

Center for American Progress



CENTER for CONGRESSIONAL  
and PRESIDENTIAL STUDIES  
[www.american.edu/ccps](http://www.american.edu/ccps)  
SCHOOL of PUBLIC AFFAIRS

**PRESENT:**

**“CHECKS AND BALANCES: PERSPECTIVES ON  
AMERICAN DEMOCRACY AT THE BEGINNING  
OF THE 21<sup>ST</sup> CENTURY”**

**PANEL ONE:**

**THE PRESIDENCY: A NEW ERA OF EXECUTIVE DOMINANCE**

**CHAIR: STEPHEN WAYNE, PROFESSOR OF AMERICAN  
GOVERNMENT FIELD CHAIR, GEORGETOWN UNIVERSITY**

**ANDREW RUDALEVIGE,  
ASSOCIATE PROFESSOR, DICKENSON COLLEGE**

**C. BOYDEN GRAY, PARTNER,  
WILMER, CUTLER, PICKERING, HALE & DORR**

**BETH NOLAN, PARTNER, CROWELL & MORING LLP**

**WALTER PINCUS, STAFF WRITER, *WASHINGTON POST***

**9:45 AM – 11:15 AM  
WEDNESDAY, AUGUST 31, 2005**

**TRANSCRIPT PROVIDED BY  
DC TRANSCRIPTION & MEDIA REPURPOSING**

JAMES THURBER: Our first panel is chaired by Steve Wayne, to my immediate left. Steve has published over 10 works on the presidency. He's widely known in the United States throughout the world as a presidential scholar and he will set the context for this first panel on the presidency in a new era of executive dominance.

Steve? And by the way, if you would like to sit at the table as panelists, that's fine.

STEPHEN WAYNE: Okay.

MR. THURBER: Or you can come up here. Thank you.

MR. WAYNE: Thank you, Jim, and good morning everyone. The American people for a long time have been ambivalent about the question of presidential power. We want a strong president, particularly in times of crisis, but we fear a strong president, particularly when that president produces – pursues policy that we don't like. We want a loyal servant as president, a person who thinks and acts in national terms, not on the basis of some personal or partisan interest. In other words, the people want a strong a president as necessary, but disagree over when it's necessary and how strong that president should be.

The ambiguity with which the American people view the president has been over the years reflected in the ebb and flow of the president's powers. From the perspective of the president today, the powers are deficient in view of the demands and the expectations placed on the office. In other words, there is a gap between what we expect the president – which has been reinforced or highlighted by what presidential candidates promise and the images that they present in campaigns, and the resources that are available to the president to meet these expectations: the formal powers, the informal influence, and more recently the rhetorical skills. So there is a gap between expectations and performance.

But let me begin at the beginning with the framers of our Constitution. The framers of our Constitution were also ambivalent, in my opinion, about the executive having too much or too little power. To guard against the president having too much power – and recall what Thomas Jefferson said in the Declaration of Independence, all the accusations against George III – the delegates at Philadelphia placed the president within a separation of powers system that was internally checked and balanced. They purposefully limited those presidential powers that they alleged had been most abused during the colonial period: the ability of the executive to get the country in war, treaty-making, appointments, and the veto. In each case, they left the initiative to the president but the last word to both houses of Congress; or in the case of appointments, to the Senate. And if all else failed to constrain the president, he would be subject for impeachment for treason, bribery, and other high crimes and misdemeanors.

When you read Article II, it lacks, as we all know, the specificity of Article I. I think the framers purposefully left much to interpret for later generations. Having left executive powers vague, the framers ensured that those powers would be sufficiently elastic to adjust to changing conditions, but that very elasticity has also ensured political controversy over the years with respect to these powers. And this symposium, as Jim just said, is going to explore that controversy in the light of the president's dilemma today.

In short, then, the initial conception of the office was that we needed a stronger executive than existed during the Articles of Confederation or during the period of the Congress, but at the same time they were fearful that the president could become too strong and so they encased it in a system. That was the original intent. It was an intelligent design, but one that has evolved over the years. (Laughter.)

Now, fast forward to 1960 and Richard Neustadt's famous book, *Presidential Power*. The book came out at the very end of the Eisenhower presidency. Neustadt had worked in the administrations of Franklin Roosevelt and Harry Truman in the Bureau of the Budget and he came out with a thesis that was a different kind of thesis, particularly after FDR. He said the president was weak, not strong, and he needed to bargain and cajole and persuade if he was going to get his way. Since the publication of Neustadt's book in 1960, we have seen a growth in presidential powers, but also a growth in the expectations that we have of the office. In the Kennedy and Johnson administrations, presidents moved into the areas of formulating social welfare and civil rights policies and power moved from the departments and agencies to the White House. This was the very beginning of the centralization of power in the White House and in the Executive Office of the President.

During Richard Nixon's presidency, we saw in the first term a continuation of the Great Society program. Nixon, as you know, was our last liberal president. I know that sounds funny, but if you think of the legislation that was enacted, which the president signed off on in his first term, the fact that he – the OSHA was created, EPA was created, the first environmental legislation was passed, campaign finance legislation was passed, a large revenue sharing program with the states was passed, all the COLAs were placed on the entitlement programs during the first term of the Nixon presidency. So Nixon basically bent towards Congress and tried to gain control over the executive branch at the beginning by politicizing power and trying to concentrate it in the White House. And he had a plan in the second term, had he been able to continue through it, where he would have sent his people from the White House out to gain more control over the departments and agencies.

Reagan comes in; he tried to – and successfully I think, redirected the philosophy of government from one of the government doing more to one of the government doing less. And he's the first president to make effective use, I think, of public relations as a means to build support in Congress. When Clinton – Bush follows in Reagan's footsteps, and then Clinton comes in and we have a – for the first two years, the last remnants of the liberal democratic movement, and then Clinton moves into the center to survive with the Republican Congress.

And now with George W. Bush, we've probably had the most vigorous use of executive powers, certainly the powers in the area of national security, since, I think I would say, the Nixon administration. And we have in the second term a president who is very anxious to make a domestic legacy like he did foreign policy and national security legacy in term one.

Now, from the point of view of the president, as Jim noted, there is always a shortage of powers given the demands that we place on the institution. I remember in 1976, I had the occasion to interview Dick Cheney when he was Gerald Ford's chief of staff and I asked him a number of questions, I said, "How do you like the job?" He said, "I love it."

I said, "What is that that you like about it? Is it the power? Is it meeting with world leaders? Is it having an impact on public policy? Is it interacting with the president?" And he said, "Steve, it's everything but the first thing you mentioned. When I was at the outside looking in, the White House looked to be a very, very powerful place. But now when I'm on the inside looking out, all I'm aware of are the constraints or the hurdles." And I think what we've seen in the Bush administration is more of a determination to overcome those hurdles through the effective use of executive power if the president cannot get his way with Congress.

And my prediction would be that for the last two years, the so-called lame duck period, we'll see an increase in the use of executive powers despite the criticism which President Bush and his administration made of Clinton's use of executive powers at the end of the Clinton presidency, so it's a give and take. It's a flow of power. It always has been, and I think the hope is that it will be. And our panel is going to examine that this morning.

