

>> Peter Robinson: Welcome, I am Peter Robinson. With me today, Richard Epstein who is the James Parker Hall Distinguished Service Professor at the University of Chicago Law School and the Peter and Kirsten Bedford Senior Fellow at the Hoover Institution. He is that author of innumerable books. Just a few--Most recently, at least--most recently in my notes but you said there's another one since in any event, how progressives rewrote the constitution. John Yoo is a Professor at the University of California, Berkeley School of Law. His most recent book is entitled "War by Other Means: An Insider's Account of the War on Terror". Both John and Richard would widely be regarded as conservatives mostly in their interpretation of the constitution. However, Richard tends to believe that the Bush administration has made a hush of legal aspects of the war on terror. He is assenting to that. I'll get a way with it. John Yoo tends to believe that the administration has gotten things just about right. And indeed as the Deputy Assistant Attorney General from 2001 to 2003, John helped devise the legal framework of which Richard is so critical. First question, article 1 section 8 of the Constitution of the United States, "Congress shall have the power to declare war. Congress has not passed the declaration of war in the current instance. So in calling the present conflict a war on terror, war by other meanings, and calling the present conflict of war and terror, what is it--what does President Bush think he's doing?"

>> John Yoo: Well, first let me say it's a great pleasure to be here with Richard who I agree with almost 90 percent of things I think.

[ Simultaneous Talking ]

>> John Yoo: And the 10 percent unfortunately, which unfortunately involved very important things. First of all, I think it is a war. You don't need to have a declaration of war to have a war. We've had many, many wars in our history. There have only been 5 declarations of war ever.

>> Peter Robinson: The most recent being the World War II.

>> John Yoo: Right, but we've had every--Korea, Vietnam, Panama, Persian Gulf is one, the Iraq war or Afghanistan--

>> Peter Robinson: And the legal framework that makes that acceptable as what?

>> John Yoo: Well one--

>> Peter Robinson: We have here the plain words of the constitution, right?

>> John Yoo: One is that 9/11 for example. If you're attacked, you don't need to declare war because obviously someone else decides to start the war against you. Second, I think that the president has inherent the authority on the constitution to use force in certain situations, not to use force anytime he feels like but there's a threat to the national security of the country.

>> Peter Robinson: And there's one thing I just wanna clear. This is not a matter of semantics. To say that we're in a state of war that this is a war on terror from that legal designation by the chief executive follow all kinds of legal consequences including the way we treat people that a--combatants that we capture in the--Okay.

>> Richard Epstein: So in legal status they could truly matter but I--

>> Peter Robinson: But are we at war?

>> Richard Epstein: I think it is a more of a metaphor at this point rather than a description. It's like the war on crime I mean and the Cold War. They are basically what we mean is that there are people who are mortal enemies but it is not war in the narrowest sense that there now is situation of hostilities between two nations. We're not only in the state of enmity with each other but a shooting in each other in a regular kind of fashion.

>> Peter Robinson: Alright.

>> Richard Epstein: So I don't think anything follows from the use of the metaphor and I think that we want to sort of reserve to declare war to narrow situations, and that's actually not so easy to do, some things the police actions if the United States were to send in troops in order to rescue with diplomat who had been seized in the Lebanese Embassy, I don't think we would regard that as a declaration of war or an act of war. I think we would guard as an active rescue. So finding out what war is is not--

>> Peter Robinson: As a constitutional matter though, are you content to accept that if President Bush says we're at war?

>> Richard Epstein: No.

>> Peter Robinson: You are not?

>> Richard Epstein: No, and the area which John and I disagree with is not that that were undeclared police actions or activities, what we disagree with is whether or not the inherent authority of the ex of the president as a commander in chief of the military services is efficient to allow him to initiate hostilities for any circumstances subject only to the budgetary check of congress. And I think on John's position, if I have it right, if the president decided to bomb Moscow with an H bomb tomorrow, there will be nothing unconstitutional about that action.

>> John Yoo: Nor would there had been during the entire Cold War. I don't think if any of the many presidents who had that authority had used it. I don't think it had been unconstitutional.

>> Richard Epstein: Well--

>> John Yoo: I think congress--

>> Peter Robinson: So you are going to accept his characterization of your position?

>> Richard Epstein: Of my position. Yeah--but let me say there's two things--

>> John Yoo: There's two separate questions.

>> Richard Epstein: Yeah.

>> John Yoo: That's what I wrote down in this book.

>> Peter Robinson: Okay.

>> John Yoo: There's two separate questions. One is whether we're at war at all and then who gets to decide and I have--Richard and I have difference on this. I think it is true that the political record of the administration and the speeches does tend to have a problem in that it suggest we're at war with terrorism. And terrorism is just a tactic. I agree with Richard on that.

>> Peter Robinson: There's a certain muddled--

>> John Yoo: Yeah and we seemed to--

[ Simultaneous Talking ]

>> John Yoo: But on the other hand I think we are at war with Al Qaeda.

>> Peter Robinson: In a legal sense.

>> John Yoo: In a legal sense with Al Qaeda. And I don't think--and I think this is where Richard and I quite disagree is that many people have thought we could only be a war with another nation, alright. And that if we're at war with entities that are not nation states, it's something else. And I just think it is not right. I think 9/11, if it had been carried out by a nation like the Soviet Union during the Cold War--

>> Richard Epstein: Right.

