Takeover: Return of the Imperial Presidency

Charlie Savage*+

DEAN THOMAS J. ROMIG[1]: Good evening. This has been a great day for Washburn University School of Law and I hope for all of you. It has been a superb symposium and it is because of all of you here who have made it so. Tonight will be a perfect conclusion to a great day.

I am very pleased to introduce our speaker this evening: the Pulitzer Prize-winning author, Charlie Savage. Charlie graduated summa cum laude from Harvard College and earned a master's degree from Yale Law School while on a Knight Foundation journalism fellowship. He began his career with the *Miami Herald* and then moved on to the *Boston Globe*, where he covered national legal affairs. This is where he gained a lot of prominence because of his excellent work and where I first had contact with him.

Charlie's work on the Bush-Cheney Administration's efforts to expand the power of the executive—the chief executive—gained him na-

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1. Thomas J. Romig is Dean and Professor of Law at Washburn University School of Law and Major General (ret.) in the United States Army. A native of Manhattan, Kansas, Dean Romig most recently served as Deputy Chief Counsel for Operations and Acting Chief Counsel for the Federal Aviation Administration (FAA). Prior to joining the FAA, Dean Romig served four years as the thirty-sixth Judge Advocate General of the Army. He led and supervised an organization of more than 9,000 personnel comprised of 5,000 active and reserve military and civilian attorneys and more than 4,000 paralegal and support personnel spread throughout 328 separate offices in 22 countries. He oversaw a world-wide legal practice including civil and criminal litigation, international law, administrative law, labor and employment law, environmental law, claims, and ethics compliance. During his career, Dean Romig prosecuted felony and misdemeanor criminal cases in Texas and taught international law at the Judge Advocate General's School in Charlottesville, Virginia. His significant military positions included: Chief of Army Civil Law and Litigation and Chief of Military Law and Operations, both in Washington, D.C. His military legal assignments included Chief of Planning for the Judge Advocate General (JAG) Corps; Chief Legal Officer for Army Air Defense forces in Europe; and Chief Legal Officer for U.S. Army V Corps and U.S. Army forces in the Balkans. He received a bachelor's degree in social sciences from Kansas State University. He was commissioned through the Army Reserve Officer Training Corps program. After serving six years as a military intelligence officer, he was selected for the Army Fully Funded Law School program and graduated with honors from the Santa Clara University School of Law, where he served as an editor on the *Santa Clara Law Review* and as a member of the Honors Moot Court Board. Dean Romig's military service and leadership have earned him numerous decorations and badges. He retired from the Army JAG Corps in October 2005 after thirty-four years of service.

tional acclaim. His articles in the *Boston Globe* earned him a Pulitzer Prize, the American Bar Association Silver Gavel Award, and the Gerald R. Ford Distinguished Reporting on the Presidency Award. His book on the growth of executive power, titled, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*,[2] was named one of the best works in 2007 by both *Slate Magazine* and *Esquire*. He also received the Award for Constitutional Commentary by the bipartisan Constitution Project and the New York Public Library's Helen Bernstein Book Award for Excellence in Journalism. This is truly an excellent book, particularly for lawyers who are looking for that link between policy and law and how it affected decisions. I do not think anybody has done it better than Charlie Savage. He looks at the whole progression of the unitary executive and how that was fundamental to the decisions that were made in this administration. So please join me in welcoming our speaker tonight, Charlie Savage.

CHARLIE SAVAGE: Thank you very much. I would like to open with a special word of appreciation to General Romig because, as he mentioned, we met some years ago in his prior role, and many consider him to have been one of the heroes for the rule of law in these troubled years we have been living through. It is a great honor and a great pleasure to be here at the law school now where he is the dean. So thank you, General.

While others today have talked in great detail about detention and interrogation policies in the War on Terrorism, I am planning this evening to take a step back. I will talk a little bit about those things. But I am also interested in the deeper motivating forces behind both the national security policies that gave rise to this conference, as well as many other issues that seemingly are unrelated to 9/11 policies but are, in fact, connected with a common root. As Dean Romig mentioned, I am not a lawyer, and so parts of my presentation may be a bit simplistic for this audience. But I hope you will bear with me, as I think there is value in stating clearly, in plain English, certain basic principles and then building up to a more crystallized understanding of the escalating power of the American presidency. Afterward, we will have a question and answer period, which I enjoy greatly when I do these presentations. I am looking forward to what I hope will be an interesting exchange of perspectives.

My book, *Takeover*, and my work as a journalist have been an effort to explain how the power of the United States President has been growing dramatically in recent years, where these changes are coming from, and what that means for the future of American-style democracy.

2. CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007).

As a result of the changes that have developed—especially over the last eight years, but also as part of a larger pattern that dates back to the 1950s—we are moving toward a situation in which, increasingly, the decisions that affect the United States are being made in secret, with less input from elected representatives in Congress, and if people do not like these decisions, assuming that they even know about them, their ability to get recourse in the courts is eroding. It does not matter whether the issue is the environment, energy, civil liberties, or war—the bottom line is that the extraordinary power of the federal government is being concentrated in fewer and fewer hands. The checks and balances on what the handful of officials atop the White House hierarchy can choose to do with that power are eroding away.

Here I want to pause to emphasize an absolutely critical point. Although we are having this conversation in the context of a Republican administration, executive power is not a partisan issue. America has had Democrats as presidents in the past. It will have a Democrat as president again in two months. If they want to do so, Barack Obama and other future Democratic presidents will be able to draw upon the same legal and political precedents established by the current occupants of the White House to unilaterally impose their own policy agendas. To think clearly about this, we must separate the specific policies that we associate with the Bush Administration, like the establishment of Guantanamo and harsh interrogations, from the structural or procedural tools that President Bush used to advance those policies—but tools that a different President could use to advance very different policies.

To give an example, back in 1993 and 1994 when Bill Clinton was President, Hillary Rodham Clinton had a task force that was trying to advance the liberal policy goal of creating universal healthcare, and conservatives were outraged because the White House was trying to keep her task force's work a secret. But there were laws on the books that said that task forces like that had to do their work in the public view. Eventually, because of those laws, the Clinton White House was forced to reveal what Hillary's task force was up to.

Flash forward to 2001 and Vice President Dick Cheney is running the exact same kind of task force, focused on energy policy instead of health care. The Bush White House wanted to keep its work a secret from Congress and the public as well. But unlike the Clinton White House, the Bush-Cheney Administration did not give in when people started citing those open-government laws. They fought all the way to the United States Supreme Court, and they won a precedent that gutted those laws. They established that presidents have the power to keep task forces like that a secret. That expanded secrecy power was not just for the Cheney energy task force; it exists from now on. It is for who-

ever happens to occupy the White House at any moment going forward, including Barack Obama's Administration, beginning in two months.

That is just one tiny example of the myriad ways in which the current administration has very successfully, very ingeniously expanded the fortress of secrecy that protects the upper levels of the executive branch. Its secrecy push, in turn, is just one of a huge number of changes that have been afoot, all of which have served to concentrate more power in the White House. This is why it is really in the long-term interests of everybody, regardless of their politics or party affiliation, to understand and have an informed debate about what has been happening to the system designed by America's founders.

Earlier today, Professor Philippe Sands[3] walked through a narrative of how he worked, step by step, to uncover the bureaucratic origins of the Bush Administration's interrogation policy.[4] I would like to follow the same approach in unfolding the story of how I got on to my own slightly more abstract topic—the growth of executive power.

