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From Checks and Balances to Executive Department

by Bruce Fein

The following is a transcript of a speech given at The Future of Freedom Foundation's June 2008 conference, "Restoring the Republic: Foreign Policy & Civil Liberties" held in Reston, Virginia.

Jacob Hornberger: Our first speaker, Bruce Fein, graduated from Harvard Law School in 1972, and after a federal clerkship went to work for the Justice Department, where he ultimately served as Deputy Attorney General. He's authored several volumes on the U.S. Supreme Court, the U.S. Constitution, and international law. He has assisted some three dozen countries with constitutional revision. He's been an adjunct scholar with the American Enterprise Institute, a resident scholar at the Heritage Foundation, and an adjunct professor at George Washington University. He appears regularly on national television and radio to comment on foreign affairs, law, terrorism, the Constitution, and related subjects. He writes a regular column for the *Washington Times*, which Bart and I, when we are preparing our FFF e-mail update, look for every single day. We can't wait until another Bruce Fein article comes in because we almost inevitably link to every article he gets published there in the *Times* and elsewhere. It's a column that's among the country's best and most insightful defenses of civil liberties. The title of Bruce's talk tonight is "From Checks and Balances to Executive Despotism." Please welcome Bruce Fein.

Bruce Fein: Whenever I make presentations that perhaps may drag on longer than expected, I always remind myself of a quip that sage philosopher Sam Johnson made about Milton's *Paradise Lost*. In his life of the poet, he was remarking how every page dazzled with metaphor and profundity. But, he observed in his closing, none ever wished it were longer. <Laughter>

Bruce Fein: When the Constitution had been completed in Philadelphia in 1787, Benjamin Franklin emerged and he encountered an elderly woman who asked, "Doctor, what have we got,

a republic or a monarchy?" And he retorted, "Madame, a republic, if you can keep it." And that's what I'm speaking about today. We are saddled with the responsibility of keeping a Republic which has been vandalized for the last decade by President Bush, his administration, and, to a lesser degree, his predecessors.

Now anytime I address an audience or, indeed, write a column, I ask, "Who cares? Why would anyone care to read or listen to what I'm saying? Why should we be spending time thinking about this?" And my answer this evening is, "You ought to care because you want to be citizens involved in the struggle, the difficulty of self-government, not vassals or serfs whose liberties are at the sufferance of a government, who tell you that you are to obey them because they're infallible."

No, if there was anything that distinguished the American Revolution from anything previously, it was their understanding that the purpose of government was to help secure our rights-- inalienable at birth-- to life, liberty, and the pursuit of happiness. And it's the struggle that we have as individuals, taking responsibility for the decisions that government makes, influencing government policy that makes life worth living. We make our own mistakes, but they're our mistakes. If there are errors, we accept responsibility for those.

Politics is difficult, it's arduous, it's a struggle, but it's worth it because otherwise we're reduced to children who simply take instructions from a benevolent-- purportedly benevolent-- government, like platonic guardians. The Founding Fathers would have rejected the idea that they would accept platonic guardians, no matter if they were geniuses, in exchange for reduced gasoline prices. That's not what the United States is about. That was not why the American Revolution was fought. It was fought to preserve our right, the dignity that we have as human beings by being involved in self-government.

I want now to describe and portray to you how our Republic has already been virtually destroyed by the theories of power articulated by the president, accepted by the Congress, and acquiesced in by the people. It reminds me of something Tacitus said as the Roman Republic decayed: "The worst crimes were dared by a few, willed by more, and tolerated by all. That's the pathology of our Republic at present. Take the issue of post-9/11 theories of governing. The president has staked out two propositions that have been accepted by the Congress and the American people.

Proposition one: We have now entered a state of permanent warfare, a condition which James Madison acknowledged was irreconcilable with freedom. Now why is it permanent? Because the war is against a tactic, terrorism. It's against persons who would engage in a terrorist event. And until the president says there are no such terrorists threatening any American at any time, any place in the Milky Way, we are at war. And that's why you'll understand no benchmark has ever been insinuated that, if satisfied, would end the state of war.

Now there's a corollary to that proposition which is equally alarming if not more, namely that since a terrorist act can be committed anywhere in the world, all of the world is a battlefield. We, ladies and gentlemen, in President Bush's view, accepted and endorsed by the Congress of the United States, are sitting on a battlefield. And, of course, under laws of war, if you're on a battlefield, military force can be used to seek to kill you. If you make an error, that's a consequence of the inaccuracies and errors made in warfare. Moreover, if you're on a battlefield, you can be subject to military law-- court-martials, suspension of habeas corpus, and otherwise. That is where we stand today, ladies and gentlemen.

And when I've raised these issues of what the theory of government is by the Bush administration that would provide a limiting principle as to whether or not he can exercise every power that a dictator would cherish, "Oh, he hasn't done it yet. It's not that he doesn't have the power, it's that we are enjoying the freedoms at his sufferance." I say, "Have you read the Declaration of Independence?" "No." My rights don't depend upon the sufferance of President Bush or Vice President Cheney. They're inherent. In fact, the whole reason we have a government is for you to protect my rights, not for you to invade them.

Now these seem to me very simple propositions extrapolated from the Declaration of Independence and the entire theory of what this United States is about, conceived by the Founding Fathers' original intent. When I was in the Reagan administration, that was the gospel we were trying to further, the vision of the country as understood by those wise men in 1787. So right now the theory of the government of the United States is all of the United States is a battlefield; the president and his successors can impose military law anytime he wishes. Now let's examine, then, some of the possible mitigating factors of such a startling proposition.