I'll introduce each panelist before they speak. Our first panelist, simply going in order, is Andy Rudalevige. Andy is an associate professor at Dickinson College in Pennsylvania. He is a scholar on the presidency. He has written two books, one of which is just being published, *The Imperial Presidency*, and another book on managing the presidency where he focuses on centralization, politicization, and their impact on the ability of the president to get his way.

Andy?

ANDREW RUDALEVIGE: Thank you very much, and it's a pleasure to be here. I want to thank both the American University and, of course, the Center for American Progress for inviting me this morning.

I'm going to cover a lot of ground and do it very quickly, given our time constraints, so a lot of the things I will talk about will be in broad terms. I'll be talking about tools and strategies and we can get into specifics, I imagine, as the discussion progresses. I want to start by noting a quote from H. L. Mencken, who in 1926 pointed

out that no person would want to be president under the constitution. That is to say that the constitution itself grants the president very limited formal powers. Article II, as Dr. Wayne mentioned, is very short and it's very vague, but as we all know people do want to be president; very badly in some cases. And this is because what Edmund Randolph feared, back at the constitutional convention, was the fetus of monarchy.

Well, I would suggest to you that the fetus of monarchy has grown up. Not to be king exactly, but certainly to extend its powers far beyond what the framers had in mind at the outset. As I'll talk more about, that's not entirely a bad thing. In many ways, it's a necessary thing. But to start with another citation, I would mention Robert Jackson, Justice of the Supreme Court, who mentioned that presidential powers have practical advantages and grave dangers, and I think we need to keep both of those things in mind as we progress through the discussion today.

As I mentioned, people do want to be president. Presidential power has expanded. I'm going to suggest very much truncating a discussion of the history here, but there have been four main ways in which presidents have expanded their power. First, over time, has been the creation of a presidential branch. This is Nelson Polsby's phrase; a presidential branch distinct from and often in opposition to the executive branch more broadly, leading to a centralization of policy authority in what now is the Executive Office of the President.

A second strategy has been to rely on what Andrew Jackson called the president's role was the tribune of the people. And, of course, as communications technology has expanded and been extended, that's been a more prominent role of presidents, but it's a strategy of grafting public opinion onto presidential power. A third aspect would be to use the formal powers strategically and aggressively in some cases; for example, the veto power or the suggestion in the constitution that the president promulgate a legislative program. And the fourth area would be the creative and continual interpretation of constitutional vagueness in the president's favor, right? No president reads the constitution – for example, the grant of executive authority that begins Article II – and says, “I don't have the power to do that,” at least not nowadays.

This is a debate that goes back to the 1790s, of course: the debate between Alexander Hamilton and James Madison over Washington's Neutrality Proclamation, very much foreshadows the kinds of debates that have gone on throughout American history with regards to whether the executive power granted or vested in the president extends to doing more or less anything that the constitution does not forbid. And while scholars tend to decry that expansion in practical terms, the Hamiltonian argument has won. This is not as much of a debate in theory as it has become in practice.

And it's not surprising, presidents are ambitious, right? They push. As Professor Thurber said, president's push continually. The question is when other branches of government will push back. Presidents are ambitious, but ambition is provided for in the constitution. Remember Federalist 51, the notion of ambition counteracting ambition.

The question is, when it's appropriate for that lack of counteraction to take place, and that's, I think, going to be crucial to the debate today.

It should be noted though, that as of the mid 1960s, scholarship was very happy to see a lack of pushing back, if you will, by especially the legislative branch. James MacGregor Burns, not to pick on him particularly, but he wrote longingly in the mid 1960s of presidential government. The reason being that he saw, as another one of his works pointed out, a deadlock of democracy. Without strong presidential leadership, strong policy and strong world leadership would not be possible.

In fact, Michael Nelson and Erwin Hargrove has pointed out that in the mid 1960s, scholarship tended towards a savior presidency, right? We expected that the president could save American government almost from its own unwieldy structure, but a decade later, of course, there'd been an abrupt drop through the circles of paradise. The savior president had turned to a sickened president, if you will. The short reason for that, of course, is Vietnam and Watergate. An even shorter reason might be Richard Nixon. And I'm not going to go into the details of the 1970s here, but at that point, of course, what Arthur Schlesinger, Jr., famously called "the imperial presidency" was in full view: the aggressive use of war powers, of covert action; the use of impoundment; power over the budget; the aggressive use of executive privilege; the political use of executive agencies, in some cases to violate civil liberties; and more generally, broad claims of executive powers being inherent. The question that presidents Johnson and Nixon often asked was not "we should do this," but "I have the right to do this," and that's sort of a shift in the debate, I think, that we've seen or returned to more recently.

In the 1970s, of course, Congress strikes back. James Sundquist's very detailed and delightful book, *The Decline and Resurgence of Congress*, published in the early 1980s, goes into great detail about the mechanisms by which Congress resurged in his view, but let me just give you a partial list of the enactments between about 1971-72 and 1980. In the budgeting, of course, we have the Congressional Budget Act and the Impoundment Control Act as well as the – as part of that, the creation of the Congressional Budget Office to counteract OMB, as well as the requirement that OMB's top officials receive senate confirmation, which is new at that point.

In war powers, we have most famously, the War Powers Resolution, but also the Case Act, the Hughes-Ryan Amendment, and finally, the Intelligence Oversight Act, and you might include here, too, things like FISA and other limits on domestic intelligence gathering.

In the area of open government and governmental ethics, the Presidential Records Act which follows on the Presidential Materials and Preservation Act; the FOIA amendments in the early '70s; the Federal Advisory Committee Act, which returned to prominence most recently with the energy taskforce debate; amendments to the Campaign Finance Act; the Sunshine Act; the Privacy Act; the Ethics in Government Act in 1978, which most lastingly produced the independent counsel.

Yet, I would suggest – and this is, as Professor Wayne mentioned, the topic of my new book – I would suggest that the – by the 2004 election, which is where I leave off, what I would term this resurgence regime has been overwhelmed. It's in shambles. Presidents, starting, I would think, mostly notably with President Reagan and continuing most emphatically with the current incumbent, have regained their freedom to act. They've reasserted their claims to inherent executive authority. This, of course, was a stated goal of the George W. Bush administration early in the administration, even before September 11<sup>th</sup>. Vice President Cheney, the president himself, Andrew Card all mentioned their belief that Watergate-era restrictions had hemmed in the president to an unacceptable degree and it was their goal to restore what they saw as rightful executive prerogative, and they've done so quite aggressively, of course.

Now, I'm going to sort of go through those areas again, just to note very quickly some of the ways in which the resurgence regime has been overwhelmed, but you should note in what follows that there is a combination here not only of presidential assertiveness, but of legislative acquiescence. In some of these areas, Congress has not been run over so much as it has laid supine or even turned the keys for the president as the executive engine starts up.

In the area of unilateral authority, for example, we've seen an increase in the reliance on executive office staff; again, the centralization of policymaking. We've seen strategic politicization of the executive branch through the appointment power, including the power of recess appointments; of course, that's been recently prominent. We've seen the use of regulation to achieve policy ends. And relatedly, the use of executive orders, of proclamations, of national security directives and the like in the order to implement policy through executive means rather than through statute, though sometimes creatively using old statutes in order to gain the basis for executive authority.