In 2005, when I was working for the *Boston Globe*, my beat was essentially 9/11-related legal issues, and I was closely following the debate in Congress over torture. At the time, as we all remember, Senator John McCain was in a big fight with the Bush White House over what limits there were or should be, if any, on the techniques that American interrogators could use in trying to extract information from captured detainees in the War on Terrorism.[5]

Back in 1988, Ronald Reagan had signed a treaty saying that the United States would never use cruel, inhuman, or degrading tactics on prisoners, no matter what the circumstances.[6] And the Senate had ratified that treaty. That seemed to mean that, basically, the issue was already settled. But in January of 2005, Alberto Gonzales had revealed during his confirmation hearings to become Attorney General that the Bush Administration's legal team had come up with a rather creative theory about that treaty.[7] They noted that the Senate had put a reservation on the treaty when it ratified the agreement, declaring that the United States would interpret the words "cruel, inhuman, and degrading" to mean the same thing as our domestic legal system's understanding of the United States Constitution's words "cruel and unusual punishment." Their theory was that this meant the treaty must only apply

3. Philippe Sands is Professor of Law and Director of the Centre on International Courts and Tribunals at the University College of London.

4. Philippe Sands, *Torture Team—Abuse, Lawyers, and the Possibility of Criminal Responsibility*, 48 WASHBURN L.J. 353 (2009).

5. *See* SAVAGE, *supra* note 2, at 209-24.

6. United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, *available at* http://www2.ohchr.org/english/law/cat.htm.

7. SAVAGE, *supra* note 2, at 213-14.

on U.S. soil, because the Constitution does not apply abroad. Thus, their theory went, the president is free to authorize the use of harsh interrogation tactics in overseas prisons.

Now Senator McCain, of course, had famously been a prisoner of war in Vietnam, where he had been tortured. He thought that this theory was outrageous. And, by the way, the Reagan Administration official who had negotiated the treaty, Judge Abraham Sofaer, said that was not what they had meant at all.[8] So McCain proposed a law that would close that potential loophole and make clear that the United States would not and could not abuse prisoners anywhere in the world, something he said was contrary to core American values.

The White House hated McCain's proposal.[9] As the year went by, I and other journalists covering this wrote stories about how Vice President Cheney was personally going over to Congress, lobbying lawmakers behind closed doors not to pass that law because, he said, the President needed flexibility. Or if they did enact this law, he said, they ought to make an exception for the CIA. President Bush was threatening to veto any bill that had McCain's amendment attached, if it arrived at his desk, even though at that point he had yet to veto a single bill in his five years as president.

But in December of 2005, Congress sided with Senator McCain. Nearly every Republican and every Democrat voted for the torture ban, so overwhelmingly that even if Bush had vetoed the bill, Congress had the votes to easily override that veto. So President Bush invited Senator McCain to the White House, and he had the cameras brought in, and he shook Senator McCain's hand, and he said that he was accepting this new law after all. The media wrote the day up, and it looked like the story was over. But a few days later, I came to work and I learned that maybe it was not over after all. The previous Friday night around 8:00 p.m.—the Friday night before New Year's Eve weekend, when nobody was in town and no one was paying any attention—Bush had issued something called a "signing statement" about that bill.[10]

Now, I knew only a little bit about signing statements at that point, although I would become intimate with them as the year went on. It turns out that a signing statement is an official legal document that a president issues on the day he signs a bill into law, and it consists of in-

8. Letter from Abraham Sofaer to Patrick Leahy (Jan. 21, 2005) *available at* http://humanrightsfirst.us/us_law/etn/pdf/sofaer-leahy-cat-art16-093005.pdf.

9. Press Briefing with Scott McClellan, Press Secretary, in Washington, D.C. (Oct. 5, 2005) *available at* http://www.georgewbush-whitehouse.archives.gov/news/releases/2005/10/20051005-4.html.

10. President's Statement on Signing of H.R. 2863, the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, Dec. 30, 2005, *available at* http://www.georgewbush-whitehouse.archives.gov/news/releases/2005/12/print/20051230-8.html.

structions to the executive branch about how they are to interpret and implement the new statutes created by that bill. So in this particular signing statement, Bush had told military and CIA interrogators that despite the new words that were now on the statute books, the Constitution gave him, as the Commander-in-Chief, unwritten and inherent powers to bypass such a law at his own discretion; and so they should obey his orders when it came to interrogating detainees and not worry about the words of the statute.[11]

So I called the White House and I asked what this thing meant—did it mean what it seemed to mean, that the law was irrelevant, that Bush would only obey it when he wanted to, and that he would feel free to disobey it when he did not want to follow it? And they put me on the phone with one of his top lawyers on the condition that I would not print his name, and he told me, yes. Under their legal theory, the president need not obey a law that restricted his options when it came to doing something he thought necessary to protect national security.[12] Basically, the White House was saying that the entire year-long dramatic debate with McCain and Congress had been irrelevant because it did not matter what Congress thought the rules should be. The president gets to set his own rules.

Now, that was pretty interesting, but I did not yet grasp just how interesting it could be. So I went about my beat. One of the next big issues in my area was the Patriot Act, which of course is the legislation Congress passed right after 9/11 which gave the executive branch much greater authority to search homes and to get information about the websites people were visiting and the people they were e-mailing and calling, often without a warrant.[13] This Patriot Act was set to expire automatically around that time, unless Congress decided to make it permanent. Just about everybody in both parties supported making it permanent.

But some of the lawmakers, especially in the Senate, wanted to add a few more safeguards to it. In particular, they wanted to require the Justice Department to give regular, detailed reports to Congress about how often it was using these new powers and in what circumstances, and what they got out of it. Their goal was to make sure that the executive branch was not abusing those powers, now or in the future.[14] The White House hated that idea as well, and they fought it. But eventually, to break a Senate filibuster, they struck a compromise, and Bush agreed to

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11. *Id.*

12. SAVAGE, *supra* note 2, at 225-26.

13. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (hereinafter USA Patriot Act).

14. USA Patriot Improvement and Reauthorization Act of 2005, S. 1389, 109th Cong. (2005) (enacted), *available at* http://www.govtrack.us/congress/bill.xpd?bill=h109-3199.

a few more oversight provisions to get the bill passed.

In March of 2006, Bush invited the leaders of Congress and the media to the White House for an elaborate signing ceremony where he put his signature on the bill, and journalists wrote it up. Once again I thought that a story I had been following for some time was over. Except, once again that night, after the lawmakers and reporters had gone home, Bush issued a signing statement.[15] This one told the Justice Department that despite the words of the new law, the president has inherent power under the Constitution to withhold such information from Congress at his own discretion. The new oversight provisions were unconstitutional and did not need to be obeyed if he told the Justice Department not to tell Congress about something. So I wrote about that as well.

Those two stories, about the torture ban and the Patriot Act signing statements, got an enormous response. My bureau chief suggested that I ought to stop writing my ordinary daily stories for a while and just go off and figure out what was going on with these signing statements—this obscure tool that most people outside the executive branch had never even thought about before.

