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The Tortured Logic of Executive Supremacy

by Joseph Stromberg

The following is a transcript of a speech given at The Future of Freedom Foundation's June 2007 conference, "Restoring the Republic: Foreign Policy & Civil Liberties" held in Reston, Virginia.

Jacob Hornberger: Joseph Stromberg is an independent historian whose work has appeared in many scholarly journals, including *The Individualist*, *The Freeman Chronicles*, *Independent Review* and our journal, *Freedom Daily*. He was a Richard M. Weaver Fellow in 1970 and '71. The title of his talk this morning is "The Tortured Logic of Executive Supremacy." Joe Stromberg.

Joe Stromberg: Thank you Jacob. I want to mention, I've prepared a short bibliography on this subject, which I'll hopefully put out by the books, if they have room out there. There's a great mountain of material on this subject. I've read several of the foothills and will try to distill that here. Now back in the early nineties when talk radio was young, I used to listen to this one program. Two old grouches sat around complaining about the state of everything, and the callers would add to the gloom. Eventually someone would mention the presidency, and then someone inevitably would say the President is our Commander-in-Chief. Well he isn't. He is the Commander-in-Chief of the Armed Forces of the United States. I know someone could reply that under an obscure 200-year-old statute all males between the ages of roughly 18 to 45 constitute the hypothetical residual militia. And I reply that until this imaginary militia is organized, funded, armed, trained, officered, and federalized, the original point stands, and most of us remain six steps or so away from having a personal commander-in-chief. We may therefore feel free to regard the President as a mere politician, a powerful or dangerous one to be sure, but nonetheless a politician. Another bit of folklore came from our teachers in the late fifties and early sixties. It went like this-- you may not like the current President but you have to respect the office. No we don't. <Applause> After studying these matters for four decades I

believe that 200 years' experience teaches that the American Presidency is the worst mistake or the biggest joke that James Madison and his cronies lumbered us with.

Audience Member: Yes.

Joe Stromberg: Now in mentioning torture in the title of this talk, I am of course referring to the famous Torture Memos of January and August 2002. These memos crucially rely on a certain theory of presidential power, and we may tease the theory out of them. At the same time the memos illustrate what the theory is good for. It is not good for us. The Torture Memos merely tell us where we are. They raise the stakes. They say if they can do that, under presidential authority, and presidential authority is some form of law, what can't they do? You have to think about that.

Now where do they get all this power? After all the Second Article of the Constitution is only about 900 words, mostly dedicated to how the President is elected. It is difficult to extract an office worthy of Caesar out of this article. But ambitious presidents and great presidents and their lawyers and advisors have done wonders for the office. And as other speakers have already noted there's been a sort of gradual rising curve of presidential power, punctuated by great leaps forward, mostly during war. Now George Washington understandably took a fairly broad view of his powers, egged on by Alexander Hamilton, and succeeding presidents have added their mite, m-i-t-e, to the office. They've exaggerated the obvious and turned everyday chores mentioned in Article Two into powers.

For example, if the president can appoint surely he may dismiss; and this is an area where presidents have been rather successful, and we'll go through a few of the highlights. Andrew Jackson popularized the idea that the president embodies the will of the people, an idea which has indeed aided the office. President Polk showed how artful deployment of military forces by the Commander-in-Chief can trap Congress into declaring war. As for Lincoln, about him we heard yesterday, suffice it to say that his historical bulk undercuts criticism of executive power-- if he did it must be right.

This theorem has forever confused the American political and legal mind. Now presidential powers made some gains during the Spanish-American-Cuban-Philippine War, and shortly thereafter Theodore Roosevelt announced his Stewardship Doctrine under which the president may do any good deed that occurs to him, provided it is not prohibited by the Constitution. Now this directly reverses the premise on which the Constitution was sold to the ratifying conventions, that powers not granted weren't there. Now the presidency gained power under Woodrow Wilson in World War One, largely because of the growth of bureaucracy that the war entailed; and the growth of bureaucracy generally tends to benefit the Executive. He was followed by three do-nothing presidents, the type we sorely miss. But even at this late date,

coming down to 1932, presidential power, as it had accumulated, might have remained bearable, but it wasn't to be left at that level.

Franklin Roosevelt asserted presidential powers to fight the Depression and further inherent powers to fight World War Two. And strangely the reactionary Supreme Court had already given Presidential Doctrine an important boost in 1936 in *U.S. versus Curtis-Wright Export Corporation*. There, in several pages of unnecessary verbiage, Justice Sutherland expounded the ultimate doctrine of presidential inherency. He deduced that in the late 18th century the English kings' sovereign prerogative powers over foreign affairs had descended on the American presidency, after having hovered over two Congresses in some kind of constitutional suspension. Now Raoul Berger, a great constitutional scholar, disputed Sutherland's claims and established, I believe, the revolutionary generation's determination to break with kingly prerogative, another English precedent; and yet Sutherland's position still provides for many writers a working theory of presidential powers over foreign affairs, and worse it makes them exclusive.

