

Restoring America After Bush

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Ames Courtroom

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PANEL I

How can Congress and the courts be made more effective as co-equal branches to offset the expansion of presidential power? Should, and can, the expansion of presidential power be reversed?

The discussion was introduced with the following:

*As Arthur Schlesinger, Jr. demonstrates in his *Imperial Presidency*, and some of you have developed in your respective writings and public statements, the original constitutional plan has been gravely distorted by the progressive increase in the power of the presidency at the expense of the other branches of government. Many Americans express the view that the present administration has radically advanced that progression and that the first task of the next president and congress must be to restore the constitutional balance.*

Do you agree, and if so, what do you see as the most crucial area for corrections?

If you disagree, why do you believe this view is so widespread?

PRESENTATIONS

Louis Fisher



While great damage to our Constitution has been done over the past seven years, the damage has been going on for half a century. Many people, including the academy, have contributed to a lack of respect for the Constitution. I base this on the fact that from 1789 to 1950, all the major wars in which we were involved either were declared by Congress or authorized by Congress. This is consistent with the Framers' concept that, in a democracy, to go from a state of peace to a state of war, the decision should be made by the people's representatives.

Rather than romanticize the executive, the Framers distrusted human nature—distrusting especially people with political power. Accordingly, they adopted a system of checks and balances and of a separation of powers. John Jay's Federalist No. 4 does not get the attention it deserves. Jay's entire career was in foreign affairs and, he, therefore, might be expected to be favorably disposed toward presidential power in foreign affairs. In that paper, Jay examined what motivated countries to go to war, and he concluded that leaders took their countries into war not for reasons of national interest but out of pride, ambition, the quest for fame or for something in the family. Jay saw that these wars were ruinous for the country in terms of lives and treasure lost. That's why the Framers would never give the president a decisive role in deciding to go to war.

It's a basic value we've lost.

In 1950, for the first time, President Truman went to war against another country without first going to Congress, instead, going to the U.N. Security Council for resolutions authorizing armed resistance to the North's invasion of South Korea. Nothing in the U.N. Charter suggests that the Security Council can be a substitute for Congress. To the contrary, the U.N. Charter, the United States' U.N. Participation Act and the debates leading up to the Senate's acceptance of the U.N. Charter, indicate that Congress must authorize military commitments. From Potsdam, while the Senate was debating the U.N. Charter, Truman sent a cable to the Senate to assure them that he would never go to war by going through the Security Council without coming first to the Congress. Truman, therefore, violated the Constitution, the U.N. Charter, the U.N. Participation Act and his own pledge when he went to war in Korea. Everyone looked away because the enemy was a communist country.

My forthcoming book, *The Constitution and 9/11*, is subtitled "*Recurring Threats to America's Freedoms*". The threats referred to are not from abroad but from what we do to ourselves in over reacting to outside threats. That's what we did in Korea: the threat from communism was severe enough in the minds of many to justify suspending the Constitution. That was done on a bipartisan basis.

The problem is not just what we've done over the past seven years. Compare the current Iraq War with President Johnson and the Gulf of Tonkin incident. Even though it wasn't clear whether there was a second attack in the Tonkin Gulf, Congress passed a resolution authorizing the president to "to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." Yet recently released documents from the National Security Agency indicate that there may have been confusion caused by signal delays reporting the first attack. This led to the belief that there

was a second attack, the attack that was relied upon to justify the congressional Gulf of Tonkin resolution. Thus, we went to war in Vietnam on the basis of something that never happened.

There is a comparison with the factors leading to the invasion of Iraq: the aluminum tubes, the yellow cake uranium ore, mobile labs, the connection between Iraq and al Qaeda. That none of these risk factors existed was clear even before we invaded.

The contributors to the aggrandizement of presidential powers are the law schools, political science faculties and presidential historians who have been pumping presidential power for decade after decade. Certainly Arthur Schlesinger, Jr., in his books on Andrew Jackson, Franklin D. Roosevelt and John F. Kennedy, contributed greatly to a mystique of presidential power. Richard Neustadt, the political scientist, in his book *Presidential Power* saw no role for Congress and the Constitution; the country would be better served by giving ever more power to the president. The media contributed to this trend. For example, in 1995, a *New York Times* reporter kept writing stories that the president did not need authority from Congress to take military action in Bosnia. When I questioned the basis for these statements, the reporter began writing that the president “claims” he does not need authority from Congress. Another paper editorialized that the president does not need authority from Congress. When I questioned this as well, the editorial writer said the basis for his statement was that he “read it in the New York Times.”

I have been opposed to concentrating power in the president, just as I have been opposed to concentrating power in the courts. The belief that the Supreme Court tells us the “last word” on the meaning of the Constitution is inconsistent with the belief in a democratic republic, where we rule ourselves and believe sovereignty is in the public. Teaching that the courts have the last word on the Constitution or the president has the last word in foreign affairs or about going to war, in effect, does away with checks and balances and separation of powers. The Framers never believed that our rights and liberties would be protected by the courts. They would be protected by how we structure government to assure that power does not get concentrated in one place and get abused. We have greatly neglected this fundamental principle.

On November 13, 2001, George W. Bush issued a military order authorizing the creation of military tribunals. The administration was relying on the 1942 Supreme Court case *In re Quirin*, involving Nazi saboteurs who landed on U.S. shores from submarines. Yet there are stark contrasts between what FDR did and what George W. Bush is doing. The saboteurs in *Quirin* were identified by name. The Bush order goes after all non-citizens in the United States—about 18 million people. Even if you say it applies only to those who helped al Qaeda, that could mean anyone who contributed to a charity whose funds the government concludes assist al Qaeda or some terrorist organization.

Another difference: the Nazi saboteurs were confronted with four specific charges against them. There are no charges filed against those held in Guantanamo pursuant to the military order. There were not even charges filed against the two U.S. citizens, Hamdi and Padilla, who had been held for years in detention. Further, the German defendants were supplied with eminent members of the Bar as their counsel. Until recently, those detained by the Bush order were denied access to counsel. Recently, they have been furnished with representation by a government employee, who is not necessarily an attorney. Where the detainees have secured legal representation, their attorneys have had great difficulty maintaining a confidential attorney-client relationship.

The evidence against the German saboteurs was substantial: boxes of explosives and other physical evidence of an intent to commit sabotage. There is no way of knowing whether any statements that may have been made against the detainees by other persons were by bounty hunters, who were paid by the United States to turn in al Qaeda and Taliban members. The evidence against Hamdi and Padilla consisted of hearsay statements by a Department of Defense official who lacked first hand contact with any relevant facts.

Finally, the Germans were in fact tried. To date, none of the detainees held pursuant to the Bush order has been tried, after more than six years.

Charles Fried

Many things have gone “terribly wrong during the Bush administration. . . . President Bush himself enjoys very low esteem in the public mind; the only institution that enjoys lower esteem is the Congress. And it’s worth remembering that.”

Mr. Fisher’s comments are incomplete and in need of correction: He fails to mention the first Gulf War, which was authorized by Congress in the same way as the second Gulf War. Nobody would say that the first



Gulf War was a mistake. The second Gulf War may very well have been a mistake. “What this illustrates is the persistent and mischievous, and in the end disastrous, attempt to cure examples of bad judgment, bad behavior, by institutional, procedural fixes. The result of that is always to repair last year’s mistake by making this year’s mistake.”