>> John Yoo: I don't think anyone would have doubted we'd be at war.

>> Richard Epstein: That's an active war.

>> John Yoo: Right. That would be an active war. So why should it be different when a non-state does exactly the same thing that a nation state does. It's interesting because it gives them an advantage, right? Because they're a non-nation state and they carry out the same kind of violent actions against this. They should somehow be treated better on this.

>> Richard Epstein: Well I think, look--I mean, you know the guys who blew up the--Murrah building in Oklahoma City.

>> John Yoo: Right.

>> Richard Epstein: Can you do an active violence against the United States? And we didn't treat that as though it was an active war. I think what happens is you're talking about an isolated events followed by continued hostilities. They send troops in armor against us. Yes. But I think under this particular circumstance, a more accurate description is to call it an active terror which certainly justify any immediate response by the president. But interestingly enough at that point at least even he thought he had to get some authorization for the use of military force. And one of the things that we have trouble with on this--

>> Peter Robinson: War Powers Act?

>> Richard Epstein: Well no, that's much early. That's in the '70s.

>> John Yoo: Seven days after the 9/11 attacks, President Bush went to congress and so he didn't wait--

>> Peter Robinson: Why did he go to congress? He doesn't share your broad view of his powers.

>> Richard Epstein: Well, he wasn't sure and he'd like to get--

>> John Yoo: Yeah, he'd like to have a political support anyway and so the constitutional question Richard and I are arguing isn't really--I don't know, it was a constitution [inaudible] reach because congress did authorize this war.

>> Peter Robinson: Let's--let's take topics that apply here in the war on terror and tease out this fundamental disagreement about the powers of the executive. Wiretapping, 1978 congress enacts the Foreign Intelligence Surveillance Act which never--no one ever calls that. It's FISA, right, establishing procedures for requesting the judicial authorization of electronic surveillance. So executive wants to engage in surveillance. They go to the FISA court. They present their reasons in secret, a judge in secret rules on whether they may or may not do so. December 2005, New York Times reveals that President Bush had authorized the National Security Agency to tap telephone calls and emails traveling into and out of the United States as long as one of the parties was suspected of membership in Al Qaeda and to do so without FISA warrants. John, I quote you again here we have this--from this book. "The president has constitutional authority to carry out searches in secret?" Yes?

>> Richard Epstein: No. Let me start--

>> John Yoo: Go ahead.

[ Simultaneous Talking ]

>> Peter Robinson: Richard, it's the shortest sentence I've ever heard in--

[ Laughter ]

>> Richard Epstein: But I think maybe one of the more accurate one was [inaudible]. I think what happen is that the commander-in-chief language is certainly important and the president has that particular role. It is not a power and that actually matters when it says he shall be pressed commander-in-chief.

>> Peter Robinson: Article 2.

>> Richard Epstein: Yes, because what the power does it allows you to change the legal relationships between the United States and somebody else. And so with treaty power because you went through into a treaty, or pardon power because you released somebody. These are powers. To make a recess appointment is a power. This is a status and essentially if--

>> Peter Robinson: Status?

>> Richard Epstein: This is his position.

>> Peter Robinson: The role of commander of chief is a position

>> Richard Epstein: A chief position which gives him--which is very important that gives civilian control over the military for example. But other portions of the constitution, in effect the [inaudible] which is the congress have the power to make rules and regulations for the government--rules for the government and regulation of the armed land and naval forces. And so the clear sense is that they set the general rules and then he executes them in the narrow meaning of that sense which is to carry them out. And let me just, sort of, read one sentence. It says when he talks about him. The president is to be commander-in-chief of the Army and Navy of the United States. In this respect--

>> Peter Robinson: What are you reading from?

>> Richard Epstein: I'm reading from Federal 69.

>> Peter Robinson: 69 was written by Hamilton?

>> Richard Epstein: By Hamilton.

>> Peter Robinson: Alright.

>> Richard Robinson: Or would be normally the same as that of the king of England but in substance much inferior to it. It would amount in nothing more than the supreme command in the direction of the military and naval forces as the first general and admiral of the confederacy. Meaning in effect, basically he is the guy who defied General McArthur. It doesn't mean that he is the guy who can disregard congress because no one inferior military person can do it. He can't do it.

>> Peter Robinson: So he can't do it. So according to this 1978 law you wanna wiretap somebody, you go to the FISA court.

>> Richard Epstein: Unless there's an emergency for which there's an exception built into the statute which you did mention.

>> Peter Robinson: John?

>> John Yoo: So I think I look it this way. We've been attacked. The president's powers commander-in-chief comes into effect because he has to use the military to protect the country from attack.

>> Peter Robinson: You're already disagreeing with Richard because you consider that--you're talking about his powers and Richard is very careful in [simultaneous talking] it's just a status.