Now the tide was then running with the presidency, in the 20th century, so much so that in 1950 Harry Truman, a politically weak president, could put us into war in Korea without consulting anyone but his advisors, himself, and five or six important senators and congressmen. The Constitution seems to require more-- and one of our speakers has mentioned the role Truman plays as author of the Cold War on national security state; and there's an important book by historian Michael Hogan on this subject. Now Truman was constantly announcing large-scale troop deployments overseas. When congressional fossils asserted the need for congressional approval, Truman would send the Secretary of State down to correct them, and the latter would refer to 100 or more cases in which presidents, beginning with George Washington, had allegedly always sent the military wherever they felt they ought to send it. Under questioning the secretary might have to admit that singly the cases weren't that good, but taken together they proved the case. The hearings would end and the House broke into congressional majority and swore allegiance to reining presidential pretensions.

By 1966 the cases had become 125. And historian Lewis Fisher divided them into three classes-- those misrepresented, those trivial, and those that were just evidence of presidential usurpation. But by mid-century far too many Americans believed that the president has complete control over foreign affairs, may do what he wishes with the Armed Forces, and may even make treaties without the consent of the Senate, provided only that he calls them executive agreements. By the way, I think we have to look at Yalta and some other items in that light. In any case, history, precedent, and a living Constitution were supposed to explain how all this power came to be. And many people agreed on this story and it served a range of liberals, conservatives, and progressives for many years. It seemed adequate to most occasions, including the Cold War.

And now we come to a parallel story. So this is the story of the Right Wing and its changing views. So enter the Right Wing, looking for power. The Cold War allowed for a gradual continuous and cumulative extension of state power, into all aspects of American life. As run by those liberals who invented it, this American enterprise strengthened both halves of the American Welfare-Warfare State, subsidizing science, universities, defense contractors, interstate road builders, et cetera. Presidential power grew with the growth of government, and in some ways ran ahead of it, of course, because of all the national security apparatuses and so forth, ran ahead of the overall growth of government perhaps. From the mid-1950s the American Right abandoned nonintervention and embraced the Cold War, asserting that they could run it better than liberals-- they were more prone, after all, to blow things up, and this was a better way to run the Cold War.

Necessarily the Right gave up its earlier critique of presidential power. These shifts left the Right with two problems. The first was the Goldwater bind, how to sustain an ambitious, expensive imperial foreign policy while having limited, relatively laissez-faire government at home. Could this be done? No. <Laughter> The second problem was implied by the first. The Right did not have its own doctrine of presidential power but was reluctant to adopt that of the Cold War liberals, for their doctrine entailed a living, flexible Constitution. This was a trap because a Constitution able to evolve toward presidential supremacy could also legitimate the welfare state, socialism, and all sorts of things that the Right did not wish to legitimate. Unlike Cold War liberals then who could embrace big government at home and abroad, the Right wished to expand the warfare state with no end in sight, while curtailing the welfare state. Meanwhile Dwight Eisenhower ruled by stealth, exercising presidential power without appearing to do so. His main contribution was to perhaps to an expanded notion and use of executive privilege, and there is a context to this. What senator, does anyone suppose, was causing the most trouble asking for executive materials at the beginning of the Eisenhower administration? Who?

Woman 1: McCarthy.

Joe Stromberg: Joe McCarthy. Now this is unfortunate in the sense that this tended to discredit, for a long time, the notion of congressional investigations, and the president was treated as a hero for refusing to comply with congressional requests for papers, materials, things that Congress does in fact have a constitutional right, I think, to see. So it's part of the politics of the period and an unfortunate byproduct of the whole McCarthy episode. In fact the Cold War liberals were always writing about Joe McCarthy is weakening executive power, what a terrible thing. Well he had his faults but I wouldn't count this as one.

Now we'll fast forward past JFK and LBJ-- we've heard quite a bit about them-- and as for Nixon we'll just mention that he imploded but the office survived quite well. In fact the mantra-- I

think this was August of 1974 that he resigned-- I remember the mantra everywhere, you couldn't escape it, everyone said, "Well the system works." Oh great, we have another president, the system works. We were so relieved. Okay, well we still have the bloated presidency. We just have Gerald Ford in there, which was not so bad. Now under Ronald Reagan the so-called real Right approached power, but the Right's old dilemma was not addressed. The Reaganites restated the Goldwater bind in a harmless form. Now it read, can we have an ambitious, expensive imperial foreign policy while talking about limited government, laissez-faire, et cetera? <Applause> And now the answer was yes, they could talk.