I would mention also signing statements, which I imagine we'll hear more about, which have been used quite aggressively in recent administrations, but going back at least to the 1980s, and in fact pioneered in some ways by President Nixon in the late '60s, to selectively enforce the law.

Law enforcement generally – again, presidential powers have been expanded, especially after September 11<sup>th</sup>, the tearing down of the FISA wall, debates over the Patriot Act and so forth fall into this category. And I would mention, also, a resurgence of secrecy. Of course I mention the Energy Task Force under Vice President Cheney. I might mention also, very pertinent to my own research, the executive order issued by the president in late 2001 restricting access to presidential libraries and making it harder to open presidential records. There's been a reclassification, or a reexamination anyway, of the data that had been previously open. That's happening for not only the presidential library system, but also the National Archives generally. And a change of the burden of proof for classification: instead of things being opened if there was no reason to close them, they're closed unless there's a compelling reason to open them. And further resistance to FOIA and possible discussion about restricting FOIA further.

In the war powers area we've seen, of course, this has been very aggressive, but the War Powers Resolution, it should be noted, has never worked as designed. People as diverse as Lou Fisher of the Congressional Research Service and Newt Gingrich and the House of Representatives that's called for the War Powers Resolution to be abolished. Fisher, because he doesn't think it reigns in presidents, and Gingrich because he thought it reigned in presidents too much.

It would be important to note, I think, that there are – I could go on and probably fill the rest of my time with just a list of examples where presidents have used force unilaterally without the prior approval, certainly, of Congress, but it should be noted that President Clinton, even while debate raged over his impeachment in late 1998, ordered cruise missile strikes and was not attacked by Congress for this, but rather praised, in fact.

We've also seen, of course, what we might think of as new blank checks issued to the president for the use of force. These, again, are not new necessarily, they go back at least to the Eisenhower administration and the Formosa Resolution; the Middle East Resolution in the 1950s; more famously, of course, the Gulf of Tonkin Resolution after 1964; and reaching a height, perhaps, September 14<sup>th</sup>, 2001, with the authorization for the use of military force – a check so broad that the Supreme Court held in 2004 that had extended even to the declaration of enemy combatants by the president.

Along those lines, we have, of course, seen presidential assertion of the authority to designate people as enemy combatants, not just those who are taken prisoner on foreign battlefields, but American citizens as well arrested on American soil, as well as the executive authority to issue military tribunals; to create those tribunals outside of the court system, though as we've seen, habeas corpus has not been suspended. We've seen even the assertion, at least in administration legal documents, that bans on torture might be unconstitutional where they interfere with inherent executive authority under the Commander-in-Chief Power. And so I would – will come back to this question, but I would suggest there's been a general lack of oversight in these areas generally by Congress.

Budgeting, we've seen a series of late budgets. A budget complete by October 1<sup>st</sup> is a rarity, perhaps even an impossibility. We've seen large continuing resolutions; out-of-balance budgets, of course, except for a brief blip in the 1990s; and huge, omnibus bills winding up being passed in January or February. All of this, I would suggest, enhances presidential leverage. It enhances the use of the veto power for presidential bargaining, especially after the 1995 shutdown of government where the public blamed Congress for that shutdown. Congress since does not wish to be blamed for that issue.

And finally, just quickly in the ethics area, we've seen, of course, the collapse of the 1970s campaign finance system in 2002 with the McCain-Feingold Act, and certainly spending on presidential elections has not been stopped in any way. Spending, of course, in 2004 reached new heights. The Independent Counsel Act itself, which was hoped would service as a check – an independent, nonpolitical check – on presidential power

was allowed to expire in 1999, partly reflecting the fact that it did not work as a nonpolitical check, and both Democrats and Republicans wound up agreeing with that, but nonetheless in its wake there is a void there.

So in the end, I would argue that we do have a new imperial presidency in the sense that the power exercised by 1960s and '70s presidents in the old imperial presidency have been regained. Recent administrations have made claims of authority, again grounded in inherent constitutional power, and the balance of power, if I might quote the famous folk singer Bob Roberts instead of Bob Dylan, "The times, they are a changing back." (Laughter.)

Now, I want to come back to that first statement by Justice Jackson, though: there are practical advantages as well as grave dangers here. You can't have an imperial presidency without the acquiescence at least of Congress. You might say you can't have an imperial presidency without an invisible Congress in some ways, but again we shouldn't let the word imperial sort of turn us away from the real necessity, in some ways, of a strong executive establishment. You need to provide authority for the tasks at hand, and you can't provide direction to an enormous nation with an enormous governmental establishment with enormous expectations, as Dr. Wayne mentioned, without providing authority to do that.

Federalist 70 – Alexander Hamilton's master work in some ways – talks about the structure of the presidency as providing an avenue for decision, dispatch, activity and secrecy: all things which the inchoate nature of Congress makes it very difficult for that body to provide. The basic balance of power, I think, in the American constitutional system has shifted up, I guess, Pennsylvania Avenue, and that is not necessarily a bad thing.

On the other hand, though, presidential preferences in my view should not become policy without persuasion. We should not allow for command without coalition building. My point is not that there should not be a strong presidency, but that, as Schlesinger himself wrote 30-plus years ago, that there should be a strong presidency within the constitution. Presidential hagiography is just as problematic as presidential impotency, I would argue.

I don't think to do this we can rely on legislation alone. The legislative framework created in the 1970s without a will politically to enforce that framework has proven to be one of the shortcomings of the resurgence regime, but nonetheless there does need to be discussion and debate. There is one area, for example I mentioned habeas corpus, the role of enemy combatants. In the Hamdi decision, Justice Souter, in his opinion, begged for Congressional oversight of this process. He said, we need assessment by Congress before citizens are subject to lockup, and likewise we need a clearly expressed Congressional resolution of the competing claims; here he meant the claims between liberty and security. He said, rightly I think, that the executive is not an impartial observer of this; the executive will always tend towards having more power for itself, and in the face of a national security threat there's something to be said for that.

But that sort of resolution and debate has been lacking in this area and I would suggest across the board. The administration has effectively said, “Trust us, this executive doesn’t do that,” for example, was the answer from the Solicitor General’s office when discussing the areas of torture.

But I’ll just end with an apt warning from non other than President Reagan, when it comes to looking at the executive, I suggest the Congress, but also the American people should trust, but verify. So I leave you there and I thank you very much.

(Applause.)

MR. WAYNE: Thank you, Andy.

Our next speaker is C. Boyden Gray. He is a prominent attorney in town. He was counsel to President George H. W. Bush; was one of the principal architects of the 1991 amendments for the Clean Air Act, and he’ll give you his perspective on presidential power.

Mr. Gray?

C. BOYDEN GRAY: Can you hear me? Some of you heard. Height is sometimes a problem. I judge hotels by the height of the showerhead. (Laughter.)

There’s something of a disconnect here. We are today in this room discussing the overreaching – potentially overreaching nature of the presidency and the imperial presidency thwarting the will of the founders and desires of the Congress, and in a few days we will hear stories about the imperial judiciary and will John Roberts thwart the powers of the Congress which are endangered by the imperial judiciary, not the imperial presidency. So somewhere there’s got to be a discussion, I think, of the judiciary, but we’ll hear that next week, so I’m not worried.