>> John Yoo: Yeah, I think that's the power that automatically comes into effect when the country has been attacked, and there's also discussion from the framing period of constitution to that effect. Once that happens, it's a question--or this very hard question of, well, does he have to go to congress and get a list of everything he is allowed to do in war time, or should he be able to exercise those kinds of powers which are natural to use in force? One thing I would say is collecting intelligence on where the enemy is. It's sort of like we gave the president the power to pull trigger on a gun, but he has to go to congress when he wants authority to figure out where to point it. It doesn't -- I think that doesn't make much sense. The other thing I would say is, if you look at history, presidents have done this quite often, a very good example would be Franklin Roosevelt. Over a year before Pearl Harbor, he authorized the FBI to wiretap not just international communications, all communications in the United States that were "subversive" in nature. There was a statute and a Supreme Court decision on the books at the time which said he could not do that, and which said that the government could not do that without a warrant. He did it. His attorney general who was later Justice Jackson authorized it. And presidents ever since until the 1978 law did that.

>> Richard Epstein: Well I mean, of course, there lies the first of the major differences. In the case of silence, there is generally conceded to be a slightly greater power to the president as executive than otherwise. But that defies that when the thing becomes regulated by statute, at this point the president is not acting in a non-regulated environment, he is acting in a regulated environment. And the general view is that the powers would therefore have to be much more circumscribed. And in particular, there's

certainly nobody would doubt that 911 was an emergency, but [inaudible] has in it built an exceptions to the warrant requirements for cases of emergency so that is it not an unforeseen situation.

>> Peter Robinson: Did they make a political mistake? Constitutionally -- these are interwoven I know. At this level, the politics and the constitutional law are almost inseparable, but so you've argued that the president had the authority to disregard [inaudible] in this circumstance. Question, did he make a mistake by doing so? Should he have called 3 or 4 of the most important members of congress and sort of that.

>> John Yoo: But he did that.

>> Peter Robinson: Yeah, he did that.

>> John Yoo: He did --

>> Peter Robinson: He did that. You're right, you're right. Excuse me.

>> John Yoo: He did not get legislation.

>> Peter Robinson: He did not get legislation which was [inaudible].

>> John Yoo: Yeah, I think it's a hard position because the reason they didn't get legislation is not because they wanted the political cover from congress. They dig that one when they could with the Patriot Act, and authorization used force in Afghanistan and Iraq. The problem that they are worried about is if you go through the process of getting legislation, you'll tip off to Al-Qaeda exactly what we can do and our advantage is over them, which I think were quite substantial if you believe what the president has said about the plots that were stopped because of this. And I think that's a genuine concern, I don't think they did it because they were just trying to aggregate the president's power. I think they did it because they felt they'd be giving up some kind of intelligence advantage to have a very open public discussion.

>> Richard Epstein: Look, right now there is a senate intelligence, a house intelligence committee which received very sensitive information and then distill that which could be made public. There is no reason as far as I am concern to say when you go to congress that we have this stat and the other technology which work in this stat in the other way. Or you have to say is we have very sophisticated technologies that we would like to use, I think Al-Qaeda already knows that. We don't want to tell people what they are at least in public. What we would like to do is to have authorization to use this. And one of problems with John's position is that, you know, the president could do a lot of things on September 12, 2001, what about 2002 - 3 - 4 - 5 and 6. After a while, there's almost a statue of limitations on the extent to which the 911 event can shape the presidential authority.

>> Peter Robinson: And actually that is very good. I mean it's intuitive to a layman like me that's a very good point.

>> John Yoo: Well, that's the hardest question.

>> Peter Robinson: We just can't -- we can't just be in war just as long as the president says so without some new action, you know.

>> John Yoo: Yeah. At first I think that is the hardest question, legal political constitutional all this is, how long does this can go on for? Because most people, we know people I think would accept greater government power to respond to this emergency, this war.

>> Peter Robinson: For the six months, everybody would have geared in many power [simultaneous talking].

>> John Yoo: But the war has begun in some point.

>> Peter Robinson: Right exactly.

>> John Yoo: On the other hand I would say that it's not the case that because we don't see a law issue from congress authorizing, if that means congress is deaf or blind. The leaders of congress were briefed on this program, now it's public. They could cut off funding for it anytime they want. That's in my view the ultimate constitutional power of congress. They don't like -- they just take the funding away. They're not gonna do that because they don't want to take the chance that, right, they cut of this program and then there's a terrorist attack.

>> Peter Robinson: Right.

>> John Yoo: And we're gonna have a -- it's very interesting. Even in the senate, right, who you would think has its own authority to interpret the constitution. The bills that have been proposed, say, we don't decide, we don't want to decide whether this is legal. We want the course to decide and they are trying to create something which should also - - ought to worry Richard, which is they would allow the course issue a general warrant authorizing wide scale searches in all situations our court would judge ever which is --

>> Richard Epstein: I mean that runs a good trouble and --

[ Laughter ]

>> John Yoo: Yeah.

>> Richard Epstein: There is a second problem here under the 4th amendment about whether or not when searches have to be --

>> Peter Robinson: Hold on. Fourth amendment, one, two, three, four --

>> Richard Epstein: There's unreasonable --

>> Peter Robinson: Thank you.

>> Richard Epstein: Which require you to --

>> John Yoo: The first one will be the only one I'm ever sure of.