Now some did more than talk however, they found their long-awaited theory, which we now know as the Unitary Executive Theory. Frustrated by congressional interference, so-called, with federal bureaucracies, and needing to rationalize violations of the War Powers Act of 1973, lawyers in the Justice Department's Office of Legal Counsel cobbled the theory together in the late 1970s and 1980s. An early statement of the theory is found in the Minority Report on the Iran Contra scandal. Richard Cheney was there. Now once launched the theory inspired presidents from Reagan to Bush the second. But the theory really arrived under Bush the second as the ultimate constitutional card trick where it now justifies designation of unlawful enemy combatants, suspensions of habeas corpus, torture, universal surveillance, and much else.

Now as I've noted, the doctrine partly arose in the context of a struggle for control of the so-called fourth or headless branch of government; that is, those many agencies set up by Congress to study economic and social questions and address them via administrative law. Fitting these agencies into the threefold constitutional structure has been a legal theoretical headache. They may in fact be illegitimate in that structure. Elegant solutions may be wanting. Whether these and other bureaucracies inherently seek to expand their jurisdiction however may be left for empirical study. I'm not frankly as afraid of the Department of Agriculture as I am of another department. So it is enough to say that where agencies exist the president seeks to control and corral them into his orbit. And thus we know the American presidency is an expansionist institution.

Now the Unitary Executive Theory got its name in a famous *Law Review* article in 1992, and it's cluttered up legal reviews ever since. Legal writers skilled at interrogating an 18th century document and getting information out of it have added to the theory. A few names come to mind-- John Yoo, Roger Delahunty, Mr. Bybee, Gonzales-- you probably ought to utter the words Federalist Society and *Harvard Journal of Law and Public Policy*, over on this point. Proclaiming themselves to be originalists, executive unitarians offer slick construction and some very original understandings. And John Yoo has produced the fullest statements perhaps of this ideology. In it the American president is Godlike, sovereign in his sphere, and the sole judge of his own powers. But Yoo himself perhaps has gotten too much of the blame. He is a symptom and not the cause.

And here a little background may be useful. In the 1960s and 1970s the activist liberal Supreme Court provoked a reaction toward strict constitutional construction. Now in 2007 we can see how apologists for executive power hijacked that reaction. In their hands so-called originalism emphasized in practice presidential power, especially war power, as the antidote to domestic unrest and reform. But strict instruction in Cold War militarism could only be reconciled at the expense of constitutional concepts. The circle could not be squared but it could be pentagoned. <Laughter> Now and even worse, instead of the liberal judges' emanations and penumbras, unitary executive theorists managed to find outright psychoses in the Constitution-- we'll come to these.

Enough of the theory itself, or what I like to call the seven or so seals of the unitary executive. But why is it unitary to begin with? Well this simply begins with the innocent sense of the word, simply meaning that there is a single executive with alleged virtues of energy, speed, and secrecy and decisiveness arising from the fact that it's not three executives or seven or some kind of Swiss committee, and so on. But the unitary executive theorists quickly bring in a presidential claim to every power or function ever called executive, by any Ancient Roman, by Machiavelli, John Locke, Montesquieu, or Blackstone. So suddenly anything that anyone's ever called an executive power or function is in the American presidency, just because that word is there. And I answer that Machiavelli, Ancient Romans, Locke, Montesquieu, Blackstone, and others were not at the Constitutional Convention, nor did they help ratify documents. So this is somewhat dubious philosophical founding material.

Now according to Unitary Executive Theory the president has a general grant, which I was just talking about, of undefined power rather than specific tasks. Congress and the courts may not hamper the executive in the exercise of his exclusive powers, for that would be unconstitutional. Acting in his hermetically sealed and separate realm, the president is beyond or above the law, as made by Congress and interpreted by courts. Thus unitary executive theory is not a statement of the law, it is an ideology of power, and we must therefore view it as a series of ideological moves. From control of foreign affairs and commanding and chiefing, the president goes on to initiation of wars, to the use of war powers at home and abroad, to the use of the laws of war abroad and then at home, and finally to a right to alter any rule he just made under all of the foregoing claims and powers, when he finds that a new ruling is better. Policy and execution replace law and presidential power becomes as vague and broad conceptually as military necessity, a concept which is after all rather hard to pin down. And then these powers are claimed to be exclusively in the president, and no one can interfere with his use of them.