Number one, the president has said, we are engaged in warfare that's the greatest threat to Western civilization in the last century. It is greater than Hitler, Stalin, Trotsky, Hirohito, Lenin combined," all right? You ask, well, where are all those troops? You know, there was the three-million-man Red Army. Where are those scientists building nuclear, biological, chemical weapons? Where is the eight, nine million barrels of oil and all the economic sinners?" Oh, that doesn't matter. Hey, you can call an elephant a mouse with a glandular condition and get away with that, right? <Laughter>

Bruce Fein: That's what goes for truth in Washington, D.C.: manufactured effort to try to frighten us all into yielding up our civil liberties. We understand the Constitution is not a suicide pact, but also it's not a license for the government to lie and to inflate problems eight million fold in order to encroach on our cherished procedural protections that distinguish us from unfree people-.

Now let us try to understand the nature of the danger that might trigger extraordinary wartime government by considering the following. There are approximately 16,000 to 17,000 murders annually. It rises and falls a little bit, but these are FBI uniform crime report statistics. So if you take that number from 9/11 to today, there have been 150,000, 160,000 murders. There have been no, of course, terrorist deaths in the United States. And yet no one is suggesting that, because of this enormous, frightening toll, we need to suspend civil law, impose martial law, repeal the Fourth Amendment, have a policeman in every home. Maybe lock up everybody because they can't commit murder if they're in prison.

We accept that level of danger, not because we don't understand murderers are out there and are dangerous, but because freedom requires some level of risk taking and we're willing to do that because we understand that the option of no risk is no freedom. And so we need to be, not imprudent, but rational about these sorts of things and measuring the kinds of dangers that we accept. Not that we relish them. We'd like to have Utopia, but we know that can't be the case. We know that can't be the case.

I would suggest, for those of you who lived in this area around the time of the sniper incidents, that you're probably far more-- I know I was more concerned about my kids getting shot by John Muhammad and his teenage compatriot than by the terrorists who belong to al-Qaida. And yet I don't know anyone at that time who was saying, "My gosh, suspend habeas corpus. Let's let the police go into everybody's home, everybody's car. Call them enemy combatants. Lock them up." Because, despite the danger, we recognized this is part of an element of freedom, and it makes us proud to say, "Yeah, we take those risks because we want to be free." Not that we celebrate anybody who's injured because of that. We mourn that. But we understand that's a price of living in a civilized society.

So this idea that somehow 9/11 has changed all of the world is, in my judgment, entirely concocted. And remember, let's try to think of the relative degree of danger that we confront now with the Soviet Union having disintegrated from what, when I was growing up, was a Soviet Union with 20,000 ICBMs, warheads, a three million man army, confrontation and the Cuban missile crisis, invasion of Afghanistan, all these things. The dangers were far greater than that. I remember thinking, "Yeah, the whole world could be incinerated," riding on my bike, 7th grade. Yet no one was arguing, "It's the end of civilian law. We need military law. We can't have any restraints on surveillance for foreign intelligence because if we didn't capture everything, maybe a missile would be launched and we wouldn't capture it. So we need to spy on everybody at all times in all places without any restraints."

And yet that's what we're being told today with regard to our privacy rights, protected by the Foreign Intelligence Surveillance Act or the Fourth Amendment. "Ah, we can't afford any restraints. We have to intercept all conversations in order to reduce the risk of terrorism." And

again, I want to go and examine these particular claims because it shows the cynicism of this administration and the willingness to inflate and distort, to try to frighten us into yielding the Republic to something akin to monarchy or dictatorship.

I was involved in the Foreign Intelligence Surveillance Act (FISA) of 1978. It didn't just spring forward from congressional nastiness. You may recall in 1975 and 1976 there were extensive televised hearings. The most prominent were chaired by then-Chairman Frank Church, senator from Idaho. And they disclosed 40, 50 years of unchecked executive branch spying authority that involved illegal mail openings, illegal seizures of telegrams, misuse of the National Security Agency (NSA) for non-intelligence purposes, breaking and enterings, spying on people who were opponents of the Vietnam War to try to vindicate Lyndon Johnson's and Richard Nixon's insistence that "Oh, the only people who could be against the Vietnam War were those who are taking money from Communists, because otherwise the war tactics are flawless. There would be no other reason." So they collected huge dossiers on these people. Great dangers from the likes of John Lennon. Playing those Beatles' songs, you don't know what's going to happen. You know, you've got to get the FBI out there. That's where the resources were devoted.

So Congress responded to what was an experiment of 40 or 50 years of unchecked executive power. It said, "Hey, something's gone amiss here." And this was a bill signed by the president of the United States, and the gist of it was very, very modest. The NSA has confirmed that well over 99 percent of all foreign intelligence is gathered outside the act because they're targeting foreigners with no expectation of privacy. The teeth of the act is when an American citizen is targeted, generally on American soil. And what does it say in that fraction of the cases where it applies? Not that the president can't spy. Go get a judicial warrant that provides probable cause to believe you're spying on an agent of a foreign government or now a lone terrorist or a terrorist in cahoots with al-Qaida. And is the standard of probable cause so great that it can't be surmounted? In 23 years, there would be 20,000 applications, and all but a handful-- three or four-- were accepted.

And indeed, I will tell you this, that you probably won't believe. In the year 2002, the head of the Justice Department's Office of Intelligence and Policy, Mr. Baker, testified to the Congress in opposition to lowering the threshold to obtain a warrant. He said, "It's not needed. The act is nimble. It's flexible. It enables us to stop terrorism plots in the bud." And they actually said, "And we have no evidence that you've provided us to think that we need to lower the threshold for a warrant to reasonable suspicion from probable cause." That is the administration of George Bush, with people involved in the day-to-day operation of these things. And yet we kept-- told by the press, not-- "I had to violate the law because FISA was handcuffing me. It was compromising our security." Well, who was he talking to? The same people that told him about the slam dunk on weapons of mass destruction in Iraq, because intelligence is distorted for political purposes.