It took me a month to find all of the signing statements that President Bush had issued since January of 2001 and to decipher them.[16] But it turned out that at that point he had attached these things to more than 125 bills, telling the executive branch that it did not need to enforce more than 750 distinct sections of those bills enacted into law over the previous six years. Nearly all of those 750 statutory sections were limits on the President's own power, so what that really meant is that the President was claiming a right not to obey those laws, including many things that had absolutely nothing to do with national security. The laws Bush has challenged include whistle-blower protections for executive branch employees, requirements to give Congress detailed reports about a wide range of government activities, and minimum qualifications for those who could be named for a variety of important positions such as the Director of the Federal Emergency Management Agency, among many other things.[17] Nearly all of these laws are the kind of things that are nearly impossible to get before a court because no one has standing to file a lawsuit over them. The President was essentially acting as the judge of his own powers and ruling in favor of himself. Because there was no mechanism for Congress to override his pronouncements, his decisions about which laws he did not need to obey were final.

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15. President's Statement on Signing H.R. 3199, the USA Patriot Improvement and Reauthorization Act of 2005, Mar. 9, 2006, *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/03/20060309-8.html.

16. *See* SAVAGE, *supra* note 2, at 228-49.

17. *See id.*

I also learned that while previous presidents had occasionally done the same thing dating back to the nineteenth century, Bush had, at that point, challenged more laws—more statutory sections—than all previous presidents in American history combined. And, by the way, now the number is close to 1,100 bill sections, nearly twice the number of such laws challenged by all previous presidents combined.[18]

Now, this revelation was coming out about the same time the public was learning about the warrantless wiretapping program.[19] In this program, the White House had acted on its very broad theory of executive power to bypass a 1978 law[20] that required the government to obtain a warrant from a judge any time it wanted to spy on the telephone calls or e-mails of an American. As with the torture ban and the Patriot Act signing statement controversies, the Bush Administration's arguments to justify its legal claims supporting the warrantless wiretapping program centered on the War on Terrorism and the new situation that arose after September 11.

But I kept digging more, and I learned that this agenda of concentrating more unchecked power in the White House pre-dated 9/11. In fact, I learned that behind closed doors on January 21, 2001, the day after President Bush's inauguration, White House Counsel Alberto Gonzales had talked about a goal of expanding presidential power at the very first meeting of the White House legal team.[21] The President, Gonzales had said long before 9/11, wanted that legal team to seek out opportunities to expand presidential power in order to leave the office stronger than it had been when they arrived.[22] This is important—it was a matter of principle, not partisanship. The goal was a permanent expansion of executive authority—not just for themselves but for all future presidents to wield as well, whoever that happened to be at any given moment, including Democrats. The War on Terrorism, of course, would provide a mechanism for throwing this pre-existing agenda into overdrive.

As I talked to former administration officials, I also learned that this agenda was primarily not the work of President Bush. Instead, it was coming out of Vice President Cheney's office, and on a day-to-day level, it was the handiwork primarily of Cheney's long-time aide, a man named David Addington.[23] When the warrantless wiretapping program

18. *See, e.g.*, Christopher Kelley, *President Obtuse*, Zone of Twilight, http://unitaryexec.blogspot.com/2008/10/president-obtuse.html (Oct. 5, 2008, 20:58).

19. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, *available at* http://www.nytimes.com/2005/12/16/politics/16program.html.

20. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978).

21. SAVAGE, *supra* note 2, at 73-76.

22. *Id.*

23. David Addington was a top aide to Dick Cheney in the Office of the Vice President and previously in the Pentagon when Cheney was Secretary of Defense in the Bush-Quayle Administration. He met Cheney as a Republican staffer on the committee investigating the Iran-Contra scandal,

had been revealed, Cheney had told reporters in a very rare press conference that if they were interested in why the Administration thought that it had all the constitutional power it needed to bypass that warrant law, they should look up a report that he had overseen back in 1987 when he was a member of Congress and Addington was a Republican congressional staffer during the Iran-Contra scandal.[24] That, of course, was the scandal in which several officials in the Reagan Administration had conspired to bypass a law cutting off assistance to anti-Marxist rebels in Nicaragua.

So I took Cheney's advice. I dug up a copy of his old report, blew the dust off the cover, and read about how he had thought it was perfectly legal for the president and his top aides to bypass a law that limited what they could do in markets of foreign affairs or national security.[25] It turned out that Cheney had articulated a vision of nearly limitless commander-in-chief power two decades earlier and now, as Vice President, he was turning that vision into a reality.

At this point, the full sweep and implications of the Administration's project came into sharper focus for me. Like many reporters, I had been focused on a close-up of one or two controversies, but I had been missing the broader context. Now, the camera had zoomed way out to bring the full panorama into view. Suddenly, what the Bush Administration had been doing across a huge range of issues made much more sense. These matters included: the claim that a president could wiretap without warrants in defiance of a statute; the claim that he could simply declare that he did not need to obey the Geneva Conventions when it came to prisoners picked up in Afghanistan; Cheney's fight to keep his energy task force papers a secret, and the attacks on other open government laws that required executive branch officials to let the public know what they were doing with their power, such as the Freedom of Information Act and the Presidential Records Act; the decision in December of 2001 to pull out of an international treaty that had been ratified by the Senate, the Anti-Ballistic Missile Treaty, without asking the Senate to de-ratify it; the choices of presidential lawyers to be Supreme Court Justices; unprecedented efforts to impose greater White House control over Justice Department lawyers, government scientists, and other executive branch bureaucrats; and an issue that is close to General Romig's heart, and many of the JAG officers in this room—systematic efforts to subordinate the Judge Advocate General Corps to greater control by politically appointed lawyers, undermining their ability to

where Cheney was the top House Republican. *See id.* at 54, 63, 83-84, 284-86.

24. *See generally* Report of the Congressional Committees Investigating the Iran-Contra Affair, H.R. REP. NO. 100-433, S. REP. NO. 100-216 (1987).

25. *Id.*

provide independent legal advice to their commanders about such matters as whether the president's interpretation of the Geneva Conventions is correct.

These and other disparate controversies seemed to not be connected to each other but, in fact, they were united at the root. The Administration, from its very beginning, had set out to take actions that would establish precedents permanently expanding presidential power for the long-term, even when such tactics brought them extra short-term political difficulties. The Administration could have accomplished the same policy goals through less controversial means, such as by asking Congress to change the warrant law or to pass a statute endorsing its detainee policies after 9/11. But it did not because it wanted to demonstrate for history that Congress did not matter, that the President had the constitutional power to do what he wanted without asking lawmakers for authorization. The signing statements story, as amazing as it was, was thus really just the tip of an iceberg—just one tactic for centralizing power among many tactics that were simultaneously in play. In short, a quiet, but sweeping constitutional revolution was well underway.

I kept asking the question: Why? What was driving Dick Cheney and the other presidentialists, as they sometimes call themselves, who were so relentlessly, ingeniously, and systematically pushing this agenda—about which they had said nothing to voters when campaigning for the office? Where was this coming from? This question took me to Ann Arbor, Michigan, to the Gerald R. Ford Presidential Library, where the National Archives houses a bookcase full of documents in grey boxes entitled "Richard Cheney Files." From that pile of memos the answer to what was motivating this push emerged.

