Court dealing with that matter on an expedited basis that Harry Truman and his administration, plagued with scandals below his level. I think there's an important distinction to be drawn between the caliber and the integrity of President Truman and some of the things that surrounded him, but that is in the mix. But also in the mix is the way his Department of Justice, which was plagued by mediocrity, argued the case. An assistant attorney general went into the district court to defend the steel seizure when the steel companies went in to seek an injunction and offered this description of presidential power. He said "The president is the common law descendant of the original sovereign, George III," and the power of the presidency is the full sovereign power of George II, reduced only by the explicitly enumerated limits in the US Constitution.

Beth Nolan: The same argument that's being made today.

John W. Dean: Nixon made that argument, of course.

John Q: Barrett: George III in 1952 like--

Nina Totenberg: You children are being bad now that Boyden Gray is gone.

John Q: Barrett: It's a laughably excessive argument and when made by someone in a context of failure and perceived lack of candor to a country that has made up its mind about the president's performance -- and maybe unfairly -- history revisits these questions and reassesses. Harry Truman is a powerful, powerful example but in that moment, in May or June of 1952, that's in the mix and one of the six votes against Truman concurring only in the result is Justice Tom C. Clark, a Truman appointee; Truman's former Attorney General. He's joined by Justice Harold Burton, another Truman appointee, his seat made in the US Senate. Burton thought it was an easy case -- executive excess, no problem. Clark thought it was a hard case and in the end, I think it took him awhile to sort of step back from his prior role and his reflexive legal support for

Harry Truman. He concurred in the result and Justice Jackson commented privately after the decision came down, “Tom, congratulations on deciding to be a judge.”

Nina Totenberg: With Senator Sarbanes here, I want to return to the question of the authorizing of military force not just in the current circumstance but as somebody pointed out to me, the last time we actually had a formal declaration of war was World War II. We haven’t had one. We fought a lot of wars since then but we’ve not had a formal declaration of war. Senator Sarbanes, is this a product of the smaller wars that we fight now and the instantaneous decisions that have to be made? Is it not conceivable that we would ever have a formal declaration of war again? How are we to reconcile that with the Constitution?

Senator Paul Sarbanes: I think the obtaining of the authorizing of the use of force deals with a lot of the constitutional question on the executive and going ahead. President Bush did get authorization, not with my vote, but he did get authorization to use force with respect to Iraq. To pick up on your previous question, I do not think that the members of Congress, those who voted for the authorization, that they were at the same time repealing the Foreign Intelligence Surveillance Act or pulling out of the Geneva Convention with respect to the use of torture. And the effort to extend that authorization, to cover that and to provide a cloak of legitimacy, I completely reject. It really goes back, in part, to what Tony Lewis said about the attitude with which this reach of executive power is asserted, which has a lot to do I think with the reaction you get from the other branches of the government. I was struck yesterday when Justice O’Connor spoke about the Merriman case, where Lincoln took that extraordinary step. But as I understood her comment about it, Lincoln wasn’t asserting, “Well this is the reach of executive power and I can do this any time I want, anywhere I want,” and so forth and so on. He hedged it in. He went to Congress as soon as Congress came back to get congressional sanction for it. He limited what he was doing in a very narrow way and that’s in sharp contrast, in my view, with the assertions that are being made now about the each of executive power. Now, the question is why doesn’t the Congress try to check that more and that’s I think a very legitimate question. I have to tell you, and I want to thank you for the chance to come up here as a recent senator and now former senator, this helps you to accomplish the transition to at least get some chance--

Nina Totenberg: Well, not all former senators are Rhodes Scholars.