Mr. Fisher’s other examples involve authorizations by Congress, but not declarations of war. The action against the Barbary Pirates, also, was not preceded by a declaration of war. Vietnam was “a disastrous piece of work,” but it was not because some procedure was not followed. “Therein lies the enormous error: that if only some better procedure had been followed, these mistakes would not have been made. No. If only there had been better people making better judgments, these mistakes would not have been made.”

Those who take the approach of Mr. Fisher omit to mention the actions of President Roosevelt prior to his declaration of war. His declaration of war against the Axis Powers was odd, because they had declared war against us before FDR declared war against them. By supplying the British with desperately needed materiel to ward off an impending Nazi invasion, FDR clearly violated the Neutrality Act. “He is applauded; he is a hero for doing that. . . . Is there anyone here who thinks that Roosevelt should not have used the power of the presidency to move us into the Second World War?”

“The problem is not the fact that we do not have the right procedures. The problem is that, from time to time, we do not have the right leaders.”

To cite a ridiculous example, Congress and the president were of one mind in the case of Terry Ann Schiavo. Their behavior was absurd. That was because we had terrible leadership in the White House and terrible leadership in the Congress.

“What [those] who worry and wring their hands . . . about this increase in presidential power [need to know] is that in a modern, complicated democracy those powers in an executive are inevitable. There is not a single, effective democracy which does not lodge those powers in one way or another in the executive.”

“One has to keep in mind, it is not procedures that have gone wrong; it has been politicians who have gone wrong.”

“What we need is not better procedures. Better and more complicated procedures will strangle us and make it impossible for us to act in an emergency. What we need is better people. Better people in the White House. And, think of the contest we are about to enjoy: Barak Obama and John McCain, two independent minded, decent, honorable people. That’s a change, and it comes about not because of procedures.”

“We should take a little perspective on it and ask, Do we really want to see a world of enormously elaborate procedures which, unless we have better people, will mean nothing; and if we do have better people, will keep us from doing the things that need to be done?”



Sheldon Whitehouse

“Congress has had an extraordinary opportunity in the last several months to witness considerable extravagance and destruction within the executive branch, and from my seats on the Judiciary and Intelligence Committees, it’s sort of been epicentric to all of that.”

The problems may be listed under three categories:

1. sunlight
2. service
3. structure

The problems do not lend themselves to simple fixes; no single law can be passed to make all this right again.

Sunlight

Secrecy and classification provide an enormous advantage to the administration. They can classify and declassify as suits their purposes, including political purposes. There is considerable abuse of secrecy in the Bush administration: “not just to achieve the national security goals but in order to develop political agendas”.

The Justice Department’s Office of Legal Counsel (OLC) “has become a hothouse of ideological opinion whose function is to deliver for the White House what it wants.”

“Some appalling things have been done that never would have been done had the light of day been expected on those opinions.” The OLC memo on torture cites language from the Medicare reimbursement law but misses a Fifth Circuit opinion exactly on point and ignores the history of war crimes charges against Japanese soldiers for waterboarding. All it would have required was a simple search of “water torture” in Westlaw or Lexis to find the Fifth Circuit opinion. They “weren’t doing analysis at the time; simply trying to deliver the goods.”

Sense of public service

“The problem of the unitary executive theory has been that it has degraded the sense of public service, and [that] positions in public service [are] positions . . . imbued with a sense of public duty.” In committee hearings we hear witnesses say that they take “an oath of office to the president”, that they “work for the president”. The Department of Justice offered an OLC secret opinion stating it was “bound by the legal determination of the president.” The firewall that protected the Department of Justice from political interference by the White House has been disassembled by the Bush administration.

“[W]e, through our advice and consent function in the Senate, can try to reanimate the tension—the healthy tension—that has always existed between loyalty to the administration . . . [with] loyalty to the duties that [pertain] to that office—and that are duties that run from [the office holder] to the American people . . . “

Structure

Beneath the separation of powers structure in Articles I, II and III “there are innumerable institutional safeguards that are built into the system, and those have been run through like a bulldozer by the Bush administration.”

Three examples may be cited:

- The use of prosecutions by US attorneys to achieve political ends. Further, the appointment of US attorneys who come from outside the community in which they serve. When the US attorney is from the community in which he or she serves, there is a relationship with the community that promotes accountability.
- The intelligence review process, which has been well publicized.
- The infiltration of politics into, and the pollution of, the science requirement for the making of decisions by the EPA.

Congress has not paid enough attention to structural safeguards against these abuses.

The courts are a good “potential remedy”. It’s too early to determine whether they have defaulted in playing their role. “Some of the exaggerated assertions of presidential power, like the proliferation of signing statements or the wanton claims of executive privilege simply have not risen through their maturation process to cases or controversies the courts have . . . had the chance to [address]. I’m still optimistic the courts will make the right decisions as they mature”

The press has been important here. For example, the McClatchy papers kept interest in the US attorney scandal alive. They pursued the matter diligently, and it finally reached the attention of Congress and the public.

“A lot of this is specific and particular to the Bush administration, which has uniquely been a partisan and political administration, has uniquely tolerated a culture of blunt corruption, has really demonstrated that there’s almost nothing that they won’t do”. The Bush administration has “no such thing as a sort of moral no-fly zone”.

“The [Bush administration’s] demands of servitude from the top down are also unique in executive history. * * * We get into a trillion dollar war with 4,000 Americans killed and the only person who has been disciplined in the whole thing was the guy who said at the beginning this might cost more than \$80 billion. [That] the only fault that they’ve ever found is with somebody who got off message, not with somebody who led this country into this disastrous war, is a sign of a very distorted view of where executive power should be deployed.”

“The good news is that it is unlikely that anybody will follow this road again, but nevertheless enormous damage has been done.”

Norman Ornstein



Comments on what the previous speakers said:

With respect to the U.S. attorney issue raised by Senator Whitehouse, “The real scandal in my judgment is some of those U.S. attorneys who were not fired because they did what they were supposed to do, which is to bring political prosecutions going against all of the norms and guidelines of the Justice Department—and not to bring prosecutions in some instances where those prosecutions were warranted.”

If we’re looking for checks and balances being provided by an investigative press, we have a “new reality”. The fact is, investigative journalism is declining. The newspapers are under financial pressures and are reducing staffs of investigative reporters. For example, the Washington Post is losing almost all of its investigative reporters because of buy-outs. “We’re going to have to find ways to rebuild our checks and balances.”

As Professor Fried points out, every president pushes to expand executive power. It’s a natural phenomenon. We want the president to be a leader and to be robust in pursuing his or her policy goals. That’s OK only if we have a robust system of checks and balances working the way it’s supposed to work. But, as Fritz Schwarz’s book [Frederick A.O. Schwarz, Jr. and Aziz Z. Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror (2007)*] indicates, “we have been unchecked and unbalanced”.

“Bush and Cheney have had the most expansive view of presidential power in our lifetime—and perhaps in history. It is an expansive view at any time, but then they move to [the notion that presidential] powers are expanded in wartime, and wartime is expanded to last in perpetuity.”

Regarding Congress

Professor Edward Corwin, the noted political scientist who was expert on our constitutional system, referred to the system of checks and balances as “an invitation to struggle.” That is missing now. “What we need are three robust, assertive branches [of government] going at each other with at least some measure and climate of mutual trust among them. That’s been gone. It’s been gone in significant part because the Congress has gone AWOL.”