[ Laughter ]

>> Richard Epstein: Yeah, which require you to describe the places particularly, the most in search. And that, of course, is perfectly sensed that when you're running investigations for completed crimes where it has a very bad fit for intelligence work where -- you're always trying to do is to monitor thousands of scraps of information, and what you do is you probe much less deeply but much more broadly. And so there is some sense in which there is a kind of planned obsolescence or unplanned obsolescence of the 4th amendment. And the constant tension in this area is between the warrant requirement, which talks about specificity, and the more general unreasonable searching seizures which is much more open ended. And that how those two clauses interact is at this point not yet fully settled a hundred and --

>> Peter Robinson: Next topic, next topic, coercive interrogation. I'm trying to avoid the T word which is torture. August 2002, Jay -- pronounce that name for me --

>> Richard Epstein: Bybee.

>> Peter Robinson: Bybee -- Jay Bybee who is your boss, the head of the Justice Department's Office of Legal Counsel, signs a memorandum to which you contributed, correct?

>> Richard Epstein: Not me?

>> Peter Robinson: Not him, you. I am quoting from the memorandum. "Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure and paramount of bodily function or even death. For purely mental pain or suffering to amount to torture under US law, it must result in significant psychological harm of significant duration e.g. lasting from months or even years." In other words, you get to rough people up pretty significantly, before it crosses the legal line into torture, is that a correct interpretation of the law?

>> Richard Epstein: I think most people believed that John has gone abridge too far in that in any sort of serious psychological or physical impairments would do, if putting people on water boards and sinking them and pulling them out, even if you don't kill it would count as torture. Bending their thumbs backwards and getting them to scream

would count as torture, organ failure I think is much too far for that. There is, of course, this horrible situation that the greater the necessity, the greater the willingness to bend the definition. And that's where John's view of terror, I think, comes in there, because we think this is being a real sort of 912-type situations. You're gonna find greater tolerance to rather extreme measures but now in a period of quasinormalization are you gonna find much more resistance to what John had said.

>> Peter Robinson: Okay John, you want to make a political point or stand on the legal. Well, I think this is isn't -- well, hold on. Let me defend you.

>> John Yoo: I don't think you need to.

[ Simultaneous Talking ]

>> Peter Robinson: 'Cause what we have here is somebody who is asked to write to review the law and what you discovered upon reviewing the law is in fact torture or something out here, and you can do quite a lot without crossing the legal line into torture. As a result of which you've been pilloried. So, I just want to let you know, we're not going to pillory on you here, go ahead.

[ Laughter ]

>> John Yoo: Richard is not --

>> Peter Robinson: No, but --

>> John Yoo: Richard would have to get in line for that though, and he'd be weighing the back too.

>> Peter Robinson: Go ahead.

>> John Yoo: You know, I mean that's how I think it is -- I mean there's a line for what torture is, and we can argue about where that line should be and Richard would say, you know, the standard is a little lower, it could be up here. But there is a standard for what torture is in, severe, physical, and mental pain or suffering, the worst consequences --

>> Peter Robinson: Is it clear enough?

>> John Yoo: Well, the problem is congress --

>> Peter Robinson: Clear enough to be a functionable?

>> John Yoo: The congress didn't define what's severe mental or physical pain was, so and there are no cases about this there or there were no cases at the time about this in the court. So --

[ Simultaneous Talking]

>> Peter Robinson: You know what you have here Richard and you have yet again the instance in which congress wants to produce the form of words which sounds good and gives them cover but does not do the hardwork of telling intelligence officers exactly what they're allowed to do and what they are not allowed to do. And the president of the United States and the executive branch in time of if not war then extreme nastiness has no choice but to try to figure out on its own.

>> Richard Epstein: Well, no one denies that they are going to have to be regulations or interpretive memos. The question is whether this was the right one or the wrong one. And there is certainly enough sort of discussion in the academic literature and international treaties about torture which take definitions that are rather more restrictive on what governments can do than this. So it's not a question of there being no background information. It's a question of whether or not the administration wants to follow it. I'm always been troubled by this administration, because it's first instincts is to pull its horns in and to always try to go it alone strategy. And I think what happens is domestically you lose a support of a lot of natural allies like myself when you go this far. And internationally I think you'll create catastrophic arrangements which are gonna result in finding more newly minted terrorist to say look what these guys are doing, that's what they'll be told. Then you would if you take a more moderate stand.

>> Peter Robinson: You don't want to deny they made a lot of political mistakes here, right?

>> John Yoo: No, I mean -- look, they could have gone [inaudible] and eventually they did, right? So we just had a bill that was passed about a month ago, signed by the president a few weeks ago, that does adopted a definition which people apparently seem to believe, preserved most of the interrogation methods. They could have done that. They chose politically not to, that might have been unwise. But I think -- and this goes to the experience of other countries too, like Israel, the Great Britain, democracy with similar legal systems to our own that did face very strong terrorist threat, and they did very much the same thing. They said look, "We're not gonna go pass this line of torture, but there's this area between questioning people in a police house with random warnings on lawyers and torture." And there are gonna be things that you can do in there under certain circumstances.

>> Peter Robinson: Shake people, keep 'em all night. Subject them to light [inaudible]. I think that's--

>> John Yoo: Well, to try to get information out of them and there are courts like the Israeli Supreme Court which looked at this question. It's a hard question. I don't think anyone believes it to be easy and they said, "Look, you know, you should be able to have some discretion to do this in certain ticking time bomb situations."