These are not trivial claims. And there is also what some writers have called an essentialist notion of power here. I call it the big blob notion of power, that there's a big blob of executive power, and we know what those are because Machiavelli or Montesquieu told us what they are, and it's always the same. And the president has all of his blob. Congress does not have all of the legislative blob because its powers are enumerated-- you'd never know it-- and because it shares

these powers with the states. And the courts apparently have all of the judicial blob. But then the unitary executive theorists come back around and say, well there may be a few remaining powers implied or mentioned or metaphysically inherent in the nature of things, and those would all go to the president too because they would be executive, whatever these mystery powers are.

There's a whole notion of powers that must exist; and you have to blame John Marshall partly for getting this started. It's sort of a deductive process in which you say well we're independent from other powers and therefore not-- we're self-governing. This must mean we are sovereign-- and the sovereignty idea quickly gets transferred to the Federal government, that sovereignty is being taken care of there at least-- and we're sovereign, and every sovereign state, look at the Kingdom of Prussia, they've got a zoo. It must be inherent in the nature of sovereignty to be able to build a zoo. Therefore we shall have a zoo. And this argument about powers that must exist because other states seem to have them and they must be deductions from the notion of sovereignty, I believe was demolished rather thoroughly by John Taylor of Caroline, Spencer Roane, and Hugh Swinton Legaré, a group of legal writers that no one reads. But in any case it seems to me the argument has been joined.

So these powers, whatever they are, wherever they come from, apparently belong to the president. In fact you begin to wonder, were the ratifiers in a position to grant plenary powers to anyone? Could they have reasonably granted a power to do wrong? So you have to begin to question this whole thing that at certain various fundamental levels-- could they reasonably grant a power, for example, that would destroy the people's liberties? Well we'll come back to this point.

I want to mention though an eccentric notion from English Law that is relevant to this point, and this is the notion that the King can do no wrong. Now to American ears this sounds horribly authoritarian and wicked and absolutist, and in fact it is not. It simply means the king has no right to do wrong. The king is actually under the laws, whatever they are, and properly understood, the king, being the symbol of the state or simply some apparatus enforcing law, is not supposed to do wrong. If wrong is done you can sue the king's agents, and they may be found guilty. So it's actually an attempt at a restraint on power, which of course was later done away with, first by the kings and then by parliament, which decided that parliament could do no wrong in the more sinister sense of the phrase.

So you have to wonder if we haven't lost something when we lost this nice legal fiction. Because we say well the people are sovereign-- this is the great underlying fiction that never seems to be operationalized in this country, the people are sovereign. And so you say, well can the sovereign people be under the law? And more to the point, can a unitary politician that's said to embody the will of the sovereign people be under the law? Apparently not; but we'll leave these considerations for the moment. Now Unitary Executive Theory holds one sentence-- "The

executive powers shall be vested in the president of the United States of America"—that entails all the powers of Julius Caesar and many other historical figures.

Now to this Raoul Berger replied, the words executive power were no more than a label designed to differentiate presidential from legislative functions, and to describe the powers thereafter conferred and enumerated. A few powers are mentioned after all in Article Two, and I think a natural reading of this article would be that the president's got these powers and that's it. He receives ambassadors; with the consent of the Senate he appoints some officials; he makes treaties with the cooperation and-- he's got a few things he can do. It is hard to find a lot more in there. He communicates with foreign states, so he's a messenger perhaps. But this got to the notion that well the president receives ambassadors, therefore he's in the recognizing business. He'll recognize foreign states. And then it reaches a point with Woodrow Wilson that he's the moral judge of foreign states and recognizing them as an American punishment or boon. And it gets out of hand. The man is supposed to receive ambassadors. I don't know.

In any case Berger continues-- if I didn't read this part before. "To derive additional authority from this descriptive label is to defeat the framers' intention, strictly to define and confine executive powers." So on various evidence that Berger adduces in his book, executive power, executive privilege is a constitutional myth; on the basis of this evidence I think he's considerably lessened the majesty of Article Two. And there's a recent *Law Review* article by Bradley and Flaherty which drives additional nails in the coffin. But nonetheless presidential apologists keep finding unenumerated powers for the president. And as Berger points out, lacking unenumerated power, action is illegal. This was the original theory of the Constitution, if there's no power obviously granted you don't do things. It's really fairly straightforward.

Now presidential apologists bring in further inherent powers from implications of international law-- and I've already shown how one of those works with the receiving ambassadors and so on. Presidential lawyers read the phrases "execute the office," "preserve and protect and defend the Constitution" as allowing the president to violate specific laws in defense, as he sees it, of the Constitution. Yet the other phrase in the Article, "take care that the laws be faithfully executed," would seem to exclude such tricks.