“Certainly every prior Congress cannot be said to have done its job and to have done it particularly well.” There is always a difference when the president and the Congress are of the same political party, but even comparing the Carter and Clinton years when Democrats also controlled the Congress, there is a difference from the Bush years.

During the Carter and Clinton years, Congress had a strong sense of institutional identity. The Democrats had been in control for over 40 years, and the members of Congress had a strong sense of identity as legislators, “not caring that much which president came and went. They were going to exert their own power.”

If you were an executive in the Carter or Clinton administration and “were hauled up before John Dingell, you were just as likely to have the bark ripped off you as if you were coming from the Reagan administration. That changed. Basically, we had a Congress that thought of itself not as an independent branch but as a group of foot soldiers in the president’s army—as in some respects, a wholly owned subsidiary of the White House. What that meant was that any of the elements, the forms of check and balance that are required to make this system operate, simply disappeared—oversight in particular.

“The oversight we got, particularly the oversight we got when Bill Clinton faced the Republican Congress, was not serious oversight as to whether agencies were doing the job they were supposed to do—whether they were carrying out their own oath to make sure that laws were faithfully executed—but almost all in the ‘Gottcha’ category.

“As we moved into the Bush administration, you could see the contrast.” For example, as Susan Mulligan of the *Washington Post* noted, during the Bush administration, there were 12 hours of congressional hearings on Abu Ghraib. In contrast, there were more than a dozen times that many hours of hearings during the Clinton administration on the issue of whether the White House abused the Christmas card list by using it for fund raising purposes.

During the Bush years, Congress has been afraid that any oversight might “embarrass the team, and you didn’t want to embarrass the team. That was colossally irresponsible and even more colossally stupid.” One of the reasons we had the disaster of Katrina was because of attempts to avoid embarrassing the

Homeland Security Department, whose reorganization had made FEMA dysfunctional. And Katrina was the beginning of the end for any public esteem of the Bush administration. “If we had had some investigation of how we were treating people in Iraq, Abu Ghraib might not have occurred in the fashion that it did to become an enormous blot on the United States. It might have become something that would have been corrected earlier”. The maladministration in Iraq: the failure to provide body armor for four-plus years, the failure to arm vehicles properly, the lack of any administrative oversight of contractors in Iraq—none of this was subject to oversight or aggressive action by Congress.

Now Congress shows signs of reasserting itself, but it is an open question whether this reassertion will continue if a Democratic president is elected. The bigger challenge is whether we will build that “sense of service inside Congress that was palpable in Congress up until a decade or a decade and a half ago.” These days, there are not many members “who see their own identity as wrapped up in what the legislative branch is supposed to do and put that first in their priority list.”

In any case, there are real limits to what Congress can do “if you have a president determined to push every confrontation to the limit, to assert powers that aren’t there and then dare Congress to try and take them away. And if you create a poisonous level of distrust between the branches so that even basic elements of civility go away— some of the assumptions that you make when you’re negotiating that [each] side will keep its word [and] that you’ll try to abide by unwritten understandings”—then the system won’t work.

“As we move to the next chapter in American life, and we get a new president, how much that new president moves to repair the damage is just as important as whether we have a Congress that is willing to stand up for its prerogatives and willing to do far more oversight of the probing variety, and also of the boring variety of looking into the details of programs, and less of the simple ‘Gottcha’ variety designed to elicit headlines but not do much beyond that.”

There are encouraging signs: the two presidential candidates do not fit into the “pattern of ‘the evil of two lessers’.” John McCain’s proposal to bring the United States to something akin to the British question period may not be workable, but the sentiment is a good one. Similarly his flat vow to issue no signing statements, like Jimmy Carter’s vow never to lie to us, may not be doable, but at least he acknowledges that “signing statements have gone to a completely different level from anything we’ve ever seen before.” It shows sensitivity to the overreach of presidential power. With both candidates having served in the Senate, we are likely to find both seeking a different level of trust and a restoration of checks and balances.

It is likely that both candidates will try to restore balance, “but it will take more than the president.” It will take people in and out of government to work at improvement. Both the president and Congress must work to create a different atmosphere and to improve the balance and to bring us back from the “frightening” level of imbalance we have seen during the Bush administration years.

Frederick A.O. Schwarz, Jr.



While I agree with Professor Fried that good people are essential, that is not in contrast to the importance of structure (rather than “excessive procedure”). Both are important.

President Franklin Roosevelt is an interesting comparison, as Charles Fried suggests. There are two enormous difference between what Roosevelt did then and the excesses that go back to the Sedition Acts of John Adams, some of the things Lincoln did, the Palmer Raids after World War I, and so on. One enormous difference is that starting in the 1950s, the powers of the president began to be exercised in secret. “That has led to a lot of our problems. We have actions which neither the public nor the Congress are able to assess because they’re taken in secret.”

Another interesting contrast with FDR is on the point of partisanship. Facing a national security crisis, FDR brought two Republicans into his cabinet in the only national security positions in his government: Secretary of War and Secretary of the Navy. Similarly, the Church Committee had six Democrats and five Republicans—a closer split than was customary in those days. That was done to reduce partisanship. “Never once in our work was there a partisan vote on that committee. There were differences of opinion” but no partisan votes.

While presidents often may have abused their powers, and while “crisis tempts us to abandon ‘the constraints that keep us free’,” there is a difference in what the “Cheney-Bush administration has been doing. It’s not just the secrecy part, because that started, really, with the beginning of the Cold War. It’s

the theory that they have, which was generated by Cheney that the president has the right to break the law. The president can, if he believes a law is harmful to the United States, he can say, ‘I’m going to disregard that law. I’m going to break that law.’ That was done by the Cheney-Bush administration with respect to warrantless wiretaps right after 9/11, and it was done with respect to torture.

“This has its genesis not in 9/11. It’s been a theory that Vice President Cheney has had at least for twenty years . . . I think he developed the theory when he served in President Ford’s White House and decided that the lesson we should learn from Watergate was not that we should watch out for abuse of power but that Congress should get out of the way and let the president alone. He articulated [the theory] most clearly when he was a member of the House, sitting on the committee that investigated Iran-Contra. In his dissent, written by the same David Addington who is now Mr. Cheney’s first assistant, Cheney said that there are times when our president should assume monarchical powers in the style of the British king. That was not noticed by people back then, and . . . people had forgotten about it.

“I’d always thought we fought the American Revolution to throw off the monarchical powers of the British king. When you read the Constitution, when you read the Federalist Papers and when you read the debate in Philadelphia in 1787, it is very clear that we were not creating a constitution which gave the president monarchical powers.”

Torture is an example of the kind of problem that arises when the president claims the right to break the law. We are made to be seen as “utterly hypocritical. As Senator Whitehouse pointed out, we prosecuted Japanese soldiers for doing to us the things that we now believe we are entitled to [do to those] we capture. The United States prosecuted Texas prison officials for using waterboarding, which our Attorney General has not yet been able to say—has declined to say—constitutes torture. Of course it constitutes torture.” We are “now defending things we have previously decried”.