Senator Paul Sarbanes: I think these assertions of the reach of executive power-- Part of the problem is that fewer people in the congress regard themselves first and foremost as a member of an independent branch of the government who have a major responsibility to carry out the checks and balances of the Constitution. They make more

of an identification as being a partisan, a political partisan, either aligned with or against the President who's the party leader. So the tendency now is if you're the same party, you support the President; if you're not of the same party, you oppose the President. It's interesting about Roosevelt, the efforts he made leading up to World War II to try to consult the Congress, to draw the Congress in to get some congressional approval or sanction for what he wanted to do, or at least some assurances that they would not resist him strongly if we went ahead and did some of these things. But the extent of consultation and the interaction that was taking place between the executive and the legislative branch is very interesting to read about and you really don't have that now. We've lost a lot of that and I think one reason we've lost it is this breakdown in terms of now the partisan identification that is made. Secondly, certainly with this administration, an assertion about the reach of executive power and the attitude well, we don't really have to consult with you. Although I do give the Bush Administration credit for coming to the Congress to get an authorization with respect to Iraq. They came, they got it, they got it by a quite substantial vote and that, I think, was a bad decision and I think it looks even worse in retrospect. But I thought at the time it was not a wise decision, it wasn't a good judgment. I don't think Bush has, in effect, in that sense, violated the Constitution. It's a different question on the assertions they're making about surveillance and about torture and about some of these other measures. Then they make these bold assertions about the reach of executive power.

Nina Totenberg: Boyden Gray basically said that Congress is not to be trusted, that it leaks like a sieve. You can't really consult Congress when you can't trust the things will remain secret. I'm not sure if that's true or not. I think on some things clearly, Congress is a sieve. I've personally never been the beneficiary of a national security leak, as much as I'd like to be. It certainly has been the experience of some presidents, maybe all recent presidents, that they have, on some occasions, briefed Hill leaders about something they thought was terribly important in the national security where there was a compromise of that information.

Senator Paul Sarbanes: I wouldn't go on the Intelligence Committee for the following reasons. The leadership would ask me from time to time if I wanted to go on the Intelligence Committee. Of course, if you go on the Intelligence Committee, then you're bound not to talk about anything you heard at the sessions of the Intelligence Committee. I talked with people who'd served on the Intelligence Committee and they said they'd go on the Intelligence Committee and either they would be told something they had already read a day or two before in either the New York Times or the Washington Post or some other newspaper for that matter, or they would read it a few days later. I thought to myself, how will we ever separate out the two? If you go on the Intelligence Committee, you're just binding yourself never to talk about all these issues which everyone else is talking about on the basis of the information which is appearing in the newspapers.

Actually, I think that Congress basically is-- It's not the Congress because the Congress sets up procedures. Beth made a very important point earlier when she was talking about setting up the right processes by which these decisions are reached, and that's terribly important because it enhances the chances that you will make wise decisions and it gives you greater assurance that you're not going to make some foolish decision. So it's an important point to bear in mind but the Congress sets up processes. Consultation with a very small group is considered as a consultation with a congress and gives the executive sort of a mandate to proceed ahead. Generally speaking, I think that's been pretty well honored. Occasionally there's a breach but better to pay the price of the breach than to go down the path of asserting and conceding to a sort of an unlimited reach of executive power. You have to consider what is better for the society.

Nina Totenberg: Do you guys have questions for each other before I continue? Do any of you have questions you wish to ask each other?

Anthony Lewis: Are we going to have a chance for later comment?

Nina Totenberg: You can say whatever you want, Tony. I could never shut you up.