And you get a glimmer of the mentality of the White House if you've read Scott McClellan's book, although it's not what I would call deep. But it is, at least, some direct testimony of the rather shallow mentality of these jokers. And that's what it is. It's not meant to be derogatory, but these people, entrusted with this power to destroy the Republic, to send men and women abroad to die, and they know nothing. And they don't care. Everything is driven by political optics. Everything is driven by political optics. Why, if FISA was deficient, after 9/11 wouldn't they go to Congress and say, "You need to change it in these ways"?

FISA, by the way, was amended nine times since 9/11. The administration kept saying, "But it really isn't good enough." Well, you're the one who's asked for these things. And the reason why they kept claiming they had inherent authority was because they wanted to establish a principle that said, "The president is above the law when it comes to warfare." And this isn't a claimant. Again, it's not limited to Bush. John McCain just hired a deputy communications director who spoke about the virtual dictatorial powers of the president in foreign policy in wartime. And he used the word dictatorial without embarrassment. <Laughter>

Bruce Fein: Dictatorial? I said, "I read about these things when I was a teenager, about the Gulag and Alexander Solzhenitsyn in the Soviet Union." This is the United States of America, ladies and gentlemen, and we're letting this country degenerate with complacency? Where is the outrage? Where's the outrage? So now we have the principle involved the president can flout' the Foreign Intelligence Surveillance Act. I need to gather foreign intelligence, just trust me. I'll only use it for benevolent purposes, like maybe destroying Joe Wilson for exposing the concocted uranium purchase in Niger. Because we know how benevolent people are in the White House.

And I'll give you an anecdote to try to, I think, reinforce the psychology of those who are in power. In 1969 the United States had begun secret bombing of Cambodia in an extension of the Vietnam War, and this was disclosed in a *New York Times* column, a leak, most of which, of course, come from the executive branch. Well, this outraged the president and Henry Kissinger and they summoned J. Edgar Hoover: "We've got to find the leaker here. How dastardly it is that the American people should know that we have a secret war going on in Cambodia. What is this, you know? A Republic or something? What good is it to be president unless you can fight secret wars?"

So the FBI targeted 17 individuals for surveillance-- newspaper reporters, some people on Henry Kissinger's staff, and others. And after three months they reported back to Mr. Kissinger and said, "We haven't been able to discover the culprit." They got a lot of information on girlfriends and eating habits and that sort of thing, but no, they were unable to find the culprit. So Henry Kissinger declares, "Ha, we need to continue to spy on them so all the targets can establish a pattern of innocence-- so all of the targets have the opportunity of establishing a pattern of

innocence." Again, if you start to think you're reading or hearing things out of 1984 or the Soviet Union, then you should be worried, because this is the United States of America. This is the United States of America, we the people being sovereign.

Now let's go to another element of this claimed need for emergency powers to defeat the international terrorists; military commissions. Now Bush initially unilaterally created military commissions after 9/11. They were later ratified by a rather effete Congress in 2006 after the Supreme Court held that they couldn't be unilaterally established. Now first we have to understand what a military commission is and why we might be a little bit jaundiced about its ability to render accurate verdicts.

Number one, it combines judge, jury, and prosecutor in a single branch. Remember, the executive branch defines what a war crime is, the military commission is appointed by the president, the prosecutor is appointed by the president, the people who sit on the military commission are appointed by the president; so you have a branch sitting on its own case. That's what the Founding Fathers described, I think in Federalist 47, as the very definition of tyranny. You're not likely to have a tribunal that has accused someone of a terrorist act say, "By the way, we got it wrong." Now in a civilian court, that's why we have independent judges who have life tenure.

Now there are other elements of these military commissions that are deviant from a customary notion of what justice is about. One, the defendant doesn't have a right to know all the evidence against him. You can use secret evidence. The defendant can be excluded from his own trial. And why is that? Well, hey, everybody knows they're guilty, so he doesn't have to be there and we have to protect sources and methods. And then you can use unsworn statements and hearsay and evidence elicited by coerced confessions or even torture. And you don't have a right to call witnesses on your behalf unless the Secretary of Defense says it wouldn't interfere with our operations in Afghanistan or elsewhere.

So this is not a commission that's calculated to come up with reliable verdicts. And, indeed, there already have been a couple of removals of those involved in the prosecution side for seeking to interfere with the little independence of the prosecution and commission itself. What is a civil case about? A civil case means that the defendant gets to confront evidence. He has a right to call witnesses on his own behalf. He has an independent judge, a jury that doesn't belong to the government, a requirement of proof beyond a reasonable doubt, the customary safeguards against unjust verdicts. And remember, if history teaches anything, it's that freedom and liberty have a history of procedural protections against overreaching, that anonymous accusations, secrecy in trials, almost guarantee lies, prevarications, and injustice. Just look at the Spanish Inquisition.

Well, it could be said, is there a case, Mr. Fein, that we just can't try these cases in civilian court, for whatever reason? And the answer, of course, is absolutely not. The cases that are slated for trial in the military commissions are ones that have been and could be tried in civilian courts. The most clear example is the war crime of providing material assistance to a terrorist organization. Now that was a charge against David Hicks, the one and only individual in the commission's entire history that's been tried. He actually pled guilty.

Now David Hicks was sort of an Australian Che Guevara. He went over and trained in an Afghan terrorist camp in his youth. He never threatened an American at any time or any place, and he pled guilty and got nine months in Australia. Remember, everyone at Guantanamo Bay, we've been told by the president and the vice president, is the worst of the worst, worse than Mephistopheles, Satan combined. David Hicks is the worst of the worst? My gosh, you know, this is going to be an easy war.