We are hypocritical when we send prisoners to Egypt and Syria, countries which the State Department annually reports regularly torture people they hold within their prisons. But President Bush and then National Security Adviser Condoleezza Rice said, “Oh, but don’t worry; they promised us that they wouldn’t torture *our* prisoners.” Indeed, the torture of one of the prisoners we sent to Egypt gave the administration the argument that Saddam Hussein and al Qaeda had actually cooperated in the events leading up to 9/11. The evidence clearly was produced through torture. Nonetheless, this was used by Bush, Cheney and Rumsfeld (who called the evidence “bulletproof”) as a highly emotional argument to justify the invasion of Iraq—even though their own intelligence agencies had previously warned that the evidence was totally unreliable.

By abandoning our adherence to the rule of law and by adopting the practices of our adversaries, we have made ourselves not only less free but also less safe. We have made ourselves less safe—

- Our allies are no longer so closely linked with us: Italy is trying CIA agents in absentia for abductions on their territory, Germany has indicted CIA agents, British intelligence officials leave the room when Americans discuss detention, the British High Court denounced America for our program of extraordinary renditions and Swedish intelligence will no longer cooperate with United States intelligence.
- The Ben Ladens of the world have been provided a fantastic recruiting tool by surrendering our great strength of abiding by law and caring for those values.

Returning to Professor Fried’s distrust of procedural fixes, it is not a question of procedures, but of human nature. The nation’s Founders couldn’t have predicted the growth of the economy, the changed relations between the states and the federal government, the complexities we face today. “But they were right about the basics.” In Federalist 69, Hamilton, an apostle of presidential power as Washington’s Secretary of the Treasury, emphasized that the executive created under the new Constitution was in no way like the British king.

The Framers had it right in understanding a basic truth that has not changed over time; namely, that men and women are not angels. For that reason “we set up a structure designed to prevent abuses of power by having a dialogue and a contest. Of course, when matters are secret, there can be no dialogue. If you think the president is a monarch, you’re not going to have a contest.” The wisdom of the Framers survives, despite the many ways in which our world differs from theirs.

COLLOQUY

Louis Fisher

Two points to be made:

1. What model should the next president follow?
2. Should we defer to the president because that's where the expertise is?

The Eisenhower presidency offers a good model. Eisenhower thought that Truman erred both constitutionally and politically by going into Korea without congressional authorization. In Eisenhower's view, the nation was both safer and freer when the two elected branches work together, with whatever compromise and accommodation is necessary. In his view, also, it was important for allies and enemies to know that, on a given issue, it was not just the president's view but the opinion of the country.

The next president will need to ask whether it's in the interest of the country to push presidential power to the extreme by alienating Congress and having no shared policy.

It is sometimes argued that the president should have the "lion's share" of power because that's where the expertise is. But policy is not usually formulated by the experts; it is formulated by the "politicos", who are amateurs and short-termers. For example, the administration in setting up the military commissions ignored the experts, who are the people in the Judge Advocate General Corps, not the people in the Office of Legal Counsel in the Justice Department.

We should be skeptical about the extent to which expertise informs policy in the Executive Branch. An example is the National Intelligence Estimate put together in 2002 that served as the basis for judgments about Iraq's weapons of mass destruction. The unclassified version of that report is on the CIA website. It is a report of over 70 pages, with a summarizing "key judgments" section at the beginning. In the summarizing portion, it is stated that "Baghdad has biological and chemical weapons", but there is no evidence presented in the 70+-page body of the report to support that claim. Those who read the summary without reading the full report would have been misled.

When we go for convenience and let the president decide what to do, we pay a huge cost ... constitutionally.

Charles Fried

Addressing three elements related to the running of government: secrecy, deception and truth—

Secrecy

As Senator Whitehouse noted, secrecy is indispensable in some respects, as in dealing with national security matters. If we can't keep our own secrets, we cannot expect allies to collaborate with us. But the question, as he observed, is who are we keeping our secrets from, and why. Because they are secrets, one has to trust the people who are keeping them that they are keeping them for the right reasons. "If they are not, the truth will out eventually, and they will earn our contempt and they will lose elections."

Deception

It is related to secrecy. "We want to deceive our enemies. It's important that we deceive our enemies. I think the public wants us to deceive our enemies. If in the course of deceiving our enemies, we have to deceive ourselves a little bit, ... so be it. If we deceive ourselves and not our enemies, and if the ... the primary object of our deception is our own people, that is contemptible, and, again, will be punished."

Truth

"I am told that at NASA it is not permissible for NASA scientists to refer to the Big Bang. The public affairs officers, who [as per what Louis Fisher said] are not the [expert] civil servants, either exclude references to the Big Bang or they say, 'the theory of the Big Bang'. This is just a little thing, but it is emblematic of the contempt for truth, the suspicion of science and a mind-set, which in the end, causes, perhaps, the disconnect between the 70 pages [of the NIE report to which Mr. Fisher referred] and the summary. [Still] those 70 pages were available to Hillary Clinton; she just said she didn't read them."

Sheldon Whitehouse

With respect to the intelligence leading up to the Iraq War, the Senate Select Committee on Intelligence is in the process of declassifying phase 2 of the committee's report on that subject. [The report was subsequently made public on June 5, 2008, entitled *Report on Whether Public Statements Regarding Iraq by U.S. Government Officials Were Substantiated by Intelligence Information*. It can be found on the Committee's website <http://intelligence.senate.gov/080605/phase2a.pdf>

The larger issue of secrecy and classification is raised by that report. Secrecy and classification provide "an enormous structural advantage to the Executive Branch. If the director of national intelligence sits in a congressional hearing and says something that until that moment was deeply classified, [he] is not in violation of any statute [prohibiting the disclosure of classified information]. [He] is declassifying the information. If I had said the same thing in a question, I would not be declassifying; I would be violating national security. This is an administration that has not hesitated to manipulate what it has made public on the implication that what was classified supported what they said publicly. We are silenced from correcting that without going through enormous procedures to bring the information out. The latest was the *Esquire* article in which John Yoo said that waterboarding was a technique that had been used three times. I am not at liberty to comment on that. He was able to say that. Time will show whether he told the truth."

With respect to Charles Fried's comment concerning from whom things are being hidden: It developed during Senator Feingold's recent hearing on secret laws that the Office of Legal Counsel's opinion regarding the terrorist surveillance program had been kept secret from the National Security Agency (NSA) lawyers, yet NSA is running the terrorist surveillance program. "What possible added national security interest is there from not showing the legal opinion justifying the program to the people who are running the program? Clearly, there is more at stake . . ."

Norman Ornstein

"No matter how wonderful the next president may be, we've got a continuing set of big problems ahead. We have a poisonous, rancorous atmosphere of partisan politics that's greater than any I've seen in a long, long time. It was underscored for me . . . a few days ago, when the minority leader in the House, John Boehner . . . issued a press release taking a comment that Senator Obama had made in an interview . . . about Israel . . . referring to [Israeli-Palestinian relations] as a 'constant sore'. This was a whole press release basically saying Obama said Israel was 'a constant sore'." As was later reported, the Boehner statement was totally out of context and misleading, but it's a reflection of the times. "We no longer see people in the other branch or in the other party as adversaries; they're seen as the enemy, and you use the tactics that you would use against the enemy."

"This has had serious foreign policy implications. [During] the Clinton administration. . . . Tom Delay said some over-the-top and vicious things about Bosnia and Kosovo—policies with which he would have agreed wholeheartedly had it been a President Bush rather than a President Clinton, simply because of the party of the president." We've seen similar things from Democrats. Some Democrats have had to try to hide their disappointment that the surge in Iraq might be working.