Anthony Lewis: I just had a general observation that we haven't approach and that is the distinctive character and danger for the matters we're talking about of the war on terror. It's different from, for example, World War II, with the Supreme Court, with the government -- as was pointed out by John Barrett -- deciding to end the Japanese program the day before the Supreme Court decided the Endo case. But the war was coming to an end. We all knew that it was slowly, still with much pain ahead, was coming toward an end. Nobody knows when the war on terror is going to end. It's not going to end in my lifetime and I doubt if it will end in anybody's lifetime in this room. That puts a very different premium on respect for civil liberties and respect for the Constitution because after all the other episodes, including the Japanese one in which we violated civil liberties during a war, when the war was over, we generally apologized for the mistakes and we eventually apologized to the Japanese-Americans and paid them modest compensation. But when is that going to happen in the war on terror? What's going to be done to Hamdi and Padilla? Think of this, ladies and gentlemen. It really is something that disturbs me profoundly. The Bush Administration did assert that it had the power, unilaterally, without any other support involved, congressional action, to label any American citizen -- that is, any of us -- as enemy combatants, take us into custody, hold us in solitary confinement forever without counsel and it asserted it first that no court could examine that detention. No court could examine that detention. You'd just be put away somewhere and you had no lawyer. If somebody, your father happened to hear about it and filed a habeas corpus petition on your behalf, the court would have to

dismiss it without consideration. That's an astonishing assertion in the American context, ladies and gentlemen and it all stemmed from the war on terror which is an endless war. So I think that assertions of unilateral executive power in the war on terror have a unique dangerousness that we ought to care about.

Nina Totenberg: I must say that I've always been sort of puzzled that the Supreme Court which is after all a much more conservative court that at any time in my lifetime, was willing to examine these questions, at least some of them, relatively early on. The history of civil liberties in wartime is that the court doesn't get involved. Sometimes it'll say to the executive branch "You were wrong when you did that, but that's over." They wait until after the war is over but really pretty early on, this Supreme Court, by an 8-to-1 vote, in Hamdi, was shoving back pretty hard and that I find really remarkable, in terms of the historical panoply that we can look at and the American experience.

Anthony Lewis: That's an encouraging point, Nina. I just want to say that I think an unspoken factor in that willingness of the court to intervene when it did is the very thing I've just mentioned, that the judges were aware that this is a war without end and that there wasn't going to be the opportunity to come along after four years and say there was a mistake in the past.

Beth Nolan: And that the authority being asserted by the executive branch was not a particular and narrow program, but one that had such far reaching effect and I think that combination of endless in time and far reaching really makes it different, Nina from any other program the Supreme Court had been faced with.

John W. Dean: Let me just footnote that. It strikes me that the courts may well be assisting the executive in this regard because there's certainly a mixture right now on decisions on questions of whether some of these matters are state secrets. Whenever we look behind the state secrets document, it often looks more like a fraud than it does like a legitimate excuse, right down to the leading case that the Supreme Court did decide. What was that? Reynolds. We have a mixed bag right now in the circuits where some are honoring state secrets, others are not. I suspect this is going to have to be litigated sooner or later by the Supreme Court. I'd like to hear how John thinks this is going to be resolved.

John Q. Barrett: I was struck by Senator Sarbanes' comment that most or many members of Congress do not think of themselves as part of a co-equal branch with its own responsibility for the separation of powers. I think that's sad; it's understandable. But by contrast, I do think what we have seen in the post-9/11 adjudications is a continuing

consciousness on the part of the courts that they are a distinct and independent branch. I think that in part that connects to the appointments process and is affected by who comes to serve on the court. It also goes to longevity and historical perspective. I think it matters deeply that Justice Stevens has served for more than 30 years and that he's a World War II Vet and that he's been around this track or tracks like these in many different contexts, from his time as a law clerk in the 1940s to his service on the court since 1975. I'm concerned as a general matter and I guess specifically on the state secrets question that John raises, that a court that doesn't have this kind of branch independence mindset is going to be susceptible to that kind of argument. The Reynolds precedence is there and venerable if controversial. Only a few justices dissented from that claim -- Jackson one of them -- but the claim prevailed in the 1950s and it's about an area of enumerated or implicated executive prerogative as we've understood national security and classification and responsibility. I would hope that people aren't on the Court who are overly deferential. But that is another branch's job.