As David Hicks was being charged with material assistance to a terrorist organization before a military commission, Jose Padilla was charged with the same offense and was tried and convicted in a civilian court, with all the procedural protections that we associate with due process. Well, why did David Hicks have to be prosecuted in a military commission? You just showed you prosecuted the same offense in a civilian court.

Now let's take the charges that are being brought now against five so-called masterminds of 9/11. Certainly, they're crimes. They are being charged now before the military commission. Now we had very similar crimes regarding the 1993 World Trade Center bombings. Ramzi Yousef-- whose brainchild —perhaps was the idea of crashing planes into buildings-- was a defendant. He was tried, convicted in a civilian court. Sheikh Omar was. Those who were implicated in the embassy bombings in Tanzania and Kenya were tried in civilian courts. Mr. Moussaoui was tried and convicted in a civilian court. What's the problem? <inaudible> the proof should be overwhelming? We know that juries are not necessarily going to be overwhelmingly sympathetic to people who are charged with these kinds of offenses. What's the difficulty?

And indeed I can summon President Bush's administration against itself. Michael Chertoff was head of the Criminal Division the first Bush term. Now he is head of the Department of Homeland Security. And he was called to testify about the military commissions before the Senate in 2002, and at that time, as head of the Criminal Division, he said, "Judges are great at prosecuting-- having these cases prosecuted consistent with the national security under what we call the Classified Information Procedures Act, CIPA." CIPA is a law that was designed to prevent defendants from using what they called greymail, threatening to expose national security secrets if a prosecution went forward. And the gist of it is you can give a summary of classified information if it would enable the defendant reasonably to defend against himself as though he had actual sources and methods. CIPA has been used since 1980 flawlessly.

And then, this is Michael Chertoff, head of the Criminal Division under John Ashcroft, saying, "Hey, there's no difficulty here. We can use the civilian model." But, he said, "Maybe you would need a military commission. I could understand that if you needed to try a case on the scene, on the battlefield in Afghanistan. Evidence could disappear. Witnesses could disappear, so you might find a situation there where the urgency of speed required some military commission." We're talking about people who have been detained for years. Speed is not critical here. So why is it that military commissions were established? Surely it's not because they thought it was relevant to defeating international terrorists? If it was, why would you have one case in seven years against David Hicks, of all people? That doesn't sound like it's a major tool in your arsenal of defeating international terrorists.

But it's there, typically, in the Bush thinking: "Hey, it's a wedge issue. It'll show we're tough on terrorism. It shows that we can use military authority anytime we want, any place we want." An aggrandized executive power, that's what this game is about. Because no one who's involved in this, including-- I've never heard the CIA say, "Hey, we need these military commissions to defeat international terrorists." This is all politics. It has nothing to do with the Republic of the United States or our liberties. It is all politics.

Let's take another example, an egregious encroachment on our understanding of what it means to be a free America. The status of an unlawful enemy combatant, now this is something that, again, is said to be at the core of our ability to defeat international terrorists. Now what is an unlawful enemy combatant? It's defined rather loosely as being any person who is either a member of al-Qaida or associated with al-Qaida or has an affiliation with al-Qaida or any other terrorist group. Now ask, well, al-Qaida doesn't have rosters. You don't pay dues and sign up. How do you know if you're affiliated with al-Qaida?

Now suppose if al-Qaida says, "I think the United States should remove itself from Iraq," and you believe that's also a wise thing, are you now affiliated philosophically with al-Qaida? You're an enemy combatant. You're providing them moral support. Lock you up. Forever. No habeas corpus, nothing. You're so dangerous here. You're questioning the president's infallibility about how to run the Iraq war. What kind of audacity is that when we have a king? Lese-majesté.

Now let's think about, he's used this idea of an unlawful enemy combatant against how many citizens that he says are important to defeat international terrorist? Well, three. In seven years, three. Now one was a Mr. Hamdi, who was then sent back to Saudi Arabia. He's a U.S. citizen; now he's out free there. We didn't even prosecute him, but, again, he was a critical component of the omnipresent danger of establishing a caliphate in Washington, D.C. if we're not alert to this danger.. Now listen, it's unfortunate I'm not making up these metaphors and characters. That's what I confront every day. Congress, talking to these people, there'll be a caliphate there tomorrow, Mr. Fein. That's what they say their objective is. I said, "Yeah, anybody can state an

objective, you know, on top of Mt. Everest or whatever. The question is, is it lunatic or is it feasible?"

Then there's the second enemy combatant, Jose Padilla. But when it got close to requiring them to prove that he was-- fell within the definition of enemy combatant, they changed and said, "No, now you're no longer an enemy combatant. We'll indict you and prosecute you." And then the third enemy combatant is a Mr. al-Masri. His case is still plunging around in the courts of appeals. But there you have it. Those are the dangers that the president had to address with this very odd and dangerous idea of an enemy combatant in order to protect us from another 9/11-- three times in seven years.

Now what is-- what are the consequences of being an enemy combatant? Well, the president said, "Because I never make a mistake--" and remember he told us in that debate with John Kerry, he just never makes mistakes; it was a gift that God gave him, and he checked it a second time and God reassured him-- even though he acknowledged he doesn't learn by reading, but we'll put that aside. That makes it even more remarkable. Well, if the president thinks-- he believes you're an enemy combatant, then he can seize you and send you to Guantanamo Bay or a brig. How long? Well, really, forever, because it's until the war against terrorism is over, which is never. And, well, what are your opportunities to prove that you're innocent, you're not an enemy combatant? Well, basically none. You can go before what's called a Combatant Status Review tribunal, which presumes, under its rules, that the government is correct. And, of course, you don't get to actually know why the government thinks you're an enemy combatant.