The Congress has given a lot away. A lot of it’s self inflicted. I’m not going to talk too much about it, but I do want to give an anecdote which I’ll come back to from Tim Wirth from my experience in the Clean Air Act, which, by the way, is our energy policy. Let there be no doubt about it. If we have an energy policy, it’s administered by the Environmental Protection Agency, not by the Energy Department.

But Senator Wirth was in on the Energy Committee during the Rio conference and he was – afterwards or before, in run up to Rio, called me up one day and said, “We’re not doing enough. You’re not doing enough on global warming,” a statement that I suppose some people can make today. And I said, “Well, we are having trouble getting the Department of Agriculture to integrate into our working group. They’re very important, and without them we can’t do much.”

“Agriculture?” he said, “Trees, crops, forest? What do they have to do with global warming?” And I said, “Well, forests are the greatest sink for CO<sub>2</sub> and the burning of them is probably the greatest source of CO<sub>2</sub>. And agricultural practices, tillage, fertilizer, tractors are 16 percent of the manmade CO<sub>2</sub>. It’s pretty hard to do anything without agriculture. It may be the single biggest swing point.”

He said, “My gosh.” He said, you know – I said, “Tim, you just came back from the rainforest. Looking at it from a global warming perspective, how could you possibly say agriculture is irrelevant?” And he said, “Different committee.” (Laughter.) And you all know the story, if you run into a congressman or a senator whose name you blank out on, which the older I get, the more frequently that happens, you’re always safe to simply address the individual as Mr. Chairman because they probably have been or will be or are, and so – and they are perfectly willing to accept the title even if they aren’t.

There is so much fragmentation in Congress, is my point, that it is very difficult for Congress to act as the proper counterweight to the presidency if that is what your concern is. If Congress would streamline its operations; get rid of, especially in the Senate, this whole notion – it’s the doctrine of unanimous consent. That’s the way the Senate’s organized. The only other body in the world that has the same rules of procedure is the Alabama legislature. If they would get – if they would move away from that so that they would have to act in a more collegial way the way they did back in the ‘50s and ‘60s and the postwar period, Cold War period, I think everybody would be better off, but I don’t think it’s the presidency that’s so overweening as it is Congress that has muddied its own backyard. And that in a sense impedes the president’s ability to act, and I want to get into that in a minute.

Just a – but a very, very brief review: there was an imperial presidency, I think personified by President Nixon, but Watergate and the Vietnam War combined to lead to a dramatic curtailment of presidential authority. We’ve heard some others say the War Powers Resolution, the establishment of the Independent Counsel Statute, and one that hasn’t been mentioned, which is the Impoundment Control Act of 1974, which took away a version of line item detail, which is impoundment, which was the one tool the president had to curtail spending or at least punish, threaten to try to coerce spending control.

Now, some of this – and then there was, of course, the Church and Pike Commission reports which are a story in themselves, but they put dramatic limits on our intelligence gathering and our covert activity and made the CIA and its covert capacity really a halfway between the White House and the Congress. So there wasn’t anything the CIA did on behalf of the president that it couldn’t that it didn’t have to get permission basically from the Congress to do, and so Congress was micromanaging the CIA along with – it was definitely a shared power, which I would argue was not good for our intelligence capacity.

The Independent Counsel Statute got repealed, of course, but only when the Democrats were bitten by it. Nevertheless, politically it’s still there. I mean, look at the Joe Wilson case. We have still an independent counsel, not under a statute, but under the

Department of Justice and they still run amok. And I believe, whatever else you may say about the Joe Wilson case, there's certainly not a criminal violation there, so we shouldn't be investigating it in the law – in the grand jury. I mean, journalists can investigate it, but I don't think the criminal justice system should be investigating it.

We never got impoundment back. And as for the War Powers Resolution, I think it's been somewhat diminished because of the effort to get Congressional authority for the use of force both in the First Gulf War and for Afghanistan and then finally for the Second Gulf War, so I think that's been kind of neutered. And of course the Clinton administration – Beth Nolan might want to comment on this – got around the 60-day clock. If you all know what that was, you could send troops in without permission of Congress, but after 60 days, you have to pull them out; kind of a goofy thing. The Clinton administration in the Balkans developed a doctrine of intermittent hostilities. A great doctrine, which is that the 60-day clock starts running every time each bullet is fired. It's a very, very, very effective doctrine, which tolls forever the running of the 60-day clock.

I want to talk though, not about the sexy – sort of very sexy topics of war powers and budget and the – especially in the context of Guantanamo, detention, terrorism, Patriot Act. There the powers the presidency will be augmented, as they are anytime we're in a wartime or quasi-wartime footing. I don't want to talk about that because that will pass, I believe. We've been through cycles of this. What I don't think will pass are the effects of globalization and what that does to put crimps on the presidential authority.

President Bush tried to retrieve some of the lost power the presidency when he became vice president, and again, of course, when he was the president. The regulatory review process, putting centralized review on OMB under executive order 12291, is probably a boring topic for most of you in this room, but for those who know about it, it's – we love it. And it was very, very important because it allowed the president to oversee the federal agencies and vindicate a very simple declaration, a statement – a declarative statement in the constitution that the president must see that the laws are faithfully executed.

He tried, of course, with the Gulf War to put the Congress on the spot and make them part of the authorization. He tried to shore up executive privilege, which the Clinton people kind of frittered away by pushing it too far, and so we don't really have executive – I mean attorney-client privilege anymore. We have executive privilege, but attorney-client privilege has kind of been eviscerated in the later Clinton years.

The president made some – had some success in regrouping some of these powers. I would argue that the most important thing that was initiated under President Reagan was the consolidation of regulatory authority because that's where all the economic regulation is done. Congress delegates it to these agencies, but that's now being endangered, I believe, by the pressures of globalization and by just the system that's set up that many of you may not appreciate. It doesn't really give the president all that much power.

I would start with the FCC. Back in the days when President Reagan was doing reg reform, the FCC was something of a backwater. We didn't have cable. We didn't have talk radio. We didn't have satellite. And we didn't have, of course, the internet. So, communications was not the big deal that it is today. Today, it is the growth engine of not only our economy, but the world economy, but it is an independent agency that is not subject to the direct control of the president. Here is the most important sector of the economy the president has no direct control over. Please note that. The Congress – John McCain, chairman of the Commerce Committee, has much more to say about how this sector of the world economy is controlled than the president does.

Now, the president can appoint and he can hope that his appointees will do what they want, but the prevailing wisdom is – the prevailing legal doctrine is that he cannot tell the chairman of the FCC what to do and he cannot fire the chairman of the FCC if the chairman of the FCC decided not to do what the president wanted him to do. And that is also true of a second most important agency now in the wake of WorldCom/Enron, which is the SEC; also an independent agency. Chairman Dingell, when he was chairman, used to call it his agency. “This is my agency, Boyden,” and it was, and in many ways it still is, but it is certainly not the president's agency. It is an independent agency and it responds to Congress.

The FDA/healthcare. We all know about the new Prescription Drug Benefit Bill, we all know about the importance of healthcare in our economy. The FDA and CMS, which is the price-setting agency, is now beginning to encroach on the FDA's prerogatives by setting prices and listing of drugs for reimbursement. A drug may be approved by the FDA, but if the CMS won't reimburse it, it might as well not be approved. Now, the CMS does not respond to the president. The CMS responds to individual members of Congress. It is run by Congress. Note that well. The most important healthcare agency in the country is not really responsive to the president of United States.