Senator Paul Sarbanes: People have to go back to American history and understand how this was structured. People will come to you and say "How many presidents did you serve under?" Think of that question. You've been in the Senate a long time. How many presidents did you serve under? Of course, Bob Byrd has been preaching. He gives a speech every year to the incoming new members of the Congress that he's never served under any presidents; he's served with presidents. It became so ingrained in me now that a woman came up to me a few months ago, she said "How many presidents did you serve under?" Instinctively, without even thinking about it, I said "None. I haven't served under any. I've served with." But there's a failure to understand how this system is going to work and if you don't understand then the checks and balance aren't working, then a time of crisis comes that can be invoked. I'm thinking now particularly of the executive which can-- A lot of your basic freedoms and liberties may be in question.

John W. Dean: Listening to Michael Dorf's numbers as to the makeup of those who come from the executive branch doesn't bode well for how these people on the Supreme Court may ultimately rule given their deference and roots in the executive branch on the issue of state secrets. If state secrets is supported, it is just going to be one other block for Americans every knowing and understand what we're doing and giving anybody a remedy for when we make mistakes.

Nina Totenberg: I want to explain something here for anybody who doesn't know what the state secrets privilege was and what the cases were discussing. It was a case brought by the widows of some airmen who had been killed in a test pilot run and they wanted to know what had caused this accident that had killed their husbands. The government -- this is I think in the 1950s -- invoked this so called state's secrets privilege

saying it could basically decide what it was going to tell people and that this information here, it asserted to the courts and to the Supreme Court, would compromise national security, that in this case, there were secrets about the weaponry involved that would, if found out by the Russians or the Soviets at the time, would compromise national security. So the case was lost for the widows and I don't know how many decades later, they finally declassified this report.

John W. Dean: One of the daughters found the information on the internet.

Nina Totenberg: And there was nothing in it about any weapons systems or any anything. It was totally nothing. But it has remained the precedent and all the government has to do is say that there's a state secret and goodbye. Just last week, the Second Circuit Court of Appeals posted on its website a decision in the case of an Egyptian who had been detained after 9/11 erroneously. He sued the FBI agents who detained him on a personal basis. The Second Circuit allowed the case to go forward and posted its decision on its website and then pulled it down. Howard Basham from "How Appealing" which is a blog, had seen it, so he had the whole original opinion. The original opinion -- and he posted it, so I've got it and so can anybody else and you can compare it with the one that the Second Circuit then put up when, I assume, after the administration objected and wanted part of it sealed. The part that's missing is the part that summarizes the tactics used by the FBI in questioning this man. I can't see how it's a threat to national security but somebody thinks it is.

John W. Dean: And the courts will not look at these issues. They will not look behind the claim of state secrets once it's invoked. So the court makes a blind decision the way it now stands based on the word of the Senate.

Nina Totenberg: You can understand to some extent why they might do that, too. They don't know. They don't want to be there saying "Okay, you can put this up," and it's the basis for the next terrorist attack. They're not crazy.

Senator Paul Sarbanes: The question is, what leads people in the executive branch to make such outrageous claims in the first place in exercising their authority or their power. In the case you just talked about, when it all came out, you look at that and you say on what basis was that being done? What reasonable case was there for doing that? Of course, you need to put yourself in the position of the people that were seeking the information and being denied it. Just like Tony Lewis said, you have to think of these people that are being-- this assertion that they can pick anyone up, declare you an enemy combatant, hold you incommunicado for an indefinite length of time. When did

America stand for that? When did that become what we stand for? And why do we need a court to tell people holding responsible positions in the executive branch that you're not supposed to engage in this kind of conduct? There has to be some self restraint as well on the part of people who hold authority.

Nina Totenberg: Let me just for one moment play the role of the Bush administration, unaccustomed as I am to doing that. Note that a good deal of these cases like Hamdi, I don't know what would have happened in the ensuing years if there hadn't been a Hamdi decision. But most of that conduct -- Padilla, Hamdi -- the detention of American citizens occurred in the immediate aftermath of 9/11 when, I think it's fair to say, that everybody in the federal government was stark staring terrified about what was next. What would have been the consequence if it turned out that Hamdi or that Padilla did have a dirty bomb and was getting it somehow over here to put it into place in Chicago? There would have been 9/11 hearings squared about the failure to do something about it.