Listening to legislators comment on a foreign policy action by a president of the opposite party, it is interesting to imagine what those same legislators would have said if the action had been by the president of their party. Three or four decades ago, it would have been different.

There is going to be an intense effort by this White House to get involved in the presidential campaign, perhaps out of fear that the next president will try to "declassify everything, which is not something they would particularly desire."

"We're going to end up on November 5th, the day after the election, with every member of the minority party having one word that they will be thinking and speaking. That word is '2010'. The time for redemption is the next mid-term. That means that any notion of trying to build bridges, work across party lines, is going to be mitigated against very considerably by the desire to recapture some standing in the political arena. So we've got some very dangerous times ahead, no matter what the intentions of some of our [candidates may be]."

Frederick A.O. Schwarz, Jr.

Secrecy underlies many of our problems. Secrecy and deception are both appropriate at times. The book *Bodyguard of Lies* deals with how the Allies deceived the Germans as to where and when the Normandy invasion would occur. The title comes from an old Greek expression: "Truth is so precious

that sometimes it must be protected by a bodyguard of lies.” But it isn’t often.

“My experience with the Church Committee, which I think is a pretty representative look at secrecy over the period of the whole Cold War . . . is that most of the things that were important, that were stamped ‘secret’, were being kept secret because they were embarrassing, they showed that people were doing things that were improper or illegal.” While truth may come out ultimately, that may not be good enough, and it does not do as much good as if the truth came out sooner.

“Certainly there should not be secret laws. How in a country of laws can you have secret laws? Which is what we have with those OLC opinions.”

“We haven’t talked about the public. The public is relevant here. Franklin, when he left the Constitutional Convention and was asked, What have you given us, a republic or a monarchy? said, ‘A republic, if you can keep it’.” He meant all of the generations down to us. “We need to think a great deal about what can be done to increase the public awareness of the kinds of issues we’re talking about. Civic literacy has gone down very substantially in our country.” A recent poll indicated students left college with less knowledge of their government than when they entered. “We need to do much more to enhance civic literacy in this country.”

PANEL II

How should we assess the impact of the seven years of the Bush administration on international peace and stability and the long-term security of the United States?

The discussion was introduced with the following:

A sense of exceptionalism has characterized American foreign policy for some time. Critics charge, however, that the Bush administration has pushed this notion beyond reasonable bounds in its declarations of national strategy and by its actions.

Do you agree with the criticism, and, if so, how would you go about setting a different policy and course of action?

If you disagree, what do you think accounts for the wide acceptance of the criticism?

Andrew Bacevich



In assessing the Bush administration with regard to national security policy, if we evaluate on the basis of Iraq, this presidency has been a “total failure and an unmitigated disaster”, and history is likely to judge it to be one. “Considered in terms of this administration’s larger national security agenda, that is to say, if you look at their record of achievements in terms of what they aspired to achieve, I’d make the argument that they have achieved some very impressive successes.”

While President Bush may return to Crawford, Texas, on January 20, 2009 “pretty much with his tail between his legs,” Cheney, Rumsfeld and Wolfowitz may get together over drinks and feel pretty satisfied with what they’ve done. From their point of view, they have achieved an enormous success in the following ways:

1. “The Bush administration has succeeded in defining the contemporary era as an age of terror. And the Bush administration has succeeded in persuading the great majority of the American people that an open-ended global war on terror is the essential, and perhaps only, way ‘to keep us safe’, as the president likes to say. Think about that, there is nobody who could run for the presidency; there is nobody who could run for the House of Representatives anywhere in this country if asked, ‘Well Mr. Smith, or Ms. Smith, where do you stand on the global war on terror?’ If that person answered, ‘I don’t believe in the global war on terror. I think the global war on terror is a stupid idea,’ they would immediately have lost all chances of being elected to higher office.
2. “The Bush administration articulated, in 2002, a doctrine of preventive war that loosened any lingering constraints on the use of force+++ by the United States of America. It proceeded to implement that doctrine of preventive war in Iraq. Most of us would say it has proven to be a disastrous failure, but let me remind you that the Bush doctrine of preventive war is still on the books. A significant achievement, from their point of view.
3. “This administration has succeeded in doing what Ronald Reagan did back in the 1980s, when Ronald Reagan declared that defense is not a budget item Once again, defense is not a budget item. For all

practical purposes, the number of dollars that we are spending—that the Pentagon is spending—has at least doubled since this president came into office. And that doubling of defense spending is essentially uncontroversial. I don’t mean to say that the Pentagon has all the money it wants. The Pentagon wants more money. The notion that there might be something troublesome or scandalous or problematic about spending 700 or 800 billion dollars a year on defense—there is no interest in that. Big achievement.

4. “This administration has completed what, I think, is a decades long shift in U.S. national security priorities away from Europe (which I think actually makes sense), but not towards Asia (where they ought to be) but rather toward the Greater Middle East. So the Greater Middle East—and that’s the term they use—has really become the nexus of U.S. national security policy. I suspect it will remain that for the next several decades. They’re the ones who drove that shift home. A significant achievement.

5. “[As the first panel discussed] they have succeeded in reinforcing the decades long tendency to invest ever-greater authority in the Executive Branch, especially on all matters related to national security. This didn’t just happen; that is what they intended to achieve. And they took advantage of the circumstances after 9/11 to advance that agenda in very significant ways.

6. “They succeeded in shielding the institutions of the national security state, especially the National Security Council, the Office of the Secretary of Defense, the Joint Chiefs of Staff and the intelligence community, from any critical scrutiny, despite their innumerable failures—to include the 9/11 attack. The only thing that has happened to the national security state since 9/11 is that we’ve rearranged some deck chairs in creating the Department of Homeland Security and the new national intelligence community, and we’ve made that apparatus bigger than it was before. The JCS [Joint Chiefs of Staff] has performed abysmally since the beginning of the global war on terror. There is no interest in examining exactly what is wrong with the JCS and why it performed so poorly. A great success on the part of the Bush administration in shielding this apparatus from any criticism.

7. “The Bush administration has managed to squelch any serious debate on the fundamentals of U.S. national security policy so that concepts captured in phrases like ‘world’s only super power’ or ‘global leadership’ continue to really substitute for any serious thought. It is an astonishing thing, it seems to me, that we could have --

- suffered the kind of devastating attack we did on 9/11,
- have now experienced the events of the last seven years, down to the present day,
- have seen the price of oil quadruple,
- have been piling up probably something like a 2 or 3 trillion dollar debt as a consequence of this war,
- have lost over 4,000 American soldiers,
- have killed God knows how many Iraqis who just happened to be in the wrong place at the wrong time

-- and yet still, at this late date, in our mainstream politics, there’s really nobody who seriously questions whether or not ‘global leadership’ by ‘the world’s only superpower’ really provides the basis for thinking about United States foreign policy. That is an enormous achievement on the part of this administration.

“I would emphasize, I believe these achievements, which are very great, are deeply problematic and manifestly contrary to the interests of the United States and the well-being of the American people. But it’s astonishing that, if we look at our politics, if we look at the discourse related to the presidential campaign, if we try to listen to what the Congress is doing, or reading the media, there is almost no appreciation . . . about what this administration has accomplished in that regard. Since there is no appreciation about what they have accomplished, there is almost no evidence that there is going to be any meaningful effort undertaken to undo all the bad things that they have done.”