Now, to explain the origins of Cheney's worldview, I need to back up very briefly to review what the founders had to say about how a government of checks and balances is supposed to operate, even in the face of national security threats. And then I need to fast-forward to discuss how the United States began to stray from that vision during the early Cold War, leading up to Cheney's formative experiences. In 1787, when they sat down to draft the Constitution, the founders brought with them a very realistic—and some would say a pessimistic—view of human nature. They knew that human beings are flawed—all of us. It is inevitable that from time to time misguided or incompetent leaders will win positions of responsibility in government. They also knew that people in power cannot always be trusted to do the right thing on their own. So they designed a system that would prevent the concentration of too much power in any one official's hands. The basic outline of their system was to give Congress broad power to enact laws establishing rules and regulations within which the president would have to operate as he

ran the government from day to day. The founders made clear that they wanted the Congress to be the branch that made the tough decisions about policy tradeoffs in such matters as—explicitly—how the commander-in-chief may treat enemies captured in wartime. Despite the tremendous threats facing the fledgling nation, they believed America would be more secure, not less, if the commander-in-chief—whatever flawed human being happened to occupy that office at any given moment—is subject to the rule of law.

There were some short-term bumps along the way, most notably the first few months of the Civil War, but this system endured essentially intact for 160 years. Then, amid the national security fears of the early Cold War, President Harry Truman—a Democrat, I hasten to emphasize—did something that was unprecedented in U.S. history. In 1950, Truman took the nation to war in Korea without going to Congress for permission. This was the first time any president had taken the United States into a major overseas war without authorization. This launched the era of what the historian Arthur Schlesinger, Jr. would call the "imperial presidency."[26] Truman and his successors of both parties embraced a theory that presidents have broad, unwritten, but *inherent* powers as commander-in-chief to protect national security as they alone see fit. For two decades Congress largely sat on its hands as one president after another began asserting a right to set aside the rules at his own discretion. While this was happening, presidents were also making related power grabs, such as keeping ever more information secret from oversight committees and the courts through such inventions as the term "executive privilege,"[27] which did not pre-date the 1950s, and the "state secrets privilege,"[28] first recognized in the 1950s.

Presidential power thus steadily escalated for two decades, peaking during the Nixon Administration. But Richard Nixon pushed the logic of power to the breaking point, and his imperial presidency came crashing down. In the wake of the twin disasters of Watergate and Vietnam, Congress finally reawakened. It began conducting meaningful oversight again for the first time in decades, and it began passing a series of laws re-imposing controls on executive power in order to prevent future abuses.

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26. ARTHUR SCHLESINGER, THE IMPERIAL PRESIDENCY *passim* (1973).

27. The Eisenhower Administration, seeking to protect government personnel files from Communist witch-hunts by Congress in 1954, promoted the new phrase "executive privilege." While predecessors had at times withheld information sought by Congress for a narrow set of categories, the Eisenhower Administration was the first to essentially proclaim that the executive branch could withhold *any* internal documents from oversight committees. *See id.* at 156.

28. The state secrets privilege allows the executive branch to withhold any information from a court by declaring that disclosing the information—even to a judge alone, in his chambers—could jeopardize national security. This essentially allows the president to shut down lawsuits challenging executive branch actions at his own discretion. The Supreme Court first recognized the existence of this unwritten constitutional power in the 1953 case *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

Understanding this moment in the mid-1970s is critical for understanding what has been happening over the past eight years, because at that moment, Dick Cheney was the White House Chief of Staff to Nixon's successor, Gerald Ford—the youngest White House Chief of Staff in history. Day upon day in the Ford White House, he and his allies were confronting a Congress that was determined to re-impose controls on White House power. As his memos and his documents in the National Archives files show, from inside the White House, this period did not look like a necessary constitutional correction. It was an outrage. They felt that they were being unjustly punished; that they could be trusted with these powers; and most importantly, they felt that these reforms would weaken the commander-in-chief, and that meant weakening America. Cheney and those who felt like him abandoned the traditional conservative suspicion of concentrated government power, and spent the next thirty years seeking to roll back the changes in the 1970s—to refight those battles and win them this time, with the goal of restoring presidential power to the inflated level that it had briefly reached in the aberrational moment before Richard Nixon's fall.

You can see Cheney's agenda in the decade he spent as a member of the House of Representatives. There, he was continuously arguing with his colleagues that they ought to be giving the president more flexibility, not less, in foreign affairs and national security matters—not just during the Iran-Contra scandal but throughout that period. You could see it in his tenure as the Secretary of Defense to the first President Bush, when he unsuccessfully urged George H.W. Bush to launch the Gulf War without going to Congress for authorization, in what would have been a demonstration that Truman was right—that it was, is, and always would be legal for a president to do that.

During my research, I found all kinds of essays, interviews, and speeches in which Cheney explained his view. In 1989, for example, Cheney wrote an essay for a talk he was going to give at the American Enterprise Institute, a conservative think tank in Washington, about what he termed "congressional overreach in foreign policy."[29] As it turned out, he never presented that paper because he was nominated to be the Secretary of Defense. But during research for my book, I obtained a copy of it. In the essay, Cheney said that he wanted to get beyond the legal arguments over the possible meanings of what he somewhat disparagingly calls the "parchment document"—that is, the Constitution—and explain why, for pragmatic and "real world" reasons, he endorses an interpretation that gives stronger powers to the presi-

29. Richard Cheney, Congressional Overreaching in Foreign Policy (Mar. 14-15, 1989) (unpublished manuscript, on file with the author) (draft prepared for the American Enterprise Institute conference "Foreign Policy and the Constitution").

dent and a lesser role for Congress.

It turns out that Cheney takes the opposite view of the founders, who, as you will recall, thought that it was too risky to let just one person—one flawed human being—control major national security decisions. Cheney said that it was too risky to have more than one person control such decisions. He argued that any system in which the body of elected representatives gets to influence the big decisions on national security would increase the likelihood of leaks and would diminish the likelihood of a proposed covert strike, military attack, or other action from going forward. Thus, Cheney wrote, back in 1989, "the real world effect often turns out not to be a transfer of power from the president to Congress, but a denial of power to the government as a whole."[30] In other words, given the dangers and complexity of the modern world and the United States' role in it, he wants the country to be assertive about launching attacks and taking other frequent and bold actions in the intelligence and national security world. He knows that the country will be more aggressive if the commander-in-chief gets to make such calls completely at his own discretion—if there are no rules to which the president is subject, and if he has exclusive control over the zone of the nation's intelligence activities and military operations. Quite obviously, Cheney is right about that dynamic.

There were others who agreed with Cheney that presidential power ought to be put back to the level it briefly achieved before Nixon's fall. But their goal faced a legal obstacle. Even if you buy into the idea that the Constitution gives the president vast unwritten or inherent power, an *inherent* executive power is not the same thing as an *exclusive* executive power. It is one thing to say that if necessity arises, the president may direct the government to do something that he was not specifically authorized to do by the Constitution or a federal statute because he has the inherent power as commander-in-chief to order such an action. But it is a very different thing to say that Congress cannot choose, if it wants, to step in and pass a law regulating how the president can go about doing that thing from now on.

For example, for most of the twentieth century, there was no law on the books that authorized the executive branch to monitor phone calls that touch United States soil in search of spies and terrorists outside of the criminal law enforcement context, but maybe the president had inherent power to order that step anyway. But that does not mean that *only* the president has power in this area, and that Congress lacks any overlapping jurisdiction to regulate how the executive branch carries out that task. In 1978, following revelations that for two decades,

30. *Id.* Cheney was, in turn, quoting with approval the thoughts of Caspar Weinberger, who had been Defense Secretary in the Reagan Administration.

presidents of both parties had abused their surveillance powers to spy on domestic political enemies, Congress passed a law requiring the executive branch to start obtaining warrants from a judge for such eavesdropping.