Senator Paul Sarbanes: How long do you think he should have been kept in that status?

Nina Totenberg: Don't push me too far in the role of the Bush administration advocate.

John W. Dean: Nina, the other thing is in taking the position of the Bush Administration, they didn't take it just in the immediate aftermath this whole motif of secrecy that they've imposed. It starts before 9/11 and it accelerates with 9/11 and it is continued to this day. It is not just in using things like state secrets. It is across the board and it's a part of a believe they've had that when they returned to power in 2001, that they found a weakened presidency because of Vietnam and Watergate. That is a totally fallacious argument. It's not true. By the end of the Reagan administration, the presidency had powers greater than Richard Nixon's fondest dreams. So they have gone way beyond and they've just used 9/11 as an exercise to gain and augment presidential powers, to bring us totally out of balance and forget the separation of powers.

Nina Totenberg: I'm going to end this with a much smaller question but it seems the suitable question for this audience, and that is about the Presidential Records Act. The Presidential Records Act initially basically made all presidential records subject to classification concerns available after 12 years. When President Bush came into office, he issued an executive order that basically allowed any living president to extend that time period and then to give himself, President Bush, the sitting president, an unlimited time then to review upon that. The result is, is that the Presidential Records Act is a mere shadow of its former self. Let's put it that way. Do we need a new act? Could we get a new act? Looking at the Congress today, do you think that Congress would be willing to

put a Presidential Records Act into place with more teeth, that was less subject to interpretation by executive order?

Senator Paul Sarbanes: Presumably, anything they tried to do would be vetoed. So the question you're really asking, if you try to do that, is as long as he can hold onto one third of one House only, he can negate any corrective action that the congress may try to take. That needs to be kept in mind as you try to evaluate congressional actions.

Nina Totenberg: But if we look forward to the next president -- forget this president for the moment, difficult as that may be for you to do, Senator Sarbanes -- can this be done or is this just a casualty of our times?

John W. Dean: It can be repealed. I followed the '78 act since it was adopted, since Bush gutted it. It is now still in a very abbreviated form pending in a federal district court in the District of Columbia and a summary judgment motion which has never been ruled on because the White House did provide sixty some documents from the Reagan administration that really prompted the lawsuit by a group of historians. But if you look at the act itself, it not only grants the power of executive privilege to the President after he leaves, it also grants it to the Vice President. In fact, it grants it to the family of a former President. Everybody except Barney has the ability to invoke executive privilege. So this can be repealed and will probably be repealed as one of those things that happened during the transition when they're cranking out the new executive orders. You can expect this one to disappear. The problem is this President is going to walk out and there are going to be no papers left. I understand that there is an occasional truck that goes in and out of the Naval Observatory in Washington where the Vice President's residence is and it literally has a sign on its face that it's a document destruction truck. This is how in-your-face he is about getting rid of whatever's there, and Cheney has made it very clear he believes the Act is unconstitutional, therefore he has a right not to apply it.

Nina Totenberg: He's not a member of the executive branch, remember?

John W. Dean: That's right. But Beth made an interesting statement about occasionally when there is an unconstitutional law, that there are occasions when a president may not want to apply it. The classic case to me has always been the way Clinton handled the situation when his veto was overridden on the amendment to dismiss everybody from the armed services who was HIV-positive. He said "I will not enforce it," and what he was able to do in taking that strong position because he believed it was unconstitutional, is he was able to get the congress to change it. That seems to me the intelligent way when you get an act like this. But in this case, you can just have a president change it.

Nina Totenberg: Any last thoughts before I close this down? Senator Sarbanes.