Detlev Vagts



Resorting to a term used to describe the Kaiser’s dismissal of Bismarck, we’re about to “drop the pilot”. Will it make a difference? It can be said that dropping Bismarck had a profound effect on the subsequent history of Europe. Will it make a difference now?

The three candidates, Obama, Clinton and McCain are different, but we cannot “write on a clean slate; history is there, there are facts on the ground.” It may be useful, therefore, quickly to review some history:

The period 1945-1990 was a bipolar period. “There was us and there was the Russians.” America did exercise global leadership during the period, and it was successful. “We kept together a coalition (NATO and other states) to confront the Russians. We managed the world economic system, at times with considerable short-range sacrifices—as with the Marshall Plan—in order to build prosperity and trade partners around the world.”

A major difference is that nowadays, “there is considerable finger pointing at people who want to ‘talk to them’ . . . There was always an American ambassador in Moscow and a Russian ambassador in Washington. There hasn’t been one in Tehran since 1979.” Even Nixon talked to Khrushchev and later to China. “From my perspective, Stalin and Khrushchev were even more frightening than anybody around nowadays.” Yet, at the time, we were concerned that Russia, which clearly had weapons of mass destruction, did not use them against the United States. That was a great achievement.

The period from 1990-2002 saw no other power equivalent to the United States; it was a unipolar world. During this period, we exercised our power with “considerable restraint”. The First Gulf War was a “remarkable event. It was sort of a perfect storm on the good side: Saddam broke a basic rule that you do not cross borders, and we had worldwide agreement on that—even the Russians and the Chinese. We built, very effectively, a coalition that put an end to [Saddam’s aggression].”

“We also exercised great leadership in seeing that the transition to a unified Germany did not upset and alarm those people who had bitter experiences of what a unified Germany could be.”

During this time, our great power was somewhat deceptive—we called it “shock and awe”. We could—and still can—“demolish” any other state. We were restrained by the realization that if we destroyed it all, pursuant to the “Pottery Barn rule”, we’d be responsible for putting it all back together again—which would be costly.

Now we are at that point, “facing a world which is going to have a lot of problems. It’s not [a world divided] into ‘us’ and ‘them’ in a clear-cut way. We’re going to have to get back into the business of building coalitions” to help us. The little “coalition of the willing” that we had in Iraq is interesting, for just about every national leader who joined in that coalition is now out of office.

Notwithstanding their differences in size and relative power, neither Russia nor China can be ignored. McCain has indicated an interest in the idea being discussed about building a coalition of liberal democracies that would be separate from the United Nations and be a source of collective power. McCain, at one point, suggested that Russia should be excluded from the G-8 (the major economic powers). Especially given Putin’s and Medvedev’s sensitivities, “that would be a daunting idea that would cause all sorts of problems.” A major test of American statesmanship will be whether, on important issues, we can maintain some sort of loose solidarity with Russia.

It is disappointing that the Chinese take their concept of national sovereignty to the point of being unwilling to decry Sudan’s behavior in Darfur and blocking the Security Council from adopting a resolution urging Myanmar to allow foreign assistance to come in to aid the victims of the recent natural disaster there. Relations with China are going to be very delicate and testy.

We clearly cannot foresee the tests that will confront us in the future. In the election of 2000, “nobody thought about a 9/11”. That just wasn’t on people’s list of issues. “It is likely that there will be other tests on the security front.”

One of the great failings of the Bush years has been the failure to maintain the efforts to prevent nuclear proliferation, though there was some success in getting Libya’s Qaddafi to abandon his attempts to “be a proliferator”. But Pakistan has progressed as a nuclear power, and Iran “has moved towards possession of nuclear weapons in a way that certainly is menacing”. Trying to put “those genies into their respective bottles is going to be challenging.”

It is encouraging that much of the world regards our “changing of the pilot” as a real change and is looking to the United States “to see whether we really move in different directions and with a different style. And style is important in this context.”

Frederick A. O. Schwarz, Jr.

The question arises, Why have the seven attitudinal changes Professor Bacevich describes had the impact they have had? Three reasons come to mind:

1. Fear—both real fear on the part of the public, elected officials and the press in the years following 9/11, and manufactured fear drummed up by the administration—even when it is not appropriate.
2. Simplicity of the message—“Often, simplicity beats complexity.”



3. Not enough is yet known about what has been done.

How does one combat these? “One way is to make the case that the actions of the administration have actually made us less safe. That’s the winning argument. The arguments about civil liberties are valuable, but they don’t win. One can prove they’ve made us less safe. . . It is demonstrable, and once it’s done, it’s a simple argument, too.

“The other is that we continue to need more disclosure of what has been done. We’ve seen the tip of the iceberg; we haven’t seen everything . . . Some people call for impeachment as a device to do that. I happen to think (a) that is a little late, (b) probably would not succeed, and (c) has some accompanying disadvantages because of how it would increase partisan fissures when we should be trying to bring people together. It is important that when the new administration does come in, the Executive Branch does release a lot of the information. It would [also] be valuable for the Congress to engage in the kind of effort that the Church Committee did 30 years ago, which has to be exhaustive and has to be nonpartisan.”

Louis Fisher



Is there American exceptionalism? There is, but not the kind of American exceptionalism that is usually talked about; namely, the use of military force against people who are weaker than us in occupied countries that don’t want us there. The American exceptionalism that makes us special is the belief in the individual—the dignity of the individual—the right of individuals to have whatever opinions they want and to express them, the right of the individual to have religious belief or non-belief. That all came out of the Enlightenment. The Framers were strongly influenced by the

Enlightenment’s notions of individual rights.

Among these concepts of individual rights is that if someone is to be charged with a crime, it has to be a crime specified in a statute. One branch enacts the statute. A separate branch prosecutes the crimes charged, and the third branch—with neutral arbiters to assure that justice is done—conducts the trial on those charges.

The process for prosecuting people for crimes developed early in our history. In the early stages of Washington’s administration, the president had issued a proclamation of neutrality in the Franco-British wars. When attempts were made to prosecute individuals for violations of that proclamation, jurors drawn from the general population refused to convict for violation of a proclamation that had not been enacted as a statute. Kings issued proclamations under which people were prosecuted, but that was not what could be done under the Constitution. Washington responded by having Congress enact the Neutrality Act.

Similarly, the value against torture developed early in our history. During the American Revolution, there were reports of British abuse of American prisoners of war. Washington refused to engage in similar practices, particularly in a guerrilla war, where widespread support from the general population is important. In the Mexican War, General Winfield Scott established military tribunals to try Americans as well as Mexicans who engaged in abusive practices. Recently, General Petraeus, in Iraq, made clear the duty of soldiers to report abuses they observed.

Since 9/11, in the military commissions that have been established, we’re willing to try people without allowing the accused to confront his accusers, to use hearsay and other unreliable evidence and to depart in other ways from basic trial processes. We’re also willing to hate groups—e.g., “suspected terrorists” or “enemy combatants” (whatever they are)—not individuals. That increases fear and anger. It’s easier to hate a group than an individual.