Now as far as founders go, Alexander Hamilton is very nearly the only one on whom these theorists can draw. But there are two Hamiltons, the first, selling the Constitution, in the Federalist papers, the second, writing in 1793, to enlarge the presidency once it existed. And accordingly his arguments are somewhat suspect and little has been gotten from him beyond the assertion that infinite dangers imply infinite powers, which tells us nothing about who it is, Congress or the president, that possesses such powers, if they rightly exist.

Now unitary executive writers make much of the war powers and the president's role in foreign affairs, as we have said. Now one might reply to this general claim of accumulated president that usurpation may beget commands. Commands may be obeyed. This does not actually change the law, only proves that presidents have gotten away with things. Berger contended, for example, that congressional acquiescence, so called, and presidential refusal to provide information does not establish a presidential right to executive privilege, especially when Congress has in fact resisted the claim for two centuries. This sort of thing brings us back to Nixon and his misadventures with executive privilege, some of which were not successful. Now presidential writers make much of the president's job of repelling invasions-- that this repelling seldom happens is beside the point. But we can say that a president who failed to defend the country ought to be impeached. I mean if people actually come into our air space and start dropping things, shooting at things, that would be fairly straightforward; anybody in any level of government with a gun would probably be licensed to shoot back. The Florida Highway Patrol could defend. So this is not the same almighty grant to Executive Power.

And now as for the heralded speed and energy again of the Executive, it may be answered that Congress is quite capable of declaring war if things are really as bad as the Executive says. But the point for Executive theorists is to claim that should the president defend American territory, that he is making war, thereby proving, apparently, that he may do the same thing anywhere, any time, at his own discretion. From defending St. Augustine he may go on to bomb Serbia, move troops to Siberia, or establish democracy in unlikely places. So presidential initiation of war is simply local defense writ large, and in a shrunken world presidents may repel attacks anywhere, and American interests can be said to exist. But here again we may have conceded too much in terms of presidential power of repelling attacks. The power may rest as much on the Militia Act of 1792 and its successors, that is on delegation by Congress. This would reduce considerably what can be deduced for the President from the chore of repelling invasions.

Now the President-- in this case the President would seem hardly better off than the states, which may engage in war when actually invaded. Now we come back to the idea of departmentalism and separation of powers. For these executive theorists the separation of powers itself becomes a further source of power, giving the president his own sovereign little sphere or world, which then may gobble up most of the functions of the other two branches of government. It also stakes a claim to dictate to all the fourth branch agencies and bureaucracies previously mentioned. These rather unfortunate results reflect the extreme artificiality of the notion of separation of powers as currently understood. If separation rigidly sorts official actions into executive, legislative, and judicial categories, it is already difficult to explain the veto power, impeachment, and other constitutional effects where these lines are blurred. Spoiling the fun, Raoul Berger wrote that of itself separation of powers does not create or grant power; it only protects powers conferred by the Constitution.

So we're back to the question these people were always dodging: for the President, what are the powers conferred? Now separation of powers used to involve some notions of checks and balances. And unitary theorists have made two differing claims. The President must control any executive function or officer. The President has his own large grant of power into which Congress and courts may not intrude. A contradiction arises when we say that the two claims taken together destroy any real notion of checks and balances. But unitary theorists welcome this result, and they invoke the President as the only nationally elected official, who therefore embodies the people's will. So now we have a Napoleon III model, or worse, of the presidency. As for federal agencies, if we really believe that concentrated power is dangerous, how does giving plenary control over every federal employee, outside Congress and the courts, how does this check or balance the Executive? If democracy means one man's rule over an immense administrative state, we are in serious trouble. It does, however, allow unitary theorists to legitimize these agencies, something that the real strict constructionists probably would not have done, by subjecting them to the president, and thus making it democratic, so that he may get on with his real task of ruling the world.

Accordingly the theorists can pose as radical democrats. But this is simply Jacksonianism. Seen in another light the American Right is offering us its version of Max Weber's charismatic leader - the popular hero who restrains the bureaucracy to the cheers of the masses, or possibly Bolingbroke's patriot king. George Bush falls rather short on charisma but the authoritarianism that comes with such a figure is real. Louis XIV said, "I am the State." And the American President says modestly, "I am only a third of the State." But when this official asserts plenary control over foreign affairs, war or peace, all federal agencies, he is really saying, "I am 95% or more of the State." If this is separation it is not doing us much good.