To recap: An inherent power is not necessarily an exclusive power. But during the 1980s, presidentialists on the Reagan legal team came up with something called the Unitary Executive Theory.[31] This rested on a revisionist understanding of the Constitution whereby Congress may not pass laws that fracture the president's control of anything deemed to be an executive power. Back in the 1980s, advocates of the theory in the Reagan Administration had not been thinking about national security. Instead, they were focused on comparatively tame domestic issues, such as control of the decisions made by independent agencies like the Federal Reserve (Fed). Since Congress had created the Fed and given it the power to set interest rates, and the decision to raise or lower rates on any given day was simply the execution of the law governing the Fed, maybe, they argued, the president should get final say over that kind of thing by being able to fire Fed members if they ignore his policy orders. But after 9/11, the Bush Administration's legal team revived the Unitary Executive Theory and dramatically expanded its sweep to encompass matters of inherent power and national security. In their hands, the Unitary Executive Theory transformed the commander-in-chief's inherent executive responsibility to protect national security into an *exclusive* power that Congress cannot regulate.

If this vision were accepted as true, then the unchecked powers sought by Cheney and his allies during all those arguments and debates over the years already existed, regardless of what Congress had chosen to say the rules were in the statutes it passed and the treaties it ratified. These powers were just slumbering in wait of a president willing to start using them, and thereby, to demonstrate that they existed.

In 2001, the Bush-Cheney Administration started using those powers. On September 25, 2001, two weeks after 9/11, a Deputy in the Justice Department's Office of Legal Counsel named John Yoo completed a secret memo that would lay out the powers the executive branch believed itself free to exercise in the coming War on Terrorism.[32] Mr. Yoo's secret memo asserted as fact that "the President's powers include inherent executive powers that are unenumerated in the Constitution"; among them a right to use military force as he saw fit regardless of the views of Congress.[33] And, referencing the Unitary Executive Theory,

31. SAVAGE, *supra* note 2, at 47-50.

32. Memorandum from John C. Yoo, Deputy Assistant Attorney General to the President (Sept. 25, 2001), *available at* http://www.usdoj.gov/olc/warpowers925.htm.

33. *Id.*

Yoo wrote that Congress has no power to limit how the president went about defending the nation. "[W]e think it beyond question," Yoo wrote, that Congress cannot "place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, or nature of the response. These decisions, under our Constitution, are for the President alone to make."[34]

This is a vision for a commander-in-chief who exists above the rule of law as it has been traditionally understood in this country. It is also a view that happens to run counter to mainstream and traditional understandings of the Constitution and what the founders were trying to do, a few years after they had fought a war to rid themselves of rule by a king. But it would not be long before the Administration discovered opportunity to turn its aggressive theory into real world action. Each time a problem arose—and many problems would arise in the weeks and months after 9/11, including matters of surveillance, detention, and interrogation—the inner-circle of decision-makers at the White House looked at their options for solving that problem, and then they picked the solution that relied upon the greatest possible assertion of unilateral presidential power to bypass statutory and treaty constraints. By acting on their legal theories, they transformed those theories into historical precedents that future presidents will be able to cite when they too want to evade such a limit on their power in the name of national security.

We do not have enough time today to enumerate all the ways in which the Bush Administration has sought to centralize power in the White House. You might say that it would take a book to do justice to that subject. But I have already talked about signing statements, dramatically expanding executive secrecy, and claiming and demonstrating that the president has a right to bypass laws and ratified treaties governing surveillance, detention, and interrogation. I will name just a few others.

For example, it has been claimed and demonstrated that the President has a right to seize and imprison American citizens indefinitely, even when arrested on U.S. soil, without charges or a trial, at the discretion of the executive.[35] Also, as previously mentioned, by pulling out of the Anti-Ballistic Missile Treaty in 2001 without asking the Senate to vote on whether to de-ratify it, the Bush Administration has locked down a precedent giving presidents the power to dispose of even major ratified treaties at his or her own discretion.[36] This was a significant ex-

34. *Id.*

35. *See, e.g.*, Padilla v. Hanft, 423 F.3d 386, 397 (4th Cir. 2005).

36. President George W. Bush, Remarks on National Missile Defense (Dec. 13, 2001), *available at* http://www.georgewbush-whitehouse.archives.gov/news/releases/2001/12/print/20011213-4.html.

pansion of a precedent that was first established by Jimmy Carter—a great demonstration about why these things are not partisan issues.[37]

The Administration also won from Congress many statutes that add to the president's power. I have already mentioned the Patriot Act.[38] In addition, after Hurricane Katrina, the Administration won from the Republican Congress a law that allowed the President to impose martial law much more easily, even if a state's governor objects.[39] That measure was later rolled back by Congress after the Democratic takeover in 2007—a very rare example of the Democratic Party using its new majority to push back successfully.[40] But cutting the other way, in the Protect America Act of 2007[41] and the FISA Amendments Act of 2008,[42] the Democratic Congress locked down in statute the warrantless wiretapping program that President Bush had earlier seized on his own, rolling back one of the last remaining Watergate-era limits on executive authority.

Perhaps the most important legislation in which Congress expanded presidential power was the Military Commissions Act of 2006, which locked down in statute the President's power to hold U.S. citizens as enemy combatants and expanded the definition of who meets that criteria, not just suspected members of Al Qaeda, but anyone who is accused of assisting anyone else who is accused of taking up arms against the United States generally.[43] This definition is so broad that it potentially sweeps in the right-wing militia movement, left-wing groups like the old Weather Underground,[44] and even the rural mountain dwellers of North Carolina who are suspected of helping Eric Rudolph, the bomber of the abortion clinics and the 1996 Olympics, evade federal capture all those years.[45] They are not criminals, but enemy combatants.

The strategy of picking presidential lawyers to fill Supreme Court vacancies has been an integral part of the groundwork this administration has laid for a long-term expansion of White House power. In 2005, when President Bush selected John Roberts, Harriet Miers, and then

37. *See* Goldwater v. Carter, 444 U.S. 996, 997-98 (1979).

38. USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

39. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006).

40. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (2007).

41. Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2007).

42. Foreign Intelligence Surveillance Act (FISA) of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008).

43. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

44. The Weather Underground Organization was a radical group opposed to the Vietnam War that conducted a string of bombings aimed at the U.S. government, among other acts. *See, e.g.*, Independent Lens, http://www.pbs.org/independentlens/weatherunderground/movement.html (last visited Jan. 17, 2009).

45. *See, e.g.*, Patrik Jonsson, *How Did Eric Rudolph Survive?*, THE CHRISTIAN SCIENCE MONITOR, June 4, 2003, *available at* http://www.csmonitor.com/2003/0604/p01s02-usju.html.

Sam Alito to fill the first two Supreme Court vacancies in a decade, observers outside the executive branch largely evaluated these nominees through the lens of social issues, such as how they were likely to rule on abortion rights. Lost amid the hubbub was what I believe to have been an essential factor behind all three nominations. There was a broad array of very prominent, very conservative legal scholars and lower court judges from which the Bush-Cheney legal team could have selected its nominees. Tellingly, the Administration chose all three from a very narrow slice of the conservative legal world. All three were executive branch legal warriors.