The state secret privilege is another problem that is not only a current problem but will be one for the next administration. The state secret privilege is asserted when someone challenges an action of government, and the government says the case cannot go forward without risking the disclosure of state secrets that would be damaging to national security. This becomes a shield to protect government, and sometimes private parties—as with the telecom companies involved in warrantless communications intercepts—from disclosing whatever it wishes to conceal from view. In effect, it provides immunity for the government to violate the law, and there is no way to address the problem by those who are injured as a result. It also belies an independent judiciary because the courts, with few exceptions, have accepted the government assertions without further examination of government documents.

QUESTIONS AND ANSWERS

Q. Another success of the Bush administration is the vast increase in power of corporate America. What are the implications of this on the justice for our citizens?

Prof. Bacevich: Corporate America wielded a great deal of power before Bush became president. My sense is that, since the 1960s, “there is a general recognition that ‘the right has it right in terms of political economy’.” As a result, both parties are deferential to “the market and the interests of corporate America”. Similarly, “there is a general recognition that the left has it right on cultural issues. Despite the ‘noise’ one hears from conservatives about traditional values and things like that, nobody really takes that seriously.” The ‘victory’ that the left had in the cultural wars in the 1960s is unlikely to be reversed. I personally don’t see that much has changed in that regard in this administration.

Mr. Fisher: It is too easy to demonize a group like “corporations” or “lobbyists”. If there are problems with their behavior, the way to address them is through regulation.

Prof. Vagts: “I think there is a notch upwards in terms of the influence of money, and, therefore, of people who have money, in the administration. [It is seen] at all sorts of levels.” It is distressing to see how much money is involved in elections to state courts. In addition, the work of organizations like the EPA and FDA can be undermined by people who have a financial interest in frustrating the efforts of those agencies.

Mr. Schwarz: “It would be good to cut down on the amount of money that is raised and spent-- can be donated. The success ... one of the candidates is having [attracting] an enormous number of small donors from the Internet is a hopeful sign for the future.”

Q. How do you think the erosion of civil liberties and the increase in presidential powers affect race relations?

Mr. Fisher: This takes us back to earlier discussions about our responsibility as citizens to be vigilant and pro-active. A good example is provided by the individual librarians, coupled with the librarians’ professional association, resisting the FBI’s efforts to use powers conferred under the Patriot Act to inspect library records that would reveal the borrowing patterns of individual users of the library.

Prof. Vagts: To address that part of the question that relates to our attitude towards people coming from Middle Eastern countries, we haven’t been as bad as we were in World War II with regard to Japanese-Americans and resident Japanese. Certainly, Middle Easterners in this country have encountered difficulties. It is evident from the difficulties students have because of crazily administered immigration procedures. But we’ve done fairly well. Perhaps we’ve done better than some of the European democracies. Often overlooked is that many people in the United States of Middle Eastern origin have higher than average incomes and therefore don’t stand out in a negative sense in the general population. The issue warrants attention, and discrimination against Middle Easterners in the United States would exacerbate our relations with the people in the countries of the Middle East. “There has seldom been a more disastrous icon” than the oft-printed photo of a detainee standing on an upturned barrel with arms outstretched and attached to electrodes. Parodies of this photo have appeared in the Arab-language press.

Mr. Schwarz: The parodies offer a good example of how the administration’s policies have made us less safe.

To pick up on one element of the question, the voter ID issue: Voter ID depresses the vote of people entitled to vote by about 3%--not a trivial amount. Primarily poor people, minorities and older people are the ones affected. It was the Brennan Center who found the nine nuns aged between 80-95 in Indiana who were prevented from voting because they didn’t have drivers’ licenses. Yet it seems clear that this country is going to have voter ID, so we have to try to flip this around so that people who are required to have ID are registered to vote. Voter registration in this country started after blacks got the vote and European immigration increased. Most European democracies assure that people are registered to vote. Accordingly, we should hold government responsible for assuring every person has a voter ID and is registered to vote. In this country many people cannot vote because they are not registered.

Q. “How do you see us coming back from the abyss” of the intense rancor currently existing between political opponents? How do we defuse the energy coming from the religious hate directed toward nonbelievers?

Prof. Bacevich: I question the premise. “I don’t believe the core theme of our politics today is that there are a bunch of religious bigots who are snarling at people on the other side of the aisle. The larger issue is that many citizens have disengaged from politics and don’t pay much attention, and don’t especially care

what goes on politically as long as they are not [personally] being inconvenienced.”

One of the “great strokes of genius on the part of the Bush administration”—whether consciously or through happenstance—was to embark on “this generational war”. A generational war in which the American people would be told that they would be asked to make no contribution and nothing would be asked of them. The American people have responded, in essence, OK, we’ll go about our business; we’ll take our tax cuts. We’ll “deny the terrorists [a] victory by just continuing on as if nothing has happened”.

The problem is not one of religious zealots snarling at each other. Rather, the problem is that 95% of Americans “could care less”.

Mr. Schwarz: The Bush administration’s assertion that this is a never-ending war has hurt them in the Supreme Court. The Supreme Court has ducked issues of presidential power arising in connection with prior wars because they didn’t want to get involved. This time, the Court has on several occasions slapped down the Bush administration’s assertions of presidential powers. The Court seemed to be saying that they couldn’t stand back because, under the administration’s theory, this is going to go on for the indefinite future. Therefore, we have to intervene to assert the values that are in the Constitution. Whether the Court will respond differently now that Roberts and Alito have been added to its membership will become more apparent in June, when they hand down a decision in the case now before them. [*Boumediene v. Bush*, decided June 12, 2008]

Mr. Fisher: The administration has been sending mixed messages. On the one hand, they have been saying this is not a war against Islam. But in practice, the administration regularly singles out Middle-Easterners and Moslems for abusive treatment.

Q. It has been suggested that it will not be possible for the next president to disengage quickly from Iraq, and that within six months of the new administration, it will become the “new president’s war”. Do you agree?

Prof. Bacevich: It is unlikely that if we elect one candidate or the other every thing will be transformed. “The facts don’t change. One of the most salient lessons of the last seven years, still under appreciated, is that our power is far more limited than anybody possibly imagined back in the 1990s, when we were thumping ourselves on the chest and claiming to be the indispensable nation.” There are structural realities that the new president will not be able to affect in any meaningful way. Whoever we elect, we’ll still consume vast amounts of oil, and its price is not going to go much below where it is today. Our trade imbalance of roughly \$800 billion per year won’t be changed except at the margins. While it matters who we elect as our next president, some problems will still be with us regardless of who it is.

Mr. Fisher: History shows there is no partisan pattern. While today, the Republicans, with George W. Bush, may be the warmongers, in the past, the Democrats were the ones who got us into war: Wilson, FDR, Truman, and LBJ.

Prof. Bacevich: It may have been Norman Ornstein who suggested that Obama and McCain would shrink the imperial presidency. Don’t count on it! People don’t run for the presidency so that they can return power to the Congress. Furthermore, the people around the candidates—those who are jockeying for key cabinet posts—are not interested in shrinking the power of the Executive Branch. For this reason also, expectations of big change as a result of the election of a new president are likely to be disappointed.

Prof. Vagts: With particular reference to the question of getting out of Iraq, I agree that things don’t change that much. The next president will have to deal with all the complexities surrounding our presence there. The image of the people climbing on the ropes to scramble into helicopters to leave Vietnam haunts us. Maybe there is some way we can justify departing on the grounds that we did our part by affording the Iraqis the time needed to get things in order, and the Iraqis are at fault for having failed to utilize it to build a fair and just regime that can survive after we leave. At some point, the American people would be persuaded that we have “done enough”.