Senator Paul Sarbanes: First of all, I want to thank Nina who's done a terrific job moderating all day long.

Nina Totenberg: Now you see why he was elected like 50 times.

Senator PaulSarbanes: And also to commend the presidential libraries and particularly this one who has been the host library and the Archives and the Franklin and Eleanor Roosevelt Institute for putting on this terrific conference. I was sitting there and I was thinking to myself how can we get members of Congress to come and sit through one of these sessions?

Nina Totenberg: Hold a fundraiser.

Senator Paul Sarbanes: I'd be remiss if I didn't particularly thank Bill vanden Heuvel for the extraordinary leadership he's provided to the Institute since -- well, he founded it and then provided such extraordinary leadership. We're indebted to him. I just want to close on sort of a light personal note. I have enormous respect and admiration for Franklin Roosevelt. I think he was one of our three great presidents, Lincoln and Washington being the other two. I want to tell you this story because Norm Dorson told this story about saying to the Daughters of the American Revolution "Welcome, fellow immigrants." My parents came to this country as immigrants, immigrants from Greece, and I grew up in a household that had enormous reverence for President Roosevelt. Joseph Alsop has written a book about President Roosevelt and he said the thing that Franklin Roosevelt did for the United States, he included in large groups of people who previously had felt they were excluded out of American society and we certainly felt that in my family. I had a summer job when I was in college. I was selling Fuller brushes. I don't know how many of you remember the Fuller brush salesman. They would come and knock on people's doors. Nowadays, you don't do it; they think it's a potential robber or something and they won't open the door. People would open the door and you'd try to get yourself invited in so you could show your wares. You carried a little kit with you that had some of them. You had a number of different items that you could give as free samples. At the end, even if you hadn't made a sale, you'd leave one of these free samples. I knocked on this door. This housewife came to the door. One of the reasons you don't have them anymore, there are no housewives anymore. The lady asked me in, I sat down in a very, very modest home. They had a picture of Franklin Roosevelt up on the wall. We started talking and we went through-- Then I finished and I want you to know, I ended up giving

that lady every one of my free samples. So thank you Roosevelt Library, thank you Roosevelt Institute.

Nina Totenberg: Again, I want to thank all of the presidential libraries, all of their staff, all of the wonderful panelists, everybody who worked so hard to make this two-day conference a success. As you can tell, it took an enormous amount of work by people who are not sitting up here to get all the nice words of praise. So thank you to everybody.

Cynthia Koch: And I would like to thank Nina Totenberg. Can we have a round of applause for what she has done for us today? And if you haven't purchased your Nina Toten-bag which will benefit the NPR station nearest you, do so in our store. I too want to echo all of those thanks to all of the people who have made this conference possible. I'd like to just take a moment before we have our closing session, to say some special thanks to the staff members who have worked so hard on this. The planning team here at the Roosevelt Library was headed by Lynn Bassanese, our Deputy Director, who has been working on this project since February of 2006 and has been living with it day and night and I'd just like a round of applause for Lynn Bassanese. Bob Clark who is our supervisory archivist, has been guiding our thinking processes and our legal acumen every step of the way, assisted by David Wolner of the Franklin and Eleanor Roosevelt Institute, thank you to our two minds. Cliff Laube is our public affairs specialist and he has done the design of our materials, our logistical arrangements, every aspect of this has been part of Cliff's very, very broad portfolio and I'd also like to thank Cliff for everything that he has done for this project. We also have had a full corps of volunteers and staff in here who have been working very, very hard these past few weeks, especially the past few days, I thank them and I thank the Roosevelt Institute staff and Chris Brysef, their president, for his hard work on behalf of this conference. Bill Boxer, our volunteer photographer, thank you Bill. And Philippa Ewing who has handled our press work. She has done a fantastic job and I know you're going to be hearing all about this conference for days and weeks to come because she's managed to get some national placement on it. So thank you all. At this point again, I'd like to thank our panelists and Nina. We're going to invite Bill vanden Heuvel to come up and also have John Barrett stay there and do a brief wrap up of the session. We were hoping that former President Bill Clinton would be with us but unfortunately, that's just not possible this close to the election. So Bill.