>> Richard Epstein: The form of words matter. Well, let us just take it as a political and moral necessity that when no matter what the definition of torture is, there will be agents in the fields who will go beyond it. So what happens is they're gonna go beyond it to some extent. If you really put it way out there, then going beyond it is truly horrific. If you pull it back, then going beyond it is going to be somewhat less. And this has always been the situation. There is no stable equilibrium in which you will find out that you give a definition and everyone will adhere to it. There will always be cheating at the edges including by our folks over in Iraq right now whose real interpret is do a lot of rough stuff with people to find out where enemy bombs are gonna be located and they're not gonna back off of that. How much they do is a function of how much they're allowed to do.

>> John Yoo: Well, Richard, let me ask you. Does it not matter what the--who the person is and what we're worried they might know about. I mean you've talked about, right, not going too far but I would think that part of that calculus has got to be whether we think there's a WMD in American city or whether we have a chief Al Qaeda planner.

>> Peter Robinson: Does the legislation that was just enacted and signed by the president involve any kind of sliding scale like this? Is there something--it says the more serious the threat that is envisioned, the more serious the damage is?

>> John Yoo: No, that--it doesn't say that. It does have--

>> Peter Robinson: Oh, but that's just puerile, isn't it? Isn't that just another instance of congress looking for political cover?

[ Simultaneous Talking ]

>> John Yoo: But Senator McCain who drafted this legislation has said in the newspaper articles he said, "Okay, this is what my legislation does." But if I thought there was a WMD in American city, I would expect the president to violate it.

>> Richard Epstein: Well, he's saying what I just said.

>> Peter Robinson: Yeah.

>> Richard Epstein: I mean this is a field in which you will always see people violate it. It's a kind of--it's the ultimate tension between morality of limitation--self limitation and the morality of self survival and we're always gonna be in this just awful position and what happens, Peter, with your position is the moment you have a sliding scale, you introduce another level of discretion inside the operation of the situation and you have the huge danger that people will reclassify situations upward to the higher level of severity at the administrative end and people to some extent, they're trying to avoid that.

>> Peter Robinson: But the problem with your position--

>> Richard Epstein: I have no--

>> Peter Robinson: But you're saying--you're saying that we should have this. Everybody recognizes that in reality, there is a sliding scale but we wanna keep it out of the law. That's just a terrible [inaudible].

>> Richard Epstein: I said that. I said--

>> Peter Robinson: You just say to the intelligence, "Look, well here's the law. Wink, wink, wink notion."

>> Richard Epstein: No, no.

>> Peter Robinson: No?

>> Richard Epstein: No. This is nobody--

>> Peter Robinson: Aren't you inviting that? Come on, John, help me out here. I'm trying to give you an opening. Jump on it.

[ Simultaneous Talking ]

>> John Yoo: No, I don't wanna jump on Richard. He's a tough guy. But--

>> Richard Epstein: No, the answer is--the answer--the answer is yes, it's exactly what happens. The issue is if you put the limit out this far, they jump this far. If you put the limit out this far, they jump that far.

>> Peter Robinson: But Richard, the promising--You are a great tort scholar, right? And so part of the problem is that you would--that you can take these very clear rules and use them to govern all these situations where there might be huge demands on the national security, huge dangers and to think that the congress is gonna pass these very clear rules and all their wisdom to anticipate all these future situations.

>> Richard Epstein: I didn't say--I did not argue to that. What I said is that the definitions should be kept a little bit narrow because you know you're gonna go beyond them, then pay 'em super broad because you know they're gonna go beyond that as well. And the answer is you will never get a situation in which you have the requisite tidiness that you'd like. The number of people who've tried to tidy this mess up over the last 100 years is legion. The success that they've been having is vanishingly small.

>> Peter Robinson: But then, why should we use the criminal law to punish people for going with these very clear lines when you yourself [inaudible]. There's gonna be a lot of demands from people.

>> Richard Epstein: I'm not even--I'm not--I didn't talk about the punishment side. What I was trying to do in effect is if you set the standard at 5, to use numbers, they'll go to 7.

You set it at 10, they'll go to 13. I'd rather set it at 5 and see them move out to 7 than see it at 10 and go up to 13. I don't think there's any way that you can avoid that.

>> Peter Robinson: Don't you have prudential judgments? You don't wanna leave those to the executive?

[ Simultaneous Talking ]

>> Richard Epstein: Well, previously no. I mean the prudential judgment is how far you go beyond the 5, but the answer is I want the first line in the sand to be drawn by the statute and the second lines the approximations to be done the other way. I don't--

>> Peter Robinson: Detainees. Detainees. On to the next. Okay.

[ Simultaneous Talking ]

>> Richard Epstein: I got too far.

>> Peter Robinson: Alright. Shall we move to something relatively tidy?

>> Richard Epstein: No, it's not tidy.

>> Peter Robinson: No of course, it's not. It's--since the beginning of the war, administration detains at the Guantanamo Naval Base in Cuba several hundred men captured on the battlefield principally on Afghanistan. Exclusively in Afghanistan or principally, principally Afghanistan.

>> John Yoo: Most in Afghanistan.

>> Richard Epstein: Mostly. And by the way, "on the battlefield" is a very controversial term.

>> Peter Robinson: Alright.

>> Richard Epstein: Captured people in Afghanistan.

>> Peter Robinson: People we got.