As former White House and Justice Department lawyers, all three had spent years marinating in disputes over executive power from the president's perspective—pushing for stronger White House powers. The National Archives houses reams of documents from John Roberts' era in the White House Counsel's Office in the Reagan Administration, and Sam Alito's era in the Justice Department's Office of Legal Counsel. This is fascinating reading, with Roberts advocating stronger secrecy powers for the White House and broad presidential powers to launch combat without congressional authorization, as in the invasion of Grenada.[46] Similarly, Alito's papers show that he spent years working on ways to increase the president's unilateral powers, including taking a key role in the development of the modern strategy of issuing signing statements much more frequently as a means of increasing the president's power over the law.[47] And of course, Harriet Miers had been part of the Bush Administration legal team during all the fights that arose after 2001. These attorneys had proven their executive power bona fides. They had already embraced theories like the Unitary Executive.[48] And they were thus likely to bring a very deferential attitude to the bench when future lawsuits arise over aggressive claims of presidential authority—Guantanamo-type issues today, but who knows what it will be ten or twenty years from now.

For the most part, the project to expand presidential power has been the most successfully implemented domestic policy of this Administration. Only on very rare occasions have there been stumbles. Most

46. Memorandum from John G. Roberts to Fred F. Fielding (Sept. 9, 1985) (on file with author); Memorandum from Fred F. Fielding (Sept. 9, 1985) (on file with author); Memorandum from John G. Roberts to Fred F. Fielding (Jan. 13, 1984) (on file with author); Letter from Fred F. Fielding to Arthur Goldberg (Jan. 13, 1984) (on file with author).

47. Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, to The Litigation Strategy Working Group (Feb. 5, 1986), *available at* http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf.

48. *See, e.g.*, Samuel A. Alito, Jr., Introduction, *After the Independent Counsel Decision: Is Separation of Powers Dead?*, 26 AM. CRIM. L. REV. 1667, 1667 (1989); Memorandum from John G. Roberts to Fred F. Fielding (July 15, 1983) (on file with author); Memorandum from John G. Roberts to Fred F. Fielding (July 28, 1983) (on file with author).

notably, in 2006, the Supreme Court's decision in *Hamdan v. Rumsfeld*[49] said when it came to military commissions, the president must obey a statute passed by Congress and the Geneva Conventions, contrary to the Administration's legal theories.[50]

But the fallout from that ruling was very quickly contained. One-party rule at the time helped the White House get Congress to roll back the decision by again setting up military commissions. Even more importantly, Congress limited the ruling's ability to spread by stripping courts of the ability to hear Geneva Conventions-based lawsuits in the future.[51] And, crucially, often overlooked by those who celebrated that ruling, only five of the nine Supreme Court Justices disagreed with the White House's legal theories.[52] The other four, including Roberts and Alito, are an average of twelve years younger than those five. Given the realities of the human lifespan, it seems likely that future presidents, within a few election cycles, will have ample opportunity to get that fifth vote if they want to. Thus, rather than a final word, the *Hamdan* decision may have turned out to have been something closer to a last hurrah for the traditional understanding of checks and balances on the president's power in matters of national security.

In closing, when I say "the subversion of American democracy" in the subtitle of my book, which may be a bit too aggressive, I am speaking of *American-style* democracy—the founders' vision, born of the rebellion against a king, of using checks and balances to prevent the concentration of government power. I am not talking about democracy per se. After all, presidents, whether they are subject to the rule of law or not, still must win an election every four years. But I believe it is a fundamental principle of democracy, broadly speaking, that if a nation's governing system is going to change, it should only happen after an informed public debate and a demonstrated mandate from voters. Back in 2000, the Bush-Cheney campaign said nothing about their attitude towards presidential power to voters, even though expanding that power would be a conscious and central agenda from their first day in office.

Last December I grew frustrated with the fact that the 2008 presidential candidates were again volunteering little about their views of executive power and what limits, if any, they would respect on their own authority if entrusted with the White House. Nor were debate moderators asking the question. I drew up a survey of a dozen questions and

49. 548 U.S. 557 (2006).

50. *Id.* at 635.

51. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

52. Justices Stephen Breyer, Ruth Bader Ginsburg, Anthony Kennedy, David Souter, and John Paul Stevens were in the majority. *Hamdan*, 548 U.S. at 566. Justices Samuel Alito, Antonin Scalia, and Clarence Thomas dissented. *Id.* at 655. Chief Justice John Roberts recused himself because he had ruled on the case at an earlier stage when he was still an appeals court judge, but in that prior ruling he had sided with the Bush Administration. *See id.* at 635.

submitted them to the six leading candidates in each party before the Iowa Caucuses. I got back detailed answers from nine of them, including all three who made it to the finals, as it were: Senators Obama, Biden, and McCain.[53] The surveys showed some interesting patterns.[54] McCain, Obama, and Biden all distanced themselves from the Bush-Cheney theories, as opposed to, say, Mitt Romney, who enthusiastically embraced or implicitly endorsed everything Bush has claimed and done.[55] McCain, Obama, and Biden all said that the president, for example, must obey a law governing surveillance or torture unless he can get Congress to change it, even if he does not want to obey it.[56]

Still there were some differences. Interestingly, McCain said that he would never issue a signing statement if he were president.[57] But Obama, while criticizing Bush's use of signing statements as too aggressive, said that he would keep using the device when he decided that legislation he was signing contradicted the Constitution.[58]

On the other hand, after McCain and Obama won their respective nominations and the power of the presidency grew tantalizingly closer to both of them, both seemed to back away from a little of the modesty they expressed early in the campaign. For example, Obama initially said he would never support a bill endorsing the president's warrantless wiretapping program if it gave legal immunity to the telecommunication firms that allowed the Bush Administration to violate the warrant law.[59] He then turned around and voted for exactly that legislation anyway.[60] More dramatically, after McCain won his party's nomination, a top adviser said that McCain now believed that the warrantless wiretapping program had been legal all along because of the president's commander-in-chief powers—a view that totally embraced the Bush-Cheney theories of nearly unlimited executive power in national security matters.[61]

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53. For the full text of their answers, see Charlie Savage, *Barack Obama Q&A*, THE BOSTON GLOBE, Dec. 20, 2007, *available at* http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/; Charlie Savage, *Joseph Biden Q&A*, THE BOSTON GLOBE, Dec. 20, 2007, *available at* http://www.boston.com/news/politics/2008/specials/CandidateQA/BidenQA/; Charlie Savage, *John McCain Q&A*, THE BOSTON GLOBE, Dec. 20, 2007, *available at* http://www.boston.com/news/politics/2008/specials/CandidateQA/McCainQA/.

54. Charlie Savage, *Candidates on Executive Power: A Full Spectrum*, THE BOSTON GLOBE, Dec. 22, 2007, at A1, *available at* http://www.boston.com/news/nation/articles/2007/12/22/candidates_on_executive_power_a_full_spectrum.

55. Charlie Savage, *Mitt Romney Q&A*, THE BOSTON GLOBE, Dec. 20, 2007, *available at* http://www.boston.com/news/politics/2008/specials/CandidateQA/RomneyQA/.

56. *Supra* note 53.