It's really quite surrealistic, Kafkaesque is perhaps the best word, to read some of the transcripts of these Combatant Status Review tribunal proceedings. The defendant or the accused says, "Well, why do you think that I'm in al-Qaida? I went-- I was performing construction work in Afghanistan." We can't tell you that. You just-- why is it that you're not?" "Well, I need to know what the evidence is." "Well, that's all classified. We can't tell you." Of course, you don't have a right to counsel, either, and that's why-- and you don't have a right of access, you know, seeking habeas corpus and have an independent judge ascertain whether or not there indeed is evidence that makes you an unlawful enemy combatant, aside from the difficulty of knowing what that means anyway. A philosophical enemy combatant or what have you.

Now, if you take a nation like Israel, which confronts a far more serious threat of terrorists, their idea of an unlawful enemy combatant is much narrower, namely someone who's engaged in active hostilities against the United States or brigaded in that sense, providing weapons or otherwise. And that's a country that really does have day-to-day confrontation with terrorists. Say, life and law, it's matters of degree and balance. It's adjusting it to what is genuine, not what is contrived in order to create executive branch power.

Now let me get to another area of law which I want to address because it transcends just the Bush and Cheney usurpations.. But it shows how sinister, in my judgment, the current political culture is with regard to ever retaining our Republic and not slowly degenerating into pure executive despotism. We're most of the way there already as a matter of our thinking, and this is the authority to initiate warfare on the president's own initiative. Now there are some provisions of the Constitution that are blurry-- they're chiaroscuro, if you will-- and others are crystal clear as to what the Founding Fathers intended. And when it came to deciding which branch of government had a power to initiate warfare-- not respond to a Pearl Harbor, but initiate warfare-- there was a uniform view. It was the Congress. Madison, James Wilson, everyone at the convention kept saying, "We do not want one person to rush us into war or even a group of people," that Congress was the one to decide whether or not to initiate warfare.

And the reasons weren't simply abstract. They weren't academic. And a couple of reasons. Number one, remember to change from a condition of peace to a condition of war is to change to circumstances where killing is made legal. That's the earmark of war: it's legal to kill people. That doesn't mean it can never be done, but it means you ought to be rather careful about the circumstances in which you cross that Rubicon.

Now the second reason the Founding Fathers wanted to entrust to the Congress the authority to decide whether to initiate warfare was their worry that the executive branch historically had invariably contrived dangers, had initiated warfare to do what? Aggrandize itself. Money. The ability to offer rewards to friends like Blackwater or Halliburton. To promote people, patronage. The desire for fame. The desire to contrive a popularity under the banner of patriotism, which Sam Johnson described as the last refuge of a scoundrel when it's used in a manipulative fashion.

And they were not writing on a blank slate. The Founding Fathers were quite aware of the history of politics and warfare going back to the Athenian times. And they understood the executive branch repeatedly would run off to war and end up using the excuse of war to encroach and ultimately destroy liberties. Indeed, that was how the Roman Republic fell. In various crises, the Senate would create dictatorial powers and hand them over to Scipio Africanus and others who would save them, and pretty soon the dictatorial powers stopped being handed back.

Again, it's because, remember, ladies and gentlemen, people in power, especially the White House, they are not like George Washington. The Founding Fathers kept saying that Washington is a prodigy-- he was someone who could have been king during the Revolutionary War, said I don't want it-- said we have to assume these will be people like James II, King George, Charles I, and we need to guard against this deformity of character that craves power and domination for its own sake. And they saw the history of empires crumbling for needless wars. The British later on, Afghan Wars, Boer Wars, Boers in Burma, why? For prestige.

Thucydides had written back from the Peloponnesian Wars that any power that enables a nation to exert itself over another will be utilized and less checked. That's the nature of the beast of people who cling to the reins of executive power, and we cannot exempt ourselves from that flaw. Indeed, Edmund Burke, the virtual gospel for conservatives, as late as 1798 is saying, "What I fear is that British power will come to be dreaded. And what I fear is that we will think we are not like other men, and we will not abuse our power and military authority unless it's checked." That's Edmund Burke.

Every syllable I've uttered is the most conservative syllable that you can find out of philosophers of politics. The things that Bush is promulgating are Utopian. Trust me. We're good people. We know it all. We're infallible. It belongs to the domain of Robespierre: if you will not accept virtue, I will cram it down your throat. That's the mentality of this crowd.

Now when it comes to this war power authority, it's not just Bush who makes these claims of unilateral power in the president to send our men and women off to die for whatever he thinks is useful, whether it's a surge, the 80th Charge of the Light Brigade, with the same result or otherwise. It's been accepted by, I think, the people in the media.

And let me recall a recent incident in the presidential campaign that I think substantiates my observation. You may recall that Hillary Clinton was interviewed on TV, and she said, "Well, if I'm president and Iran attacks Israel, I attack Iran." My first thought was, "How can you attack? You don't have any congressional [authority]. Are you going to do that on your own?" No. And where was the commentary? It wasn't, well, has she made herself queen? Is she Queen Elizabeth? She's watching too many movies? But it was just acceptable. Of course she could do that, and anybody else could as well. Did McCain or Obama try to take her to task? No, because they also think the same way. And the American people have come to think the same way and the media have come to think the same way, and that's the danger. We just shrug our shoulders. These are truly revolutionary ideas, in the sense of revolutionizing what the United States of America is about.

Now let's take a lesson from our own Founding Fathers about how to react to these claims. You may recall in 1765 the Parliament enacted the Stamp Act, which created a tax on everything in writing, anything that was printed in the colonies, ranging from cards to legal papers or otherwise. And there was a big protest about the Stamp Tax. No taxation without representation. Well,, Parliament repealed the Stamp Tax in 1767, but simultaneously they passed the Declaratory Act, whose substance was, "Yeah, we repealed that Stamp Tax, but we can still regulate you in whatever matters we wish, and you have no right of representation."