Now presidential signing statements are simply a result or an artifact of all of this, and they poison the well by asserting an executive reading of something the president is signing into law. Well if he's signing it into law, his job is simply to execute it. If he thinks there's something wrong with it he should veto it. Nonetheless, the President instead of vetoing it announces he will enforce the law in his own fashion or not. The attempt is rather old. Edward S. Corwin, another great constitutional historian, wrote of attempts in the late 1940s to do something similar. For a court to vary its interpretation of an Act of Congress in deference to something said by the president would be to endow him with a legislative power not shared by Congress. Now the point here is not that Congress is being injured as a department and the boundaries are being frayed and the separate spheres are not where they should be; the point is the President is claiming a power not granted him. And here one has to mention presidential directives, executive orders, and so on, where the President effectively makes laws. So having claimed he's only protecting his separate sphere, he's encroaching on all the others.

One that's interesting to historians of course is George Bush's Executive Order restricting access to the Federal Archives to look at the papers of several recent administrations. One wonders

what that's about. But again secrecy is leverage and they like both. Okay. Now what we have then in the end is a heightened absolutism that claims that the President is the sole judge of his powers. We are asked to agree that our ancestors knowingly signed on for such a system. It is easier to believe instead that a whole generation of conservatives went to Law School in order to surpass the liberal Supreme Court in creative writing. And the upshot is what John Yoo calls the flexible system for beginning wars and fighting them in which the President initiates war-- oh that's brazen-- Congress funds it and the courts remain aloof. In Yoo's view Congress's only role is to acknowledge the presidency creating crises and declare war; in a sense that Congress looks around the world and says oh, the President seems to have got a war going, we'll have to admit that there is one-- that's all declaring war is. So through this coerced ritual various international and domestic legal complications kick in, including the now traditional partial suspension of our dual use Constitution.

Now liberals and conservatives can both take some blame for creating the modern presidency. Someone built the ceiling that became the next administration's floor, and this reality is more important than the political labels attached to the current practitioners; simply replacing the present unrighteous stewards will not solve the problem. One more point about the interpretive mode into which these unitary executive theorists get themselves. In their interpretive zeal they tend to discover, think they're discovering more conscious design structure and ideology, in an 18th century text, hastily written and ratified, than such a document likely possessed. But unlike the Cold War liberals, unitary executive theorists claim that their notions are actually in the Constitution, and always were. The unitary executive is primordial. Yes, the president is sort of eternal, he's before the Constitution, he's after it. This may be the final insult. And like other Constitutional interpreters, the unitary theorists bring claims in from outside the Constitution, from political theory, from considerations of policy or the dire necessities of international existence. Here their notions closely parallel similar ones lately discovered by certain proponents of Chicago School of Law and Economics, and by those who interpret Machiavelli in the manner of Leo Strauss.

Interestingly, unitary executive originalism is not in fact a type of fundamentalism-- this is what a lot of the law bloggers seem to think. It resembles instead 19th century higher criticism of the Bible, and just as an excess of that bred agnostics in the church, so does Unitary Executive Theory breed constitutional agnostics. Unitary Executive Theory amounts to a kind of dare-- accept our theory or reject the Constitution. Well as Jack Benny said, I'm thinking. <Laughter> Now here and now-- and we're really, I think we're really in deep trouble with respect to all this energy and dispatch and decision in the Executive, which was not the work of a day nor the achievement of one administration. What seems striking at this point is the sheer arrogance, the colossal nature of the claims made, the partisanship, unprincipled greed shown by the present leadership. They wish to exercise unknown and irresponsible powers in permanence, emergency or not, and their assertions of power utterly lack any idea of check or restraint on their will. They want to push us back from the Stuart Constitution, where the Stuarts had to have an

emergency in order to torture and rule arbitrarily; back to the Constitution of the Tutor dynasty who could do it just because they were there. <Applause>

So we are faced with what republican thinkers of the late 18th century would have called corruption; not someone stealing \$200.00 from the treasury when that was money, but instead a concerted effort to overbalance the constitutional order itself. Such an outcome is not what our ancestors had in mind when they expelled our unitary executive, George III, from these shores. Now with Andrew Jackson in view, Senator John C. Calhoun noted in February 1835 that a president who could judge his own powers would take over the government. Calhoun did not buy the artificial notion of separation of powers. The departments, he said, were in effect united by complementary powers, or complementary functions, each with powers actually granted. There was no inherent divine right power in the Executive. Even the removal of power mattered. If the President could dismiss federal officers without giving cause, we would have, Calhoun said, a base and servile civil service. Calhoun noted the dangers of presidential patronage, adding that where the president can dismiss at his will and pleasure, he would gain an imperial power. And in talking about this whole question, Calhoun counts the Army as part of the presidential patronage; so it's sort of an anticipation of a military and industrial complex. It's rather timely with all the business of the U.S. attorneys serving solely at the whim of the President and so on-- we've been hearing this lately.