Q. (1) Who in this administration should be held accountable criminally? John Yoo who authored the torture memos is now a professor at Berkeley, and there is a movement afoot to have him discharged from that faculty. Yet he is being defended on the grounds of academic freedom.

(2) How should we deal with the private contractors performing quasi-military roles in Iraq, virtually a private army, who are not subject to law?

Prof. Vagts: John Yoo, at the time involved, was not acting as a professor, so the issue is not really one of academic freedom. His conduct raises the question of when a lawyer crosses the line so as to become a participant in the crime. There are cases of securities lawyers who gave opinions justifying certain actions when they knew or should have known that the actions were illegal. We shouldn't punish a lawyer who honestly believes, and advises his client, that the action is legal—and testing the frontiers of legality is not a bad thing. If, however, lawyers recklessly and knowingly advise conduct beyond the line, then they are co-conspirators. Perhaps John Yoo was one. Even like-minded people, like my colleague Jack Goldsmith, think that John Yoo “went off the deep end”.

Mr. Fisher: I've known John Yoo for 14 or 15 years; we look at constitutional issues in entirely different ways. But he didn't make government policy on his own. He came into an Office of Legal Counsel that believed in a broad interpretation of presidential powers, particularly in the areas of national security and foreign affairs. John Yoo may have pushed a bit, but what's come out of the Justice Department since John Yoo left has not changed a whole lot. It's a systemic problem: the Justice Department deciding to push executive power and relying on doctrines that seem extreme. It's not a John Yoo problem; it's a Justice Department problem.

Mr. Schwarz: John Yoo's opinion may be unprofessional, and perhaps he should be vilified for it, but that is not the same as committing a crime. It's the people at the top who really are responsible. Abu Grab didn't happen because a few lower echelon people decided on their own to do what they did. Abu Grab is only the tip of the iceberg. It came from the top. The people at the top violated the Constitution, broke the law and lied to the American people. The remedy for that is a more complicated question. It may not be productive to resort to the criminal justice system. If Dante were placing those persons in the proper circle, it would be a circle where they are constantly humiliated for what they have done and how they've injured this country.

Prof. Vagts: There is an intermediary possibility. John Yoo, presumably, is a member of the legal profession, and professional discipline might be appropriate.

Prof. Bacevich: With respect to the contractor issue, the Bush administration did not invent the practice of contracting out to supplement the limited capacities of the United States' armed forces. The practice goes back decades. What the Bush administration did do was to exploit this practice in novel ways by widening the contractor participation to what may be deemed combat, or quasi-combat, functions. They did that because the U.S. armed forces as presently constituted are not adequate for the military tasks required in Afghanistan, Iraq, together with the other contingencies they must be prepared to meet. Having told the American people “to go to Disneyland”, the Bush administration was not prepared to go back to them and say, “I'm sorry, we've just launched an open-ended global war, and we forgot to expand the size of the United States army accordingly.” Contractors became a way to expand capability without any of us paying any attention. Congress has to appropriate the funds to pay the contractors, like Blackwater, or they could not continue to perform. However dismayed we may be with this administration, we must keep in mind that the Congress, even under the control of the Democrats, has been complicit in many respects. One example of that is that they keep appropriating the money to pay for the contractors.

Q. Two questions: (1) Accountability. How do we draw clear lines to assure that future presidents don't emulate this administration's clearly breaking of our own laws? What could accountability look like? (2) How do we put a brake on the range of methods used for the collection of all sorts of domestic information of the type now going on in a number of federal agencies? Or is that sort of intrusion into our personal affairs something we have to live with?

Mr. Fisher: Losing office is one form of accountability, and one would think that we would learn something from that. Members of Congress seem to ignore the impact on them of derelictions by the Executive Branch especially when of the same party. Yet, Republicans paid a price in the 2006 elections. Democrats paid a price for what Truman did in Korea. Democrats are still paying a price for what Johnson did in Vietnam, as exemplified by the John Kerry campaign. Ideally, if there were a political defeat because of bad policies, elected officials would learn a lesson, but there does not seem to be a “learning curve”.

Q. Two questions: (1) Would it make a difference to eliminate the Electoral College so that every vote would count equally? (2) Given the importance of the Supreme Court in recent years, which candidate will select the better justices in terms of protecting civil liberties?

Prof. Vagts: Until the Boumediene decision is rendered, it is too early to judge the effects on the Court of the appointments of Roberts and Alito. Moreover, the Supreme Court is a passive actor. They are criticized for not stopping something that the other branches are doing. The focus has to be on the other two branches.

Mr. Fisher: While it sounds appealing to eliminate the Electoral College, in the last two elections we had problems in Florida and in Ohio. If we had direct votes, then there might be a problem recounting the votes in the whole United States.

Q. What can a U.S. president do to stop the abuses in Darfur?

Prof. Bacevich: Not much. The expectation that the “world's only superpower” has a responsibility to address humanitarian situations of this sort assumes an amount of power and wisdom on our part that greatly overstates our capacity. If we were to occupy large parts of Sudan and stopped the killing, what would we do next? Occupy Sudan at the same time we are occupying Iraq? “I don't see us ‘fixing’ Sudan any time soon.”

The responsibility of the president and Congress is to promote and protect the interests of the United States. It is not clear that sending troops to stop the killing in Sudan is in the national interest, and sending troops is the only way the killing will be stopped. Morally, what is going on in Darfur is awful; practically, it is not within our capability to fix.

Prof. Vagts: Reluctantly, I must agree with Professor Bacevich. Solving humanitarian problems elsewhere is something the United States would like to do. We did a good job after the tsunami in Sumatra—and received a lot of credit for it—but absent a national interest, it is not easy to send people to risk their lives. At the same time, the former Yugoslavia, while really a European problem, is a problem we took up. It seems to have been reasonably successful; however, it does not appear that the problems there will be fully resolved in the near future.

Q. We are counseled to be active participants in the political process and to be involved. What good does it do to be involved? We cannot really have any impact. Just voting out the incumbents does not seem to solve any of the problems that have been discussed by both panels. As an example, even after the Supreme Court decision in the Reynolds case was discovered to have been wholly erroneous, the Court refused to correct its error.

Mr. Fisher: These things take decades. The families involved in the *Reynolds case* can go to Congress and seek relief through a private bill. In the Japanese detention cases, it was subsequently determined that the Justice Department had made misrepresentations to the courts, and many years later, the courts attempted to provide a remedy to the injured parties. It takes a long time and requires perseverance; one cannot give up.

Member of the audience: It does no good to be hopeless and to give up the quest. There are, and can be, transformations through effective leadership.

Mr. Schwarz: There can be a substantial difference from a change in leadership, but it will not be a sudden transformation. There will be a struggle between those who want a retention of expanded presidential powers, either for institutional or personal reasons, and those who want to push those powers back.

Prof. Bacevich: There are enormous structural explanations for why we have problems with regard to energy, trade, foreign policy, debt and so forth. Just electing “an Obama, who is loved by young people everywhere” will not per se mean that those issues will be addressed in a decisive way. He can make a difference at the margins, but, in my judgment, the person who lives at 1600 Pennsylvania Avenue doesn't actually determine the course of events.