>> Richard Epstein: In Afghanistan, but sometimes they were turned in by their fellow Afghanistsans.

>> Peter Robinson: They are obviously not entitled to the rights of American citizens 'cause they're not--

>> Richard Epstein: No, that's not--That's not cool.

>> Peter Robinson: They're not American citizens.

>> Richard Epstein: But the question is--

>> Peter Robinson: None of them--none of them are Guantanamo American citizens.

>> Richard Epstein: Yes, but it's much more complicated than that because the two major provisions that are going to be involved in this, the due process clause of the fifth amendment and the suspension of Habeas Corpus do not give any special protection to citizens. That's all by judicial interpretation.

>> Peter Robinson: Okay.

>> Richard Epstein: It says no person shall be deprived of, and it talks about the suspension of the rule.

>> Peter Robinson: Time out. I just want to alert John he's rough enough when he gives the answers. Now that he's reshaping the questions, I've just--I'm just on your toes and [inaudible].

>> John Yoo: It's a typical law professor.

>> Richard Epstein: But [stuttering] no, but I mean the person citizen dichotomy is from the case floor, it is not from the not statute.

>> Peter Robinson: The administration holds that these prisoners are not entitled to the rights conferred by--on prisoners of war by the Geneva Convention. One prisoner, Mr. Hamdone, Hamdan, how is that pronounced?

>> Richard Epstein: Hamdan is good enough.

>> John Yoo: Hamdan.

>> Peter Robinson: Hamdan, challenges his treatment and the Supreme Court rules more or less in his favor. John Yoo writes and I quote John again, "Hamdan was an unprecedented attempt by the court to rewrite the law of war and intrude into war policy." John Yoo, you explain yourself. That's a pretty--pretty sharp smack to take at the Supreme Court.

>> John Yoo: Until this war, the court had always said, "We're not going to allow our civilian courts to be used by the enemy as a source of a remedy, as a form to challenge the legality of their detention, and there are series of cases at the end of World War II where German prisoners tried to sue under the writ of Habeas Corpus and said, "You know, the war is over," or, "I was tried illegally. I want the Supreme Court to review my case." The Supreme Court said, "If you're an alien and you're an enemy and you're held outside of United States, you have no right to come to our courts." And so, this court

using that--first overruled that and then used that power to say, "We want the President to explain the military necessity of having military commissions of detaining people in Guantanamo Bay. We believe that the Geneva Conventions should protect at some minimal level the rights of enemy [inaudible] and we're going to reject and give no deference to the way the President interprets the laws of war or trainees during war time."

>> Richard Epstein: I don't think that's quite right. The Japanese--for example, the cases involving the Germans were people who were admitted enemy aliens. They were working for the Japanese after the Germans had surrendered and the only questions that they raised were challenges not to their status as enemy aliens but to the kinds of procedures they received. All of the question that's gonna be raised with respect to many of the people who are in Afghanistan is whether they were enemy aliens at all or combatant. And indeed the problems are very serious there because in some of these cases the people are claiming that they were actually tortured into making various kinds of speeches or videos for Al-Qaeda.

>> Peter Robinson: Right. Right.

>> Richard Epstein: They have evidence by independent third parties that they were not so involved. In some of the cases, the allegations in a case which is now going before the courts are that the Americans essentially, we, as the people tortured some people in Guantanamo to get them to testify against other people and that those --

>> Peter Robinson: So the Supreme Court is a jurisdictional matter. The Supreme Court was perfectly correct to say, "Come on into our court, we'll hear you".

>> Richard Epstein: I think -- I think if the question is whether or not the status is that of an enemy, I think that you have a right even under these early oppressions to do so. Then the next --

>> Peter Robinson: You're in there.

>> John Yoo: Historically, if that hadn't happened.

>> Richard Epstein: And we've never surrendered --

>> Peter Robinson: As you're out side the US.

>> Richard Epstein: No, no, no. But this is again the same problem that one has. Historically, we never had any trouble figuring out who is an enemy combatant because they were in uniforms and so forth. The problem now is and this is a horrible problem is when these folks get out of uniform and they're killer, then they're murderers, they are trying to get an advantage that no uniform soldier should get. And John is absolutely right to think you want to throw the book at them. But on the other hand, if you get somebody who is trying to be the hunter because he is mad of what the guy did, now you

have somebody who's not in uniform, who's not a soldier and the question is who gets to decide that status, and I think --

>> Peter Robinson: And the answer is the President of the United States.

>> Richard Epstein: No I don't think it can be the --

>> John Yoo: Why shouldn't it be the courts?

>> Richard Epstein: I think because what happens is we do have provisions about due process of law and to the extent that normally indeed and variable has been chosen.

>> Peter Robinson: Hold on, you mean we have provisions that speaks specifically to such cases or you mean simply --

>> Richard Epstein: No.

>> Peter Robinson: In the American tradition we have to behave --

>> Richard Epstein: No person shall be deprived of life, liberty, or property without due process of law. There is no territorial limitation in that sense and there is no limitation to citizens.

>> John Yoo: Which we do things in war that deprive people of life or even property all the time.

>> Richard Epstein: Well, collaborative no.

>> John Yoo: Given no due process -- not just that, think about the, you know, the Predator Jones, they're shooting missiles at people we think are leaders of Al-Qaeda.