Okay, now we probably still have the question, why presidential legal doctrines matter. Well it matters first because acceptance of these claims by legal professionals, by politicians, by the public, will lead to further assertions of such powers, and use of them, and more of the war-courting policies we have seen since at least 1950. Further, the more the president can appoint judges who are carriers of Unitary Executive Theory, the more he can finish transforming the courts into another arm of the Executive, so that no check will come from that corridor. So new doctrines will create the foundations for a new legal regime and shape what the courts will enforce and what they will ignore.

Where judges are concerned we must not be misled by an artful confidence trick. Recent judicial nominees have widely advertised their views on abortion and state's rights while downplaying their commitment to the Unitary Executive Theory, arguably the most important item in a package deal. I don't know why this is a package deal but it is. Senator Biden saw through it in the case of Judge Alito, as did Professor Lawrence Tribe and some others. If unitary executive claims spread through the system like a virus, further subordinating Congress and the courts, the last stage in our own regime change will be at hand. We shall have a system of vast and irresponsible power centralized, grasping, and ultimately vulnerable to the crises it generates and represses; although I suppose we could say we're pretty far along at this moment. We cannot treat the Unitary Executive Theory then, apart from the policies of which it is both a symptom and enabling act, and so we come to empire and its sundry costs.

Would we be as concerned if the war had gone well? I hope so but I can't say. Had the war gone well new gains for arbitrary power might have gone unnoticed or less noticed. But it has not gone well, and this focuses our attention-- and the costs to which I refer include lives lost, money squandered, new enemies made unnecessarily, and a sense of national pessimism. But there are additional moral and institutional costs, and this is the wider sense of the term blow-black. The American Presidency has become a serial war initiator. Empire, constant war, and emergency regulations march in lock step with presidential power and patronage. It is futile to treat one and not the others. If we wish to maintain or restore the rule of law and our essential liberties in the Republic, we must confront what the presidency has become. We may find ourselves preferring lethargy, sloth, openness and slow, careful deliberation in the Executive in place of the much advertised energy, speed, stealth, and decision. So essentially I think we face a republican crisis of the sort the 18th century writers went on about, and we will have to resolve this one without the Machiavellian ventriloquism of establishment conservatives.

So we face a number of questions. How can we reverse the corruptions of institution, law, and language? Can we play the constitutional record backwards? Can we disunite the unitary executive? One proposal that I've seen is to-- if it were feasible, and I suppose the crisis will have to really reach an interesting point before anything could be done. There's no reason the President should be appointing an Attorney General. The one we have now is-- well it just probably proves the case-- but there's got to be some other way to have these important officials put in place, not beholden to the President. It's worked well enough in the states where there's separate elections for a whole array of top state officers who are not considered inherently executive and therefore subject to the unitary governor. There's other models to look at.

So can we disunite the unitary executive? And that also goes to the question of who is actually sovereign around here? It's peculiar that the Unitary Executive Theory derives presidential powers over foreign affairs, from the very king whom we were deposing. Apparently the people are only sovereign in the unimportant area of domestic politics. It's a very strange thing to have a legal fiction of popular sovereignty but have the Executive deriving his foreign affairs powers directly from the King of England.

Now I want to leave you with a real signing statement. This was signed by people that were really signing something. In the ratifications of the Constitution, by New York, Virginia, and Rhode Island, the convention stated that the powers granted to their new agent could be resumed-- or re-assumed, there's two spellings-- resumed, when perverted to the oppression of the people. Now perhaps the unknowably large emergency powers actually reside here.

End of Joe Stromberg Part 1.mp3

Joe Stromberg: Sure. What I'll hear.

Rebecca Dunn: Rebecca Dunn, Palm Beach, Florida. Let's assume that all of the stars lined up correctly and Ron Paul were elected president, which would be wonderful, and let's say we had a very reluctant legislative branch and a reluctant or uninspired judicial branch. What would you see as Ron Paul's lead in this? How do you feel that he-- without overstepping his boundaries in the presidential role, how would you like to see him bring about many of the changes that we've talked about today?