Trade. Trade, of course, is something that is legitimately in Congress' bailiwick. That is where the constitution puts it, but look at the difficulties over fast track, look at the difficulties the president had over CAFTA. Again, Congress is in the driver's seat on trade. And as we live in a global economy, trades then becomes the regulatory driver.

Then, of course, there is monetary policy. Again, that's something the constitution passes directly in the Congress. Congress has delegated to the Federal Reserve. It is not much within the purview of the president of United States. The president can ask or ask his treasury secretary to ask that Chairman Greenspan do X, Y or Z, but Chairman Greenspan is perfectly free to ignore the request.

Finally, there's energy. The Energy Department has nothing to do with energy. The EPA is in driver's seat, and we all know how difficult it is for the White House to direct what EPA does. Now, that's in the hands of the environmental groups and the

media basically. Congress really doesn't have that much to say either. That's really controlled by outside parties to an astonishing, although not complete, degree.

If we don't have energy policy, it's because of the fragmentation; the fact that the Energy Department has no say, the EPA does. The Agriculture Department has a huge role in all of this, but is not a player. It's simply not a player. As Tim Wirth said, different committee. Not relevant.

Finally, globalization. Just to recap with all these alphabet agencies and the role they play, our economic future is dependent increasingly on our trade relationships not just with the EU, but obviously with China – that should be obvious to everybody – with India. And what our regulatory agencies can do and what our trade agencies can do is going to be largely dependent upon what our trading partners do, and right now, we have a regulatory race on with the EU: which regime for issuing and promulgating regulations will prevail for the rest of the world. Will it be the EU approach, the Brussels approach, or will it be our approach? And no one knows. The biggest issue – and one of the biggest issues in foreign policy – foreign economic policy is convergence for regulatory standards. If we don't get that right, it can close off trade. If the Europeans get it right, we will be disadvantaged, and I believe the world will be disadvantaged because their system is hostile in some ways to market forces. But this is where the action is; it's driven by world considerations. Now, the president is really – has his hands tied, not so much by Congress, although they're tying his hands – again, look at the trade regime, but his hands are tied by the realities of our foreign trading partners, and to lose sight of these economic realities, I believe, is to miss the point of where presidential-congressional relations are headed.

Thank you. (Applause.)

MR. WAYNE: Thank you, Mr. Gray. So far at least, the presentation is clear. Andy spoke about an imperial presidency and blamed Congress for its acquiescence. Mr. Gray spoke about an imperiled presidency handicapped by independent regulatory agencies, Congress, and the effects of globalization.

Our next speaker is Beth Nolan. I think she should tell us what it is, imperiled or imperial. She's an attorney in town and she served as White House counsel for President Clinton.

Beth?

BETH NOLAN: Thank you very much. Sometimes height has its disadvantages. Bring that down. Well, I didn't ask myself the question, "the presidency: imperiled or imperial?" as I was thinking about what to say this morning, but I did ask myself the question, are we in fact in an era of increasing executive dominance? And I think the answer is yes.

Then I thought, well, is this an era that really is marked by the start of this administration, which we've heard some claims about, and I think the answer is no, absolutely not. As others have mentioned today, presidents have constantly sought to increase their power. Certainly there have been periods of retrenchment, but as someone who served in the Office of Legal Counsel at the Department of Justice under both President Reagan and President Clinton, I know for certain that protection of presidential prerogatives is not something new to this millennium.

But then I thought, well, is the assertion of executive power or efforts to assert executive power something that's at a high tide right now? And I do think the answer to that is, yes. I've heard the claims – they were mentioned earlier – that President Bush is in part righting the ship of the executive that was battered during the Clinton administration. And of course, the irony of these claims does not entirely escape me: some of the very same people who now say we have to shore up the executive, the executive needs to recover from the weakened presidency, are the very people who did their best to weaken the presidency. And some of these very same people were in fact very outraged at assertions of presidential power so that they both saw a weakened presidency and an overreaching presidency. I can think of recess appointments, executive orders, use of military force, assertions of privilege, all of which were viewed as overreaching assertions of power.

So, that's Washington life, of course. Where you sit is where you stand in many cases and while I feel compelled to note that irony, I don't want to focus on it because I do think we can look at this – all of us can look at these questions and try to think about where do we want – what kind of presidency do we want no matter who sits in the Oval Office?

And I will start by saying in looking at this, I certainly agree that there were some executive prerogatives that were, in fact, weakened during President Clinton's tenure and that it is appropriate to try to reassert some of those. I wish, for instance, that we had been in a better position to insist on the privilege in some cases in which we reached accommodation and were not able to insist on the privilege. We did, however, assert privilege a number of times and the number of times the Clinton presidency was required – that President Clinton was required to assert privilege was unprecedented, and I mention this because I remember privilege fights in both the Reagan administration and the Clinton administration. They are never pleasant or easy, but there was one significant difference I noted, which is that the point at which you got to legal compulsion; that is, that a subpoena was issued, was at the very end of the process. That's how it used to work. That's how it worked in the Reagan administration. It was at the very end of the process, so you could have accommodation without being in a position of actually having to assert a privilege.

That changed in the Clinton administration so that the first notice you had that Congress was interested in hearing from you was a subpoena, a legal compulsion to testify, and you could seek to accommodate, but ultimately you had to answer the legal compulsion in a different way than when you simply had a request. And I wish, and I

certainly wished fervently at the time, that we had been able to hold to the position that White House staff cannot be called to testify before Congress. That is a position that I think is the right one. I think it keeps White House staff focused on their service to the president. You still have Senate-confirmed executive branch officials who can testify before Congress, but you can't continually disrupt the work of the president's White House by calling staff up to testify.

We were not successful in holding that line in many cases, but ultimately it does reflect political realities because that's what these decisions are about, just as ultimately this administration had to abandon the position that National Security Advisor Condoleezza Rice would not testify before the 9/11 commission.

So given different political realities, as I said, I do think it was important to reclaim executive power in certain areas and I think this administration has certainly encountered a vastly different political reality, a vastly different political world that has enabled it to do so. But I come to this, what – why do we want a strong president? Why do we want a strong executive? The chief executive has a constitutional obligation to take care that the laws are faithfully executed. This means all the laws respecting the roles of the constitutional actors in our democracy, including the rights of our citizens.

Ultimately, a strong president who is one who leads by persuasion and not by fiat, that's real strength. Ultimately, a strong president is one who can deal with strong coordinate branches and respect their constitutional rules, and who has strong coordinate branches to deal with. Executive dominance is not the same as a strong presidency. A strong president takes forceful and decisive action even if necessary, but very unpopular action, with open and direct accountability for those steps. I worry that secrecy in the name of strong executive power has been permitted to obscure the real reasons for certain actions or the ability of Congress or the American people to judge the necessity for those actions. This may reflect dominance – the ability to keep things secret – but it does not necessarily reflect strength.