>> Richard Epstein: Oh, I understand that.

>> John Yoo: They get no due process.

>> Richard Epstein: We understand they --

>> John Yoo: And they are not in uniform.

>> Richard Epstein: But on the other hand, once we have -- that's the whole point about it is if their intention and you have control so you're not in the battlefield conditions as they are in Guantanamo which are not in some sense part of American soil but it is ours to do as we please. At that particular point, stability is returned and hazard is less, and the question of letting undisputed their status is intimately very important.

>> Peter Robinson: John?

>> John Yoo: You know there's a question about whether -- we don't wanna make mistakes. We don't want to have errors in who we're detaining and which body should make that decision. And we --

>> Peter Robinson: You've got three choices, you've got the courts, you've got the congress, and you've got the executives.

[ Simultaneous Talking ]

>> John Yoo: The congress could try to do it, right. And the idea that the court should do it seems not to recognize the realities of war including the executive branch has done it in the past and every previous war. And they do not want to keep people for it innocent of being a terrorist and they have their own procedures to figure out whose an in combatant or not, but should we have federal courts draw and why?

>> Richard Epstein: Well, let me say to you -- one of the things that get to be most troubled is this possibility. Many of the people who are kept there are in fact innocent. They have figured this out but to turn them out now is a scandal. And so what they would do is that they'll --

>> Peter Robinson: Well, hold on. That's extremely a serious charge, what evidence have you got with that?

>> Richard Epstein: I have not.

>> Peter Robinson: You have not.

>> Richard Epstein: But let me just tell you what the fear is.

>> Peter Robinson: Oh, the fear is, okay.

[ Simultaneous Talking ]

>> Richard Epstein: It's a fear and -- and let me tell you the other thing. Certainly, the allegations in the cases that are now going forward about the conduct of American military personnel to make it sound like I'll be great. And the issue is I can't speak to the truth of falsity of stuff but when you have charges that serious made by people and by their returns, at that point you'd like to have some neutral party. So the advantage of getting the court in there is you have somebody who's not the president, somebody who's not vested in this particular fashion looking over their soldiers. And what's the standard of care. I don't think you have to prove the [simultaneous talking].

>> Peter Robinson: Are you pleased by this -- the Military Commissions Act that congress just passed in response to the Supreme Court?

>> Richard Epstein: No. Because I think --

>> Peter Robinson: Well, the Supreme Court has that in effect in Hamdan, the congress has to tidy this up.

>> Richard Epstein: Yes.

>> Peter Robinson: At a minimum, congress has to tidy this up. The congress passes the Military Commissions Act which gives the president authorization to go right ahead instead of military commissions to try combat [simultaneous talking].

>> Richard Epstein: What happened is the Hamdan, well, let me say it, the original statue was one which says that the president has to use military commissions unless there are some judgment about the practical ability of using the UMCJ. It's a badly drafted statue because it's got the --

>> Peter Robinson: The current -- [simultaneous talking].

>> Richard Epstein: Well, no.

[ Simultaneous Talking ]

>> Richard Epstein: And what the court says --

>> Peter Robinson: It's badly drafted in itself or badly drafted once the war on terrorist --

>> Richard Epstein: No, badly drafted in itself.

>> Peter Robinson: Alright.

>> Richard Epstein: And I don't wanna go to the technical points. But essentially, what the court said and I think they were right on balance in fact they were briefed to this to this effect is that you just can simple assert practicability. You have to give some demonstration that there is -- it is impractical to use normal United States military court of justice procedures and in fact the UCMJ uniform military code is -- was something that the military people wanted to use in this case. They are against the president in terms of all the internal fights. They are quite ruled.

>> Peter Robinson: Yeah I think so some of them, some of them.

>> Richard Epstein: Yeah and so what they -- what -- so the statue essentially didn't cover it on their view because they didn't give complete deference to the president. They said they have to make an independent showing of practicability which is something of a change in learning. I think John is right.

>> John Yoo: Which they had not done that before.

>> Richard Epstein: They had not done that before but it is certainly not a violence to the original statute. What this --

>> John Yoo: It's an interesting thing. We've had the same statute since, well, before World War II. The courts have interpreted it before this war to say president just decides. He doesn't have to give a reason why he wants to use commissions. The court raised the bar and thanks to Richard's advocacy on point, and that's a change, right? The president never had to do it before.

>> Richard Epstein: I did not. I think it's a change for better.

>> John Yoo: But the thing is -- the thing is -- Richard though -- Richard ought to be happy now because at last -- because --

>> Peter Robinson: Asking Richard to be happy.

>> John Yoo: Because congress has the statue that said now congress went on record saying you do all these things, they ratified 90 to 95 percent of the Bush administrations terrorism policies in that statue on commissions on detentions.

>> Peter Robinson: Hold on. Let me tell you what this quotes. Richard writes -- Richard writes, I think this was in the Wall Street Journal reacting against the military commissions. And I'll quote you Richard, "To strip the federal courts of habeas jurisdiction for individuals captured on the war on terror tramples a fundamental guarantee of liberty that the constitution provides to citizens and alien alike. It makes a mockery of our efforts to advance the cause of liberty abroad." So here is my question to you. I'm a layman. I'm not a lawyer and Lord knows I'm not a constitutionalist.