Joe Stromberg: Well, there is the veto power. I mean these people won't use the veto power anymore, because they're afraid they're too weak and there actually is a majority of the other party sometimes, and it's politically difficult now, to use the veto power, but, you can veto. I think he would have to be a bit like a monk who was prepared to renounce a lot of things to actually be in that job because it would be tempting to use powers. But, if the office itself has become the problem, you know, we would have to have someone who would actually read the Constitution and only use the powers that actually seem to be there in some reasonable way. So we need sort of a stoic individual, I suppose, to carry out such a program. I don't know what I could say beyond that. I mean, I don't really worry at this late date about the President's-- the poor old President's boundaries. If you did a diagram and you say well here's the branches and there's this big line between them, but then the Presidency says well all of the foreign policy, though, that's mine, and of course, in practice, that affects a great deal of domestic policy. Pretty soon the President is claiming most of the diagram, if we had a chart for this or something. So, I'm not worried about the boundaries of the poor old President very much. Yes.

Q: Assuming for the sake of argument that there are powers inherent in the Office of the President as contemplated by the framers of the Constitution, which are not explicitly stated in Article 2, how do those who argue for this executive—unitary executive, as you call it—not bound to acknowledge that these powers and particularly the manner in which they are wielded are still constrained by the Bill of Rights and other subsequent amendments to the Constitution?

Joe Stromberg: All right, let me think about that. Well partly is by making a complete and total exception of foreign affairs, I think that's their best card trick is to say, "Well foreign affairs is of such importance and the powers came directly from a different source from the king," it will sometimes say that. Well, OK, I won't say his unitary executive theory because he's probably worse, but, Professor Harvey Mansfield makes the argument that, after all, the President is above and beyond the Constitution. He's been saying this every week for a while now because Machiavelli told him this when they confer. And so, the President has only emergency powers that Machiavelli or Karl Schmidt or a number of people imagine must exist in the world for us to be safe. And so, this is a big world of hostility. And you have to have those powers and deal with all of those things, and after that, we can talk about civil liberties and the Bill of Rights. So that would just be in a way of a much more subordinate status. But, if I can pin it down any closer, I will, but that's how I think they do it. And as far as I can tell I'm not sure they really put much real argument into some of the things they assert. There's a lot of

assertion. If you read the Torture Memos, I mean they're rather painful reading literally, you'll find a lot of sure assertion in them, as well as sort of various tendentious legal argument. Ma'am.

Rosalind MacClennan: Rosalind MacClennan, Rockville, Maryland. You cited the second article of the Constitution and I wanted to know why this section 4 hasn't been implemented and used more often to bring down or to stop this serial killing or the serial initiator of war? "The President shall be removed from office on impeachment and conviction of treason, bribery or other high crimes and misdemeanors," section 4 of Article II? When one intern Monica Lewinsky almost brought down a President or at least incited a columnist to write, "Mr. President, you are a disgrace."

Joe Stromberg: Well, a conspiracy theorist, which we didn't want to be, but sometimes things just work out, a conspiracy theorist would say that, "The Republicans knowingly launched an absurd impeachment to discredit the idea of impeachment." And that might be going too far, but the fact is they helped discredit the idea of impeachment. And when Nixon squeaked by by resigning, I think that was unfortunate because we didn't get a test of the principle of impeachment. I tend to agree with Ronald Berger by the way, who argues that, "If the President just screws up, he can be impeached. It doesn't have to be a crime in the criminal law sense of the world." It doesn't have to be a crime. I mean, if the President really messes everything up, he gets impeached. It's basically a political provision of the Constitution. So, yes, I wish we did. I mean I'm not particularly partial to the Radical Republicans in the 1860s. There are days when I wish Andrew Johnson had been impeached just to establish the precedent, although that would have had some other drawbacks. Yes, ma'am.

Althea Schoen: Yes, I'm Althea Schoen from Edison, New Jersey, and in keeping with the conference's theme of civil liberties, I just wanted to make sure that people know about the Bill of Rights Defense Committee, which is headquartered in North Hampton, Massachusetts. And they've spearheaded the passage of over 300 anti-Patriot Act resolutions by cities and towns and a few states across the country. And these resolutions instruct the local police not to cooperate with the feds in doing anything unconstitutional. And the Bill of Rights Defense Committee is trying to think of other ways to oppose the newer abuses of the Bush Administration on a local level. And they promote local activism on these issues. So, if you're interested, you should look up their Web site, which is bordc.org.

Joe Stromberg: Well, that's a very good point. I would like everybody in the so-called "blue states" to get out their copies of the Kentucky and Virginia resolutions because if the red states won't do it-- I'm for anybody doing it. But to the extent that we have any say in local governments these need to be used. And it might seem peculiar if we suddenly have a coalition in which all sorts of leftists and progressives are talking about states' rights, so be it. Thank you.