57. Savage, *John McCain Q&A*, *supra* note 53.

58. Savage, *Barack Obama Q&A*, *supra* note 53.

59. Greg Sargent, *Obama Camp Says It: He'll Support Filibuster of Any Bill Containing Telecom Immunity*, TPM Election Central, http://tpmelectioncentral.talkingpointsmemo.com/2007/10/obama_camp_says_it_hell_support_filibuster_of_any_bill_containing_telecom_immunity.php (Oct. 24, 2007, 13:18).

60. For the Senate roll call vote on the FISA Amendments Act of 2008, see United States Senate, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=2&vote=00168 (last visited Jan. 18, 2009).

61. Charlie Savage, *Adviser Says McCain Backs Bush Wiretaps*, N.Y. TIMES, June 6, 2008, at

Now the election is over and Obama is going to be president. So the question is: What is he going to do? His answers before the Iowa Caucuses were quite limited, but his transition team appears to be filling his coming administration with Clinton-era attorneys. We have to remember that President Clinton—while not as aggressive as the Bush-Cheney Administration in its systematic effort to expand presidential power—was nevertheless no slouch when it came to pushing the envelope when he had specific policy problems he wanted to solve. Among other things, Clinton used signing statements extensively against the Republican-dominated Congress, albeit not on the scale of the Bush Administration. More importantly, in 1999, Clinton launched the Kosovo War without congressional authorization and then allowed combat operations to go on for seventy-eight days, becoming the first and thus far only president to violate the sixty-day clock for unauthorized military operations that Congress imposed in the War Powers Resolution at the end of the Vietnam War. If many members of the same legal team that signed off on Clinton's moves flood back into the White House, now with the Bush precedents to draw on, we will see what happens.[62]

But even if future presidents renege on their promises, I believe that it is important to ask them these questions. There is value to having presidents' pre-Iowa answers on the record so that we can at least hold them accountable and draw public attention to those occasions when they may fail to live up to what they said when they were asking voters to elect them. For this reason, I believe that in the future, aspiring presidents should be required to tell voters in detail what they think *now*, not after one of them has already moved into the Oval Office.

So once again, I would like to thank Washburn University School of Law, and particularly General Romig, for fostering public discussion of this critical issue. It is an honor for me to be here as a part of this conference. Thanks to each of you for listening and taking an interest, and I would be happy to address any questions.

AUDIENCE MEMBER: Really terrific, wonderful. I have a compound question. I wonder whether you have given thought, or have any ideas, on the relationship between what you describe as the presidentialist view and the neo-conservative view, marrying those two propositions. And the second piece, I wonder if you are being a little too apocalyptic in your predictions about the Supreme Court appointments. I am thinking of two things—the decision in *Medellín v. Texas*[63] where Chief Jus-

A1, *available at* http://www.nytimes.com/2008/06/06/us/politics/06mccain.html.

62. I made this remark prior to the selection of Dawn Johsen to lead the Justice Department's Office of Legal Counsel (OLC), along with David Barron and Marty Lederman as deputies. While all three were OLC attorneys during the Clinton Administration, it is important to note that all three are very prominent and outspoken critics of the Bush Administration's legal theories about presidential power.

63. 128 S. Ct. 1346 (2008).

tice Roberts and Justice Alito both went against the President in his assertion of power, vis-à-vis the State of Texas. And also Justice Jackson, when he was in the Truman White House, advocated for very strong executive power in connection with Truman's position, and then later wrote the famous decision in *Korematsu v. United States*,[64] disavowing his prior position as advocate. I just wonder whether we have more reason to hope.

CHARLIE SAVAGE: A lot of good questions. I think Jackson was in FDR's White House at the time of those aggressive pro-executive power writings. But you are right that Jackson dissented in *Korematsu*, which upheld FDR's Japanese-American internment policy during World War II.[65] That dissent, by the way, includes a great quote with which I close my book.[66] He is arguing that the Supreme Court ought not to have taken this case and ought not to be upholding the Roosevelt Administration's power to detain all the Japanese-Americans on the West Coast.[67] And he invokes this great image, that once a new executive power is ratified into precedent—in that case the judicial precedent, but I would argue a historical precedent acts the same way, especially in the Office of Legal Counsel world—it lies about like a loaded weapon, waiting around for some future president to pick up whenever he can claim an urgent need to do so. I think all of these powers that the Bush Administration has established are going to be with us for some future president's Office of Legal Counsel to say, "It is well-established that we can do this because in 2002 the President did this and got away with it. That shows it can be done." That is a tangent.

Addressing whether there is a neo-conservative connection to presidentialism—presidentialism makes neo-conservatism easier, in the sense that neo-conservatism means aggressive use of force abroad for a variety of policy ends and a more muscular presidency can just send the troops off to start fighting at his own discretion without first having to convince others of that policy. As Cheney observed back in 1989, the country will just do that much more often.[68]

But I think this is bigger than national security and foreign affairs. These powers can be used for all kinds of policy ends that have nothing to do with the neo-conservative worldview. For example, here is an interesting thought experiment. During the Democratic primary, Barack

64. 323 U.S. 214 (1944).

65. *Id.* at 242-48 (Jackson, J., dissenting).

66. "As Supreme Court Justice Robert Jackson once warned, any new claim of executive power, once validated into precedent, 'lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition embeds that principle more deeply in our law and thinking and expands it to new purposes.'" SAVAGE, *supra* note 2, at 330 (quoting Justice Jackson's dissenting opinion in *Korematsu*, 323 U.S. at 246).

67. *See Korematsu*, 323 U.S. at 244 (Jackson, J., dissenting).

68. Cheney, *supra* note 29.

Obama and Hillary Clinton were fighting with each other over who hated free trade more. It was probably just posturing, but they were each promising that they were going to unilaterally renegotiate NAFTA (North American Free Trade Agreement)[69] to make Canada and Mexico put in more labor protections and so forth—not that Canada needs more labor protections, but I guess it was aimed south. I think Obama said the leverage he would use to get them to change the treaty was that he would just pull us out of NAFTA if they refused to add those provisions to it. Well, that is pretty interesting. Can a president unilaterally pull us out of NAFTA by waving his fingers? Bush pulled us out of the ABM Treaty by waving his fingers.[70] So I guess Obama can do that if he wants.

Now, getting rid of free trade has nothing to do with neoconservatism. In fact, it probably cuts the other way because it would be an isolationist move. So this thought experiment illustrates how these issues float above ordinary politics. Presidential power—including seizing the power to unilaterally control when the United States is going to abrogate a treaty—is a structural issue that can be invoked for a wide range of policies.

As far as *Medellín*, that is an interesting observation.[71] That case addressed the death penalty, the rights of Mexican citizens arrested in the United States to get consular consultations, and whether Bush could order the state of Texas to stay its executions because it had not gotten those consultations.[72] The conservative Supreme Court Justices held that Bush did not have the power to interfere with a state's criminal justice system.[73] So it is true, that case cuts the other way. None of these things are completely black and white. There is a lot of complexity and nuance here. I think another one would be Justice Scalia's dissent in *Hamdi v. Rumsfeld*,[74] which was about the U.S. citizen who was picked up in Afghanistan and indefinitely detained as an enemy combatant. Scalia said that the president had to charge Hamdi with treason and give him a trial or release him.[75] So no one is a robot here. But I think there are inclinations, there are biases, and there are overall trends. What we see here is overwhelming deference, if not one that has no exception.