William J. Vanden Heuvel: Thank you Cynthia. Thank you Allen Weinstein. Thank you Sharon Fawcett. Thank the National Archives. All of the presidential libraries have made this extraordinary conference possible, I want to thank you. Chris Brysef, the president of the Roosevelt Institute. Dick French was here today. Anna Eleanor Roosevelt, our co-chair, thank them and all of the directors who came today. I was especially pleased that

David Ginsberg was with us for this conference. He was with us at the beginning when we founded this. He was with us at the beginning of the Roosevelt administration so to have David here is a great honor and I'm very grateful for that and his participation is important. I want to thank of course those who have conducted this extraordinary symposium. To Alan Brinkley and to Allen Weinstein and Nina Totenberg for moderating these and for all of the participants. The presence of Sandra Day O'Connor made a great difference. To have her here for us to have the personal opportunity to talk to her and to exchange points of view, I was especially pleased today at lunch when she was still here since she was appointed by President Reagan to tell her this story of when I went to see President Reagan with Claude Pepper to discuss the possibility of financing the Roosevelt Memorial in Washington, DC. Ronald Reagan said "I voted four times for Franklin Roosevelt. He was the greatest president of this century." So I was glad to give that little wisdom to Justice O'Connor so that she could carry that back to Arizona with her, too. What has been discussed here today of course is the ongoing dialog of a democracy. We have inspected two of the independent branches of our government. Paul Sarbanes has made a very important suggestion. This same conference the presidency and the congress would be a very important conference to have as well. I think the way we're ending up as the questions have been focused is extraordinary, too. Because as I listened to this, I thought of how very important the question is: What is war in the context of our Constitution? In 2002 Robert Byrd came here to receive one of the Four Freedom Award. He gave one of his great speeches where he had called for the invocation of the Constitution Article I Section 8, where he says only Congress can declare war. It's not for the president to declare war. We've now gotten into the habit, with Korea, with Vietnam, with Iraq twice, to allow the Congress to vote on a resolution, whether it was Tonkin Bay Resolution or the Iraq Resolution, that allows the use of force but then is used to declare and operate as though a full war has been declared. Franklin Roosevelt was very, very careful about his constitutional obligations. When Winston Churchill at the Atlantic Charter conference said the United States must come into this war, he reminded him that it had to come in through a constitutional process. When I hear people say that this crisis of terrorism is the greatest crisis since the Civil War, which the Attorney General-designate has just said in his testimony, it appalls me. To think that what we went through in World War II, what Roosevelt had to confront: the Nazis controlling all of Europe, with the strongest military force the world had ever seen, with a scientific community that was totally capable of producing the nuclear weapon itself, and whoever was going to get there first was going to win that war, with the United States 17th in the world in military power in 1941 behind Portugal, with the Congress of the United States by one vote extending the Selective Service Act in August of 1941 just months before Pearl Harbor, President Roosevelt confronted a crisis and even that terrible crisis where we lost half of our fleet in Pearl Harbor and three thousand dead, he did not react to it with fear. He went before the Congress confident as he was then as he was in 1933 at his inaugural to say "We have nothing to fear because we are America and we know our strength and our power and our possibilities." To call this a war in a

situation where if the President had read the intelligence briefings on August 6, 2001 that warned him that Osama was going to attack our airports, that the whole thing could have been avoided if a simple regulation of the FAA regarding pilot security could have been enforced and now to have spent more than a trillion dollars and to take our nation where we are abandoning our constitutional obligations is appalling to me. And so you know what I'm going to do? I'm going to put on this button, "Re-Elect Roosevelt" because the time has come. Thank you for being here today.

End of Session 5