Now the Founding Fathers didn't say, "Hey, no corpses, who cares?" They were alarmed. Jefferson said, "This is a blueprint for absolute tyranny and despotism." It accelerated the

movement towards 1776. They understood what theories were, and they said, "No, our liberties aren't at the sufferance of you," the same words that we see enshrined in the Declaration of Independence. Our liberties aren't at the sufferance of any government. They're unalienable.

Now I think that if we went after this presentation this evening and dinner and saw President Bush make a special primetime appearance on television, and he announced, "Ladies and gentlemen, I have just been made emperor. I have coronated myself like Napoleon. But don't worry; trust me. I'll protect your liberties. I'm only going to use these powers as emperor to go after al-Qaida. And by the way, you'll notice that since I announced my coronation, there has not been a terrorist attack. That shows you we need to keep me as emperor, because otherwise there'll be a terrorist attack. Post hoc ergo propter hoc." How would the United States respond? Would the Congress have the gall to say, "Hey, we need to impeach this fellow? He's claimed he's an emperor." Or Nancy Pelosi would say, "Ah, don't have the votes. Impeachment's still off the table. We don't want to be unmannerly here. We don't create controversy. After all, maybe I'd like to be an empress someday." <Laughter>

Bruce Fein: And I have my doubts whether this country at this time would stand up and say, "It's the end of your tenure, Mr. President. We're voting you out of office." And the American people would write in, millions of e-mails, protests, this guy's got to go. And the reason why that's dismaying for somebody like me, I came to Washington 41 years ago. It was in the middle of Watergate. I worked in the Justice Department at that time. Indeed, one of my first tasks was to define what was an impeachable offense for a president. It hadn't been examined since Andrew Johnson in 1868. Going up to something like a Dickensian hovel in the Library of Congress in 100 degree weather and looking at these old parchments.

But I was there at the time of the Saturday Night Massacre. I was over looking at the Department of Justice balcony in the Great Hall when Elliot Richardson said, "I quit." And William Ruckelshaus said, "I quit." And there were 450,000 telegrams into the White House. And then the president backed down, and we had Leon Jaworski. And when the president announced de facto, "If I say I can burglarize Daniel Ellsberg's psychiatrist, it's legal," the people said, "No, it's not." And they held hearings and ultimately we forced him from power.

My proudest moment as an American was seeing Richard Nixon leave the White House. I said, "This is our finest hour. We don't accept abuses of power like this. This is the United States-- we the people." It's not that we're gleeful and want retribution, but this is what it means to be self-governing people. It gives us that pride and dignity. We can make errors, but by God, we are not going to be vassals. We'll decide them ourselves.

Where's this atmosphere today? Nothing. And the things that Bush has done are more egregious than Nixon, even though Nixon set a pretty high benchmark. Let me give perhaps what to me is the starkest example, the president's claim of executive privilege. Remember how Watergate began to unravel for the president? He had a White House counsel named John Dean, former White House counsel, who, before Congress, was recounting chapter and verse of what? Conversations in the Oval Office with the president. Remember, oh, the president could raise \$25,000 to pay off the burglars, but that would be wrong. And no one suggested, "Oh, John Dean, you can't testify. We're talking about Oval Office conversations. This is sacred communications. Otherwise, if he talks, presidents will never be able to plot crimes again." How bad that would be, right? So Dean testified fully. The president himself claimed authority to shut him up. And we all know what ultimately happened, the tapes and whatever.

Now, let's fast forward to today. We have subpoenas out to Harriet Miers, former White House counsel like John Dean, and Joshua Bolten, he's White House chief of staff; Karl Rove, former political adviser. Testimony is sought and some White House documents. They relate to the firings of the United States Attorneys and trying to cast sunshine on what was the White House involvement. It may or may not involve criminality in the sense that some of the answers might tend to prove that Alberto Gonzales, that hapless soul, perhaps strayed from the truth when he testified, although I must admit, someone with that strength of amnesia, you'd probably have a good defense that he really never knew what he was saying, so the intent to lie would be hard to establish.

But putting that aside, the serious part, this is what the president has said: he's ordered Harriet Miers not to show up. Now, that's quite an extraordinary power. The president's saying as king he can tell a citizen not to show up in response to a congressional subpoena. And what was the authority for that? Well, I'm king. I told her not to show up and answer-- not even to show up and say, "I can't talk about this. It concerns executive branch communications." Just I don't want to be there. The hell with you. The same with Josh Bolten, Karl Rove.

What is this? Even if you have a Fifth Amendment privilege against self-incrimination, you have to appear and invoke the privilege with regard to a question. You don't just say, "Hey, the system is bad. The president told me not to be here." And in fact, in the litigation that's pending now in the United States District Court for the District of Columbia, the lawyer for Harriet Miers, when asked, "Well, what was the legal reason why Harriet Miers didn't think she had to appear?" says, "Well, because the president told her." Because the president told her. Oh, this is Louis XIV, the State, I am the State.

Heck, what do you do when you have your king tell you you're not supposed to do certain things? This is laughable. That by itself in my judgment would have yielded instant impeachment of Richard Nixon. And during the House Judiciary Committee proceedings against Nixon, one of

the articles that was voted against the president, this is Article III, was that he attempted to obstruct the proceedings of the House of Representatives by refusing to provide information and documents which, if accepted, would reduce the impeachment power to an inkblot. That was voted-- that was an impeachable offense.

And when President Bush even more egregiously not only applies it to himself but to his former aides, shoulders get shrugged. "Oh, well." Because, remember, it's the informing power of Congress, it's the oversight that is most important, far more important than its legislative power. Sunshine is the best disinfectant. That's what really frightens the executive branch. Oh, we can't-- if they think it'll be public, they worry. When they didn't think it would be public, that's all the lies that Scooter Libby and everybody else told about Valerie Plame and Joseph Wilson. The informing function of Congress, it's most important so that we, the people, know what our government is doing, and then we can evaluate whether we want to support or oppose, in the ballot box, in lobbying or otherwise, what the president or Congress is doing or not.