There is no question that we live in very dangerous times and that the president is charged with protecting us in those dangerous times, and that the events of September 11<sup>th</sup> and subsequent events have put in fresh and chilling perspective the need for decisive executive action, but I worry that treating us as being in a perpetual state of war that justifies extraordinary executive action threatens to erode the very constitutional freedoms we are protecting.

The executive, as well as Congress and the courts, have solemn constitutional obligations that they should exercise together. A strong executive is essential, but the system was designed to have, as I think Andy mentioned, ambition counteract ambition and for each branch to be strong.

I want to suggest two principles for exercise of executive power, which I borrowed from some guidelines that some of us who were former attorneys in the Office of Legal Counsel published last December. These are principles that I think should

apply, no matter who the president is. The president is constitutionally obligated to preserve, protect, and defend the constitution in its entirety; not only executive power, but also judicial and congressional power and constitutional limits on government power.

And then secondly, the president's legal obligations are not limited to those that are judicially enforceable. In fact, when judicial oversight is unlikely, the president has a special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of power.

MR. WAYNE: Thank you very much.

(Applause.)

Our final speaker is Walter Pincus. He's a reporter for the *Washington Post*, has spent many years covering national security issues; winner, with other *Post* reporters, of the Pulitzer Prize.

Mr. Pincus?

WALTER PINCUS: I may even be the entertainment value. The reason I'm here is 40 years ago, in the mid – in early 1961, the then chairman of the Foreign Relations Committee, Senator Fulbright had his chief of staff call me and see if I would come work for the committee for 18 months. He wanted me to run an investigation based on a story I had written for the *Reporter* magazine exposing foreign government lobbyists, and Fulbright's message was that I had shown foreign lobbyists misleading Congress, thanks partly to a flaw in the Foreign Agent Registration Act law that governed their public reporting, and now he wanted to give me a chance to help reform it.

I was 28 years – a Washington correspondent for three North Carolina – small North Carolina newspapers and survived by freelancing for magazines, but I had chosen journalism as a career because – I come from the old-fashioned school – I really wanted to change the world. I wanted to make government better, and the idea that Senator Fulbright was giving me the chance to take the process full circle be part of the process of change was something I couldn't turn down.

That first 18 months in 1962 and 1963 – it was a long time ago – working with one lawyer as a two-person staff investigating foreign lobbyists for a four-senator subcommittee was probably among the most rewarding times I've ever had. It was so good that I promised Fulbright I'd come back in five years and run a second investigation in the U.S. military involvement in foreign policy, which became an investigation of the Vietnam War policy.

By the time I took up that option, I was working for the *Washington Post*, which then gave me leave to run the investigation, and again the staff was myself and a lawyer. Over an 18-month period, we went to military bases around the world including Vietnam and Laos. The investigation concluded with the committee using our information to write

and get Congress to pass the first amendments to limit spending on the Vietnam War that led up to Hatfield-McGovern.

Those two sabbaticals on Capitol Hill, working on substantive inquiries, not PR, have always influenced my reporting in all the succeeding years. First of all, I've never forgotten the lesson that Chairman Fulbright gave me the first day: he said, "Remember" – describing his own experience running the investigations during the Truman administration – "it's not what someone did wrong in Washington that counts, it's what they did after they were caught." They were wise words. They've guided my reporting in Washington ever since and I think they show sort of how the city works. They also gave me a real look inside government, not just the Senate and the House, but also the executive departments and agencies, and what I saw for the most part were people working hard to solve tricky and complicated problems in ways not visible to the outside world and particularly not to journalists.

But also more important in those two tours, I had a firsthand view how even 40 years ago how much time then was spent creating news for print and electronic journalists. In succeeding years, Washington officials, legislators, all learned to hire press agents to build barriers so that today in Washington we work in what I call the PR society. The image of what's going on in government has almost entirely replaced what in fact is actually happening in government. News and truth are not the same thing and must be clearly distinguished.

Walter Lippman wrote some 40 years ago an extraordinary book called *Public Opinion*. Quote, "The function of news is to signal an event. The function of truth is to bring to light the hidden facts, to set them into relation with each other and make a picture of reality of which men" – and I'll add women – "can act."

It will be bad enough if the only change I saw today was in journalistic oversight of government, but what makes today's situation even worse is that Congress is not playing its constitutional role as coequal branch with the executive. I teach a seminar in the fall and spring terms entitled "Oversight of government in the media," part of a Stanford and Washington program which brings 24 students here, and they work all day as interns either on the Hill or in government or with NGOs, and I start with the Constitution, the *Federalist Papers*, and the importance of checks and balances.

Sad to say, even the undergraduates who are working either in government or on the Hill have seen the checks provided in recent years by Congress on the executive are not being used, and therefore the balancing is not being done. I agree that we're in a period where executive branch is dominant in the public arena and that's why I think what Boyden said is interesting. In the public arena, the president – thanks in part to my own profession – dominates the airways, both television and radio, and the printed word. His polls were falling a week or two ago, and suddenly there were stories that he was going to go out on the stump, give a series of speeches to support the war, and everybody carried those stories. And during the next week he made the speeches, and everybody carried the speeches. Each day, there was a major story based on his intentions and then

on his carrying out of them. The facts are the same, but the stories run nevertheless. When I first joined the *Post*, we never had a daily slug – a daily president story. The president was covered when he made news. That's how he got in the paper.

Mike Deaver, who I consider a public relations genius in this field, took the Reagan White House and developed what is now today's system. He used the 9 o'clock a.m. meeting – it used to be set up in the White House to tell producers where the president would appear during that day so they can set up what they wanted to cover. What Mike did was to make that the White House story. Reagan, he would tell people – and by the time the system was really well known, the White House correspondents would show up at the meeting. Deaver would announce and talk about what the subject was going to be the president would talk about when he appeared that day. Crime is growing, particularly citing Chicago or San Francisco. Given that advance warning, networks could gather material all day for an evening story. Reagan would appear, say what he had to say, the networks had their material.

Soon, the *Post* and other newspapers began to cover the same thing. And when there was no pre-planned story, questions will be shouted at Reagan by Sam Donaldson and others and his off-the-cuff answer would become a story the next day. The result was that media began covering not news, but the appearance of news from the White House.

When George H. W. Bush became president, he wasn't as adept as Reagan in sticking to the script. And lo and behold, he began to get criticized for not staying on message. In truth, that meant the press was demanding he do what they were told he was going to do. And if he didn't, he was not acting presidential. In short, the media was now covering the PR of the White House. Hunt was criticized for doing too many things each day, for stepping on his message. With George W. Bush, the message has become the presidency. Meanwhile, the Republicans and Congress control committees and congressional oversight of the executive branch has become almost nonexistent. And the legislative branch is reduced to a bureaucracy devoted primarily to the reelection of its members. Today, the average Senate staff is two or three times what it was, and every member in addition has advisors on foreign policy and others. And I would argue much less is being accomplished by this – what is now an enormous bureaucracy.

One other point I think is worth mentioning: television, which helped create the imperial president, has led to a diminished Congress. There are press conferences every day. In the run-up to Iraq war, there was literally a campaign in which on a single day, you'd get the national security advisor, the secretary of defense, the deputy secretary of defense and sometimes the vice president all talking about the same thing the same day, and they were all covered. Congress was not included. But what's worse, debates on the Senate and House floor have been reduced to seriatim speeches. There is no confrontation. Committee hearings have become sort of PR events.