AUDIENCE MEMBER: Thank you very much, Charlie. I think you may be a little bit over-pessimistic in terms of anticipating that presidential power will always ratchet itself up over time. If you reflect,

69. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993); 19 U.S.C. §§ 3301-3473 (2006).
70. Bush, *supra* note 36.
71. Medellín v. Texas, 128 S. Ct. 1346 (2008).
72. *See id.* at 1353, 1354.
73. *Id.* at 1353.
74. 542 U.S. 507 (2004).
75. *Id.* at 554 (Scalia, J., dissenting).

the first three presidents in United States history presided over extremely strong executive offices in Washington. Presidents Adams and Jefferson were, by any measure, very strong presidents. But between 1865 and 1933, I think it is safe to say we lived in an era of congressional supremacy, and presidencies were rather weak. One can envision, then, at least in theory, a strong presidency giving way to a period of congressional ascendency. It is not inevitable that presidents or presidential power will be embraced by succeeding administrations. But my question for you is a different one. It is very interesting to me that you set out to anticipate how Barack Obama might interpret executive authority based on his responses to your surveys.

Perhaps my question is embarrassingly naive. But Barack Obama was professor of constitutional law for ten years. I have not read his curriculum vitae. I do not know how long he taught. Presumably, he has published something. As a professor of constitutional law in Chicago, one would anticipate that someone is publishing on constitutional law. Does he not have a record of publications addressing the issue of the balance of powers within the federal government, and how executive authority is placed within those bounds? And also, I do not want to read too much into *Medellín* because *Medellín* also incorporates federalism in the balance.[76] It is one thing for a relatively conservative judge to defer to state power. It is another for a relatively conservative judge to embrace international law or federal constitutional checks on executive authority.

CHARLIE SAVAGE: You made three points. I entirely agree on your point about *Medillín* and the conflicting notions of federalism versus executive power that came into play in that case.

Your question about whether Barack Obama had published anything, I feel maybe was a rhetorical question as he famously has not published anything.

AUDIENCE MEMBER: I did not know that.

CHARLIE SAVAGE: During the campaign, there was an argument about whether he ought to be called a constitutional law professor, when he technically had the title of "senior lecturer" at the University of Chicago. In part because he spent most of his time in the State Senate in Illinois rather than as a full-time academic; he published nothing.

AUDIENCE MEMBER: Nothing on executive authority?

CHARLIE SAVAGE: No scholarly work on anything. But his answers into the survey were quite detailed. The question is just: Is he going to stick to that? Can you trust a politician, you know? Maybe you can. We will find out. It is going to be an interesting set of years here.

76. *See generally* Medellín v. Texas, 128 S. Ct. 1346 (2008).

But we are going to have another factor in play here. We are entering another period of one-party rule in Washington. It does not matter whether it is the Republicans as it was in the Bush years or the Democrats as we are going to have now or as LBJ had in the 1960s. When you have one-party rule in Washington, the constitutional structure breaks down. We have this reverence for the Constitution as this sort of perfect document—the founders were geniuses—and it is not. It is a flawed document. One of the ways that it is flawed is that the founders did not anticipate that we would have political parties. In the *Federalist Papers*, they specifically warned against factions. They wanted everyone to be a free agent and, thus, if the executive pushed too hard, the self-interest of lawmakers would cause them to push back. But that is not what happened. In fact, we got political parties almost immediately. We have teams of politicians working together across state lines, across branches of government to control policy outcomes, and that means that when we have one-party rule, it sets up a conflict of interest.

The leaders of Congress have their own leader. That is their party's leader—the president. Their interests are intertwined. They need the party leader to do well so that they themselves will be returned to power. That causes them not to push back when the White House gets too aggressive, and it causes them to go easy on oversight. And, so, I expect we are not going to have a lot of oversight of the Obama Adminitration initially. What oversight we do have will probably be retrospective, looking back at the Bush years. I expect that will allow problems to fester in the executive agencies. In general, strong oversight nips problems in the bud, and so I firmly am convinced we will have problems.

As far as whether Obama himself will assert strong unilateral executive authority, it may be that he will not need to. It may be whatever he wants done, Congress will just sort of rubber-stamp for him. One of the mysteries of the Bush years on its surface was why he did not go to Congress and just say I want the following power given to me. Because they would have given it to him. Jack Goldsmith argues in *The Terror Presidency* that is what Bush should have done, and he would have avoided all these controversies.[77] The solution to the mystery of why they did not ask Congress for authorization is that they did not want to implicitly concede that going to Congress was necessary; in fact, they wanted to demonstrate that the president did not need to go to Congress. They adopted that strategy because of these long-term issues that dated back to the post-Watergate, post-Vietnam era. This is what I was talking about when I said they were willing to create extra political diffi-

77. JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 206-08 (2007).

culties for themselves in order to achieve their policy goals in a way that would also expand executive power. Obama appears not to share that agenda, so he may just go to Congress to authorize everything he wants, which may mean that on the surface, he will seem more modest and accommodating, even if he ends up exercising extremely broad day-to-day powers.[78]

But that brings me to the first thing that you said—is it true that executive power always ratchets upwards, since after the Civil War it went down again? I think that the really relevant period is the modern era, which is FDR to the present—with standing armies, with America having its sort of hegemonic role in the world, with nuclear missiles, and so forth. Now, even within this era, it was not consistent escalation. There was the exception of the post-Vietnam and post-Watergate era—the Ford and Carter Presidencies—a backlash moment which ended by the Reagan Presidency. But I think that exception proves the rule, because it shows how difficult it is to swing the balance back the other way and how quickly those forces dissipate, after which executive power goes back to where it was and then starts ratcheting up again. Almost all of the post-Watergate controls had already eroded away by the end of the Clinton Administration with the exception really just of FISA (Foreign Intelligence Surveillance Act of 1978),[79] and then FISA went by the wayside within a year of the Bush Presidency. I think the history of how this works is that presidents of both parties push the envelope. Maybe not as systematically as the past one has done, maybe just when they have some specific policy goal they want to achieve, like Clinton and Kosovo, but they push the envelope. And then as far as each one gets it, that becomes the baseline for the next guy and he pushes it a little bit more.

Much of this is the kind of issue that never gets into court, because no one has standing to sue over any of these sorts of questions most of the time. That means that you are never going to get judicial resolution of any of these issues. An aggressive president who is willing to simply claim, "I can do 'x'" and then does it—unless Congress is going to impeach him over that, he gets away with it. That makes it all the easier for the next president's Office of Legal Counsel to opine, usually in secret, "It is well-established that we can do 'x' because we have been doing 'x,' and let us keep doing it some more, or do it in these new instances." This just keeps expanding and expanding and expanding.

So I think, in fact, the one-way ratchet is the right way of looking at how presidential power has been escalating in the modern era. It is not

78. *See, e.g.*, Jack Balkin, *Are the Parties Dividing over Executive Power?*, Balkinization, http://balkin.blogspot.com/2007/12/are-parties-dividing-over-executive.html (Dec. 28, 2007, 11:02).

79. FISA, 50 U.S.C. §§ 1801-71 (2000 & Supp. V 2005).

a pendulum that goes back and forth. It is a ratchet that is much easier to increase than it is to roll back again. Even if you sometimes get a president who is comparatively modest for whatever reason, that cannot erase the historical and legal precedents that the previous, more aggressive presidents have established. So sooner or later we will have another aggressive president again, and that person will be able to easily pick up where the last aggressive one left off.

Thank you very much. It has been my pleasure.