That's what self-government is, knowing what your government is doing. If you're blind, how do you know whether to support or oppose what's going on? Now that doesn't mean that you necessarily have to show military plans of when this particular sidewalk is going to be hit. That, however, could be shared in executive session. But it means the people have a right to know the basic policies and reasons why the president is acting the way he is so the people decide I agree or disagree. And the way in which the people express their sentiments, they're at the ballot box, joining particular parties, making campaign contributions, all the kinds of things that politicians pay attention to.

Now to give you an example of the power of just publicity, there are threefold incidents recently that I think are very informing. Number one, you know that after the *New York Times*-- this is December 15th of 2005-- disclosed the warrantless surveillance program of the NSA, they called it a terrorist surveillance program. For an entire year Congress held hearings about this program, its legality. There was a white paper produced. It's rather amateurish, but at least it was something trying to justify the authority of the president to ignore FISA.

All during that time the president kept saying and Attorney General Gonzales insisted the president has inherent constitutional power to spy however he wants, commit torture, break and enter homes, intercept e-mails, without any regulation by Congress. This is part of his so-called unitary executive theory. I call it the counter-constitutional theory of the Founding Fathers, but, you know, that would take an entire additional session, and I'm sure I'm overstaying my welcome anyway. So he had claimed for an entire year nothing Congress can do can regulate my authority to gather foreign intelligence.

But then suddenly, after criticism from many, including myself, although I don't want to be boastful, in January of 2007 suddenly Attorney General Gonzales said, "Ah, now we've returned to FISA Court. We've decided that, yeah, we actually can conduct foreign intelligence collection under FISA." And that happened for one reason. There was publicity. Can you imagine that would have been done if the *New York Times* hadn't published this program? Of course not.

Another example, it's a little bit arcane, but it makes the point. For long years, when there was a vacancy in a U.S. Attorney position-- they typically serve four years-- the federal judge in that district would have authority to make an interim appointment, and that interim appointment would serve until there was a successor. Well, in the Patriot Act, the Department of Justice said, "Well, that's wrong. We want the Attorney General to have the authority to appoint interim United States Attorneys." Now there was at least some skepticism, for this reason: U.S. Attorneys who are nominated as permanent have to undergo Senate confirmation, so you get the scrutiny and the ability of the Senate to evaluate the competence and character of the nominee. If you have an interim appointment and you keep an interim appointment and never submit a permanent replacement, then you can evade the Senate confirmation process.

And the department repeatedly pledged, "Oh, we don't really intend to use the interim authority for that purpose," because they were driven solely by the new test. And when there were hearings held about the firing of U.S. Attorneys, the nine, it was disclosed that, indeed, there was a plot contrived by Kyle Sampson. He was Special Assistant to Attorney General Gonzales at the time to try to get a-- Tim Griffin was a friend of Karl Rove. They wanted to get him in as an interim U.S. Attorney in Arkansas. He might-- credentials were thin, to be euphemistic, and they thought, "This is a chance. We can get him as interim. We don't have to ever put his name up there. He can wait out the remainder of the president's term."

And when this was disclosed through the oversight process, then there was a clamor, "We need to go back to the old system. You deceived us." And President Bush signed the new legislation. And this gives an example to show that we're talking about things that are of more than academic importance. It has real influence on how the government operates. Real influence. And that's why to take away the power of informing the American people of what the government is doing, the oversight power, by saying, "Ah, the president can say you can't testify. You can't testify. I don't want to disclose what you told me or I told you," goes to the heart of our ability to exercise self-government at all.

Now, what makes this even more outrageous is that this claim of privilege in theory is based upon an entire fiction, a legal fiction, namely that, without confidentiality, presidential advisors would compromise what they said or they would be worried or be silent, a fear that it would ultimately be disclosed. Now having been in Washington 41 years, in government 15 years, read

virtually every memoir that's been written by people who are less old than George Washington, I have never encountered anybody, including myself, who ever went into the Oval Office and said, "Mr. President, I'm worried what I can say to you because maybe this will leak out." Nobody.

And indeed, George Tenet in his recent book-- he was the former director of Central Intelligence; remember. His statement about the grand slam, I mean, the slam dunk with regard to proof of weapons of mass destruction was reported in Bob Woodward's book, I think, *Plan of Attack*. First he writes, "Of course, no one in Washington ever believed that anything, even in the Oval Office, will remain private." So the fact is, this privilege is for nothing. It doesn't protect any advice whatsoever.

And, of course, everybody walks into the Oval Office thinking, "This could leak." It happens every day. Look at all-- or somebody will write a memoir and disclose it. You know, you would really have to be an ingénue, really an ingénue, to think that your advice to the president would always stay confidential. And, of course, the president can waive the privilege anytime he wants. Of course, he would for his own purpose.

And another additional mischievous element to this idea is that if you acknowledge the privilege and then the president can waive it selectively, so it can give the public a wrong impression of what the facts are. He'll waive it for the good information, and the bad and the ugly, he'll assert it then. So the public record is not really the truth, it's a half-truth, which is another word for a lie.

So what is to be done? There is no guarantee that we can turn this situation around because this is not simply a Bush-Cheney problem. And it's not simply even a problem of the effeteness of Congress, most of whose members couldn't pass a 12th grade civics test on what the Constitution means. When they take their oath of office, as required under Article VI to defend and support the Constitution of the United States, they don't really understand what the Constitution means. Their mental universe is, "What about my party, though? That has to come first." And I've gone up to say, "Do you find anywhere in the Constitution mention of Republicans or Democrats or Libertarians?" "No." "Well, your oath is to the Constitution, isn't it?" "Well, what's the Constitution between friends? I mean, we've got to move on to more important things."