It is an advantage that we in the media haven't learned to overcome, and I think Boyden points an interesting thing out because I can't – I think you'd have a hard time

remembering the last time you saw a story about the FCC or the FTC or the FDA on television, and to some degree, in newspapers. That's what's really going on, but because we've become a PR society, that's not what the most people see or hear about.

Thank you.

(Applause.)

MR. WAYNE: Thank you.

Before we turn to your questions, let me just try to summarize some of the issues or the consensus and disagreement among the panel. We've had here academic scholars and practitioners who've worked in the White House, and they seem to agree that today a strong president is necessary. That's, as Beth Nolan said, where you sit obviously affects where you stand and what you see.

The disagreement seems to be whether this president, President Bush, is exercising power in accordance with or in contradiction to the constitutional system, and whether this president is using crises as a rationale for exerting more power; in other words, extending the crises. And I might simply recall that certainly George W. Bush, if he is doing that, is not the first president to do that. And in fact, even in domestic areas, recall the War on Poverty under Johnson, under Carter, the energy policies as a national equivalent of war, the healthcare crisis under President Clinton, Social Security is going to go broke President Bush says. In other words, there just seems to be a way of presenting these issues in crisis format so that the president can mobilize support behind his or her initiative, which we expect him to do but sometimes are fearful of when we disagree with the policy.

There also seems to be a consensus that the congressional checks which we've been so used to under divided government are not working as well under unified government, whether it's because Congress is too ideological, whether it's because it's unrepresentative, whether it – because it is in partisan agreement with the president, I think those issues will be discussed later, but that the only effective checks on the president at least at the moment are the media and perhaps the polls and then maybe the polls drive the president to more of the PR rather than less, as Mr. Pincus just observed.

So we have a quandary. We have a consensus very strong president, but the disagreement over how strong this president needs to be and how he is exercising his powers as president.

Let us turn to your comments and questions. We have a few minutes for discussion, so who would like to make the statement or ask a question?

Yes, sir?

Q: (Off mike) – I wanted to raise the case –

MR. WAYNE: Just wait one second. The microphone is coming.

Q: I was wondering whether I was going to get one of these.

The case is the creation of the Department of Homeland Security. I think before the W. Bush administration there had been a general consensus that reorganizations of this magnitude were essentially impossible to get through Congress and one should – shouldn't waste one's time trying. Now, if you think back to what happened in 2002, the president was initially opposed to creating a department, then essentially change his position a 180 degrees, proposed a more ambitious department than anyone else had thought of proposing. I would argue, much too ambitious department, but the Congress essentially enacted it almost word for word – I can't think of one significant change in the legislation and essentially didn't play much of a role of review, didn't really – although they have some good hearings before the president made a proposal and then once it was created pretty much by the president's specifications, including the issue he made a successful political issue of flexibility against the unions and hiring.

The department seems to not done very well. The people – slow to appoint people. The people don't seem to be necessarily the right, people. Not clear that the White House focused very much on making it an effective department once it had scored the tremendous any symbolic coup of creating it. Now, maybe it's Walter Pincus' insight that public relation is everything: you can get a lot of gain from creating the department, you don't get nearly as much from making it work. And – or maybe people argue that I'm wrong; that the department does work well, but I'm curious about a sense – because it seems to me on the one hand it suggest an inability of Congress to play the deliberative role of taking an important presidential proposal, really refining it, making it work better, but instead they basically took it and passed it. But yet then the president, in the area where he is ostensibly supposed to have the greatest unintelligible within the executive branch he does not seem to have been – it's been at best a slow, stumbling process including making the department effective. So just interested in comments.

MR. WAYNE: Mr. Gray?

MR. GRAY: I'm not so sure I could agree that it is not been a success. I mean, we have been attacked since 9/11, not that it proves it is a success, but I don't think we know that it is not a success. It has gone slowly but government grinds slowly. You don't really want things to move too fast anyway. But the main point I would like to make a response to your question is that what Homeland Security Department does is try to pull together in some coherent fashion those entities which Congress has pulled apart in an incoherent faction. And what this end of Pennsylvania Avenue is trying to do is to rationalize what the other end of Pennsylvania Avenue makes it impossible to comprehend.

I mean, you take the Department of Justice and the CIA and the FBI and the CIA, and this is true the Intelligence Reform Act as well, there is incoherence at the other end

of Pennsylvania Avenue. You have the Judiciary Committee jealously guarding the FBI and you have the Intelligence Oversight Committees jealously guarding the CIA; neither one wants to allow the other into their own turf and poor president of United States – trying to fight that war is a courageous thing. So I would argue that there has got to be reform at the other end. That’s why I call it the fragmentation – the different committee, Mr. Chairman. I mean there are so many Oversight Committees. There are 45 oversight committees for EPA and each one of those committees or subcommittees are separately staffed with redundant staff, to pick up on Walter Pincus’ point, and you just have a gargantuan free for all turf war down there and it’s for the President to sort it all out, but I would have given credit for trying and – but the other Pennsylvania Avenue’s got to be cleaned up, too. They’ve got to behave a little bit better.

MR. WAYNE: Miss?

MS. NOLAN: I just think – and actually, Boyden, as the question was being asked, I thought it proved your point somewhat. I was thinking really not about the congressional side of it, though I agree with those problems, but it is also the executive branch at its interstitial war worse, I think, to try to pull Justice and Treasury and CIA and ask them to all act like one agency quickly. I do think it’s a slow and lumbering process. I imagine the internal turf wars were terrible beforehand and continue to some extent.

No matter how much people are well intentioned about accomplishing the goals of the department, I think that the way that people see – again, the perspective that people have brought to the department has probably made it harder to make it work the way it was intended.

MR. WAYNE: Yes?

MR. PINCUS: I mean one minor fact and that is it was originally congressional idea and the president didn’t want it, but Congress was reacting to the public that wanted something done – anything. The intelligent reformat is exactly the same thing. Somebody wanted something done and they rushed and did it. And the internal side that took place in the Hill after the president sort of came up with a program is very much like the congressional program was – was just what Beth and Boyden are talking about and that is you took this disparate groups, threw them together without much thought about how they’re going to work, and let them fight out who is going to control what and it’s still hasn’t worked and they’re trying to make it a work in progress. And the same thing is going on within the intelligence community. John Negroponte is still trying to figure out what his powers are.

MR. RUDALEVIGE: Just a very brief addendum. This won’t be a controversial statement here I suspect, but up in Carlisle, PA, it might be. I’m going to argue the politicians are smart and that they act very rationally within in the instances and the constraints that the system gives them. You didn’t mention in your question, for example, that the Homeland Security reorganization is completed in the sort of the white

heat of the 2002 midterm campaigns where President Bush very astutely guides public opinion towards the idea that dissenting on personal control within the Department of Homeland Security is tantamount to, you know, dissent from the war on terror more generally. And so I think we have a sort of coming together of these various strands of presidential power here.

Again, the president as the representatives of all the people against Congress this fragmented group of people who represent very small interests, and the president was successfully able to portray the reorganization as a triumph from that national will as oppose to localism. I would say that from the congressional point of view at that point there was a lot of incentive to push it very hard and I think our members will act in accordance with those kinds of incentives.