And that's the psychology up there, and that's the most dangerous element, ladies and gentlemen. It's the psychology. It's the psychology of a vassal, a psychology of indifference, a psychology that says, "No, we don't really want to worry about freedom and checks and balances, the procedural protections against our own fault. We just need to worry about our own careers and what our party-- how our party fares. We'll leave it, like Scarlett O'Hara, until tomorrow to worry about the important things that make the United States worth keeping, the United States of America as we inherited it from the Founding Fathers."

Now there is an element in human nature that militates against believing that anything in the short run will reverse this complacency with what is already a virtual executive despotism in theory and understanding, and that is most of the-- I see I've been told that I have five syllables left, and I'm going to try to ask for a little more yielding of time as a concession to the shortness of life. <Laughter>

Bruce Fein: And that is the ultimate collapse is probably not threatened in a few days. And the irresponsibility of the current generation will be visited mostly on those yet to be born. And those yet to be born don't have money to give. They don't speak up, because they're not born, to prick your conscience. So it takes a very mature people in order to say, "Hey, I've got to draw the line now. I may have to sacrifice some creature comforts in order to protect and defend our liberties so my children and others will inherit what I did." Because that's what's inspired me. I said, "Bruce, why do you have this freedom, even the ability to speak out?" Because I've read the Founding Fathers and they worried about democracy, not creature comforts. They worried over and over that we must make this succeed because if we fail, all Europe will say, "Democracies can't work, you've got to have despotisms and kings forever." This must succeed. And that's why they pledged their lives and fortunes and sacred honor at the end of the Declaration of Independence, knowing if they lost, they were traitors. They were traitors.

And that's why we sit here today. We are at a precipice, but we've not been pushed over yet. And we need to be inspired by our forefathers in order to make the sacrifices they did so those who inherit the United States of America will still say, "This was civilization's finest hour." Thanks. <Applause>

Man 2: I'll let you go, because I just want to point out real quick there was one presidential candidate who did criticize Hillary Clinton publicly for making that statement, and I bet you can all guess who he was. I'll give you a hint. It's a Republican from Texas.

Woman 1: Actually, there were two. <laughs> My question is, you brought out about where is the righteous indignation, and I've really been wondering where is that righteous indignation? I don't understand why there aren't protests like we saw in previous years, in previous decades. And what do you think is the number one reason for that? Is it the education system? And second, a very quick follow-up, what do you think it would take to make that indignation and that protest and saying, "We're not going to take it anymore"? What will it take for that to occur? Thank you.

Bruce Fein: There are very few serious problems that have single causes, so I don't believe that there's one answer. But one element in this is that at present, most of the victims that we know about have names that seem foreign-- Muhammads, Hamdins. They don't seem to be Jones and

Smith, that people would readily associate, "Hey, it can happen to you." And this is what you might call a subterranean bigotry, but in my judgment it's there. It's the same attitude that was at work in World War II when we put into concentration camps 120,000 loyal Japanese Americans. There were no protests.

And to show you how egregious it was, we had dispatched a general, John DeWitt, to the West Coast to discover evidence of Japanese-American treason, espionage, sabotage. He comes back and writes a report and says, "Nothing there. But I am a psychologist. I know they have racial strains that tie them to the Emperor Hirohito. And the fact that they've not been disclosing their treasonous activities to me proves that treason is afoot." Now it sounds like Alice in Wonderland, and it is, but that was what was utilized. And no one protested. And the names were what? Korematsu, Hirabayashi, whatever.

So one reason is at present the names seem unfamiliar. The second is the one that you touched upon, the youth today in the adult population; they're totally ignorant of what this country is about. They don't know constitutional philosophy. They don't know what sacrifices were made, why people died at Cemetery Hill, why people died at Omaha Beach, why people sacrificed at Valley Forge. They prefer creature comforts and *American Idol* to the struggle for freedom. <Laughter>

Bruce Fein: That is what-- and this is something that has gone back to centuries, eons of civilizations that acquire this kind of power. This is what Edward Gibbon wrote about Athens after he'd written *The Decline and Fall of Rome*. He said, "When they came to cherish more than anything else comfort and convenience, they came to cherish that more than liberty and freedom, they lost all of it." And that is where we are. People would care more about their favorite *Idol* or-- I mean, *American Idol* grabs these huge audiences-- but they wouldn't spend five seconds reading anything about the history of abuses of power that show the danger we're at and creature comforts and worried more-- I don't want to deny that you don't like to pay \$4 for gasoline, but, my gosh, the Founding Fathers didn't sacrifice their lives so we could buy gasoline at \$3 a gallon. <Laughter>

Bruce Fein: But freedom, now what does that mean? How do you change this? You have to change it in the classroom, at the breakfast table and the dinner table. It's not like anything, that the light goes out, but everything, ladies and gentlemen, is matters of degree in life. It's matters of degree, knowing when you've got to sacrifice. Some generations get saddled with greater burdens and responsibilities than others. We have been saddled with the responsibility of avoiding kingship and executive despotism. Whether it's unfair, it's our responsibility, and it comes from groups like this talking and speaking. You have to stand up and say no, we don't have kings in this country. We don't have any vassals in this country. <Applause>

Bruce Fein: And again, it can happen, because the American Revolution didn't spring like Athena from Zeus's brain, you know, immaculate. It took time and educating the American people over decades as to what were the dangers of King George III's oppression. It doesn't happen overnight, but it was sustained and continued-- the committees of correspondence, the writings. So I'm not suggesting this can be done in a day, but it's the small efforts to make certain that people and children and students have their priorities right. Freedom ultimately comes first all the time; then we worry about other things.