MR. WAYNE: Of course, that was right after the midterm election and it was a lame-duck Congress controlled by the Republicans at that point that supported the president. Jim Thurber in his opening remarks made a comment which I wonder if we can think about and maybe discuss this afternoon and that is, in times where there is this pressure, either generated by a crisis or simply a major problem, is Congress able to deliberate? It's not only a question of the committee system, but it's also a question of public impatience.

Brad Patterson?

Q: Brad Patterson, formerly of the White House staff. I'd just like to raise an issue and have the panel discuss it a minute, which is one of the most contemporary and the media issues of presidential – the imperial presidency, and namely the position George W. Bush is taking that he will not permit the opinions of Mr. Roberts when he was in the Office of Legal Counsel in the Department of Justice to be made public during the confirmation hearings on the basis that these are privileged material from the president's legal section – traditional legal section for the president on constitutional issues and therefore being a presidential privilege that he will not permit them to be made public as the ranking minority member of the Senate Judiciary Committee has asked.

My suspicion is that maybe Walter has a different view on this than Boyden, but I would like to see this issue discussed as a matter of imperial presidency going overboard, is he is denying Congress the rights they should have, and so forth.

MR. WAYNE: Gentlemen?

MR. PINCUS: Go ahead.

MR. GRAY: He is a lawyer by the way. I want you to know he is not a practicing lawyer, but has a law degree. I don't think you've ever practiced.

The kind of privilege that is being asserted here, executive privilege about the deliberative process, and I think Beth would have to agree with this, maybe not, is as old

as the country. It even goes back prior. The common law basis for this is very, very, very, strong and not the invention of George Walker Bush. And as you know – as everyone here well knows, all the Democratic SGs have agreed with this position that the president is taking. I doubt, frankly, there is very much in the papers that Congress wants that will shed much light. He was the principal deputy. He would write a few comments. He was not a deep participant in this cases, but for the future it would make it very, very difficult to get any kind of candid discussion about what the U.S. government should do with respect to the third branch of government, the court, if the young lawyer who is working on this knew that it would show up on the front pages of the *Washington Post* at any time in the future. You just couldn't get candid discussions, and I don't see anyone really can argue with that, but I would again this literally this goes back hundreds of years. There is nothing new about this.

MR. PINCUS: There is just a constant fight that goes on about what's released and what's not released. I don't know the details. I know that Boyden is right about when Roberts was in the office of the solicitor general. There has been a tradition, with both Democrats and Republicans, of not turning those over, although I am told some of them were done selectively. I think you only have to wait to see if somebody leaks some of them. That's how we end up dealing with it.

One of the problems, I think, was the coverage – and again I tend to criticize my own profession. You have a flow of stories every day for the last months about one item or another that has been discovered in the files that he wrote when he was in his 20s responding to requests, and his flip remarks get taken out of context. It's not a great way to prepare the public for what's going to be a very serious and I think interesting discussion about Judge Roberts and his past and what you ought to ask people who are about go on the court.

I think there's more interest in the solicitor general material because he hasn't been a judge that long, so he go from his 20s to 50 years later, or 40 years later, and so we'll see what happens, but I know the history of the solicitor general papers and Boyden is right.

MS. NOLAN: I'm going to disagree a little bit with you, Boyden. I completely agree that the privilege is one that's respected and there is a long tradition for it. I do think that there – it seems a bit odd to me that we are treated to all these papers from a very junior attorney mostly handling these kinds of requests that Walter mentioned. And yet when he was a senior political appointee, presumably with much more authority and his papers would be about cases that the United States has now taken a position on – the United States has its position, it's public what its position was. I'm not sure that we really do need to keep everything privileged forever. And, in fact, I would say, Boyden, that the experience we've had over the past 10 or 15 years suggests that any young lawyer who thinks that anything he or she writes definitely won't end up on the front page of the *Washington Post* is very naive because the privilege is insecure and it's insecure because it is ultimately a political decision and if the Senate wanted to say we are not confirming John Roberts without these papers – if it wanted to say that, it would

get the papers. And so it all depends on the strength of the political actors. I'm not saying the president is wrong to assert the privilege, I'm just not sure that it has to be or will protect the kinds of things that we think it will by asserting it here.

MR. WAYNE: We have time for one last question.

Yes, sir?

Q: Bob Tobias, American University. During the period of divided government, Congress and the president were criticized, or Congress primarily criticized as being a roadblock to allowing the president to act, and now I'd be curious about whether or not the panel believes that we should return to divided government to provide the incentives for decreasing fragmentation that Mr. Gray suggests Congress should be doing and as a counterbalance to the imperial presidency that the other panelists described. Is divided government the answer to the role of the presidency that's been described today?

MR. WAYNE: Someone?

MS. NOLAN: I'll give a quick answer, which is, I don't think it takes divided government; I think it takes each branch doing its job and not doing it in a totally partisan way.

MR. PINCUS: I think you have to remember, Senator Fulbright took issue with the Vietnam War when Lyndon Johnson was president, and President Clinton's early troubles came when the Democrats controlled the Congress. I think that's right. You need – I mean, the one sense that those of us who live in the past miss is that the Senate and House leadership recognized their role not as political partisans, but rather as equal – running equal branches and government and act that way and give even the minority, if there is a political issue, an opportunity to be heard.

There have been no hearings on a lot of controversial issues that would have been heard in the 60s even when the Democrats controlled things. They have – the Republicans have made a practice of silencing the opposition.

MR. WAYNE: Andy?

MR. RUDALEVIGE: Just very quickly. It's a little bit ironic from an academic viewpoint in that the American Political Science Association back in the 1940s, I think, was so enamored of the idea of responsible party government that it issues, in fact, the policy statement that we should have responsible party government. These days we are not in the academic committee is so excited about responsible party government since the party in power doesn't seem to be doing things that at least those on the left within my profession think ought to be doing. And so the notion that, you know, who is the ox doing the goring is a partisan consideration is, I think, very real.

Obviously those on the left didn't liked it when there were strong Republican presidents. Those on the right didn't liked it when Democratic presidents tried to assert similar privileges. We've heard a little bit about that. So I'm not sure that divided government is an answer here. I guess I would agree that, you know, responsible constitutional government is what we should be aiming for and the Congress should be willing to utilize its power to investigate, among other things, and the hold hearings and to provide information. Professor Thurber mentioned the explicative role of Congress and I think that is something we have lost a little bit. Congress isn't going to act until the public demands action. That's the nature of a bottom-up representative system, but Congress isn't – the public isn't likely to demand action unless Congress educates and provides information and I think that is what we need to try to get right.

MR. WAYNE: So we end this panel on the presidency by throwing the ball to the people who are going to be talking about the Congress. And we are really asking them, to what extent has the division of power in Congress and to what extent has the politicization or the ideologicalization of political parties made it very difficult for Congress to play this role as a coequal branch with the presidency in the formulation and in the oversight of public policy, and I hope we'll hear a discussion of that this afternoon.

I want to thank the panelists for their comments and thank you for your comments and your attention.

(Applause.)

MR. : Ladies and gentlemen, lunch is available on the backroom, so we'll back here at quarter to 12 on the dot to start the next program. Thank you.

(END)