>> Richard Epstein: And you don't wanna be either after this.

[ Laughter ]

>> Peter Robinson: But somehow or rather, the notion that we scoop people up in Afghanistan and they're still on Guantanamo five years later without any clear understanding at least that is it's filtered down to this layman's mind that the defense department has setup clear procedures and that they're being followed. This people are being -- you can't -- it's just fundamentally in some way to put it crudely on American to take people, drop them in the Caribbean and say, "We'll get to you when we get you." And it maybe years, right?

>> John Yoo: First, I think they do have procedures and they do have these military tribunals. They do have a system to try to read out whose innocent, who's not innocent. But that's something -- it's not the right phrase but who's an enemy combatant, who's non-enemy combatant. The second thing is this is something that always happens in wartime. It does seem strange to us. We are so used to the criminal justice system. We got charged

and you have a trial, but there are wars where people are held as enemy combatants without any trial for years until the war is over. The supreme court is so [simultaneous talking] --

>> Peter Robinson: Okay, fundamental point -- fundamental point. Justice Robert Jackson. You already know where this is headed. Descending in the 1949 Free Speech Case, Terminiello versus Chicago.

>> Richard Epstein: Suicide act.

>> Peter Robinson: "The constitution is not a suicide pack." Lincoln wrote rough shot over habeas corpus during the Civil War.

>> Richard Epstein: At [inaudible].

>> Peter Robinson: Wilson, during the First World War, we've just heard about what FTR was up to during the Second World War. In time of war, constitutional niceties give way to the imperative of preserving the republic.

>> Richard Epstein: Well, this is not necessary to preserves the republic at least as far as we know. Let me again go back as to all that one is asked is that you've got these guys here, the standard understanding of due process which is not congressional authorization. It goes to the issue of rights as whether or not there was sort of indifferent laws and neutral arbiters to describe the fundamental question of liberty when there is substantial data about the status. And I cannot conceive of how it is that the present simply allow to designate as he is under the new Military Commissions Act. Somebody as an enemy combatant by calling him that and to use tortured evidence from other individuals and not give him the chance in the military procedures to respond.

>> John Yoo: Well, Lincoln's example is a good one because a lot of this process --

>> Richard Epstein: Yeah. But we're at a constitution --

>> John Yoo: A lot of these forms happen in the civil war, right? There are people who maybe civilians, they may not be civilians who are captured. Lincoln imposes military government essentially. He detains thousands of citizens and he questions -- and you're right, Taney -- Chief of Justice Taney [inaudible] issued a writ and told him to release the suspected sympathizer, Merryman, found him John Merryman and Lincoln refused. Congress -- and then he didn't have congressional authorization for this act for 2 years till 1863. We tend to think today that Lincoln was a great president and he did what is necessary.

>> Richard Epstein: But not because of that act --

>> John Yoo: To protect the con -- not because of that but he did things which were argued between constitutions.

>> Richard Epstein: It gets a little rough. I mean --

>> John Yoo: That's the Civil War --

>> Richard Epstein: There's no argue we have battered flatly on that particular case, but under these circumstances, we're not under the middle of an insurrection in Guantanamo Bay. There was no mass or form of civil disorder as there was in the border states in 1863.

>> Peter Robinson: Yes. We've been enjoying ourselves but even for the web, we have to bring things to a closure here. So I'm gonna ask one more large question of each of you. This is not with regard to interrogation or Guanta -- this is larger, the war and terror itself want the correct attitude for an American citizen to have toward the whole set of questions we've been discussing tonight. My question for you Richard is as follows: Is it not the case that the most serious threat to our civil liberties is not that George W. Bush will go to far in prosecuting the war and terror but it that it won't go far enough, that if there's another terrorist attack, the public will demand a suspension of civil liberties that would make all of the things that we have been complaining about this evening look like child's play? Is that not the case?

>> Richard Epstein: If there is another attack, well, it obviously depends on the nature and the quality of the act but certainly there will be an immense call for action. The heart point in the interim, however, is not that, it's whether this policies are going to increase or reduce the likelihood of that taking place and --

>> Peter Robinson: And not the courts, no, for example the Supreme Court in Hamdan granted an immense amount of deference to the executives to this matter.

>> Richard Epstein: No actually did not. I mean it's -- it went to the opposite direction. I think in effect the areas in which he has discretion, the ordinals, how you run surveillance, how you run appropriations, how many troops you deploy overseas, what kinds of weapons, what sorts of lines is this and so forth. But I think that the intuition that they had both in Hamdan and the previous case resume.

>> Peter Robinson: Is wire tapping on the torture stuff on the wire tapping, Cheney the president himself it is clear that they believe, you tell me otherwise but it is pretty clear to me, I think, I think as you look at the television, you read the reports, it is clear that they believe that they are being hampered in their efforts, materially hampered in their efforts to protect the country.

>> Richard Epstein: Yeah and there are some of us who believe that they made such a hash of so many of these things of that if the only thing you could do with the increment is to sort of make sure that certain people have been held indefinitely which I think is a key issue are gonna be limited, are going to have some recourse to the course that will not hamper, they're up in some slightest. There is a very difficult question here as to whether

or not this is completely counted productive and when you have constitutions, the last thing is system of separated powers means is that a president can say on every important issue of the times trust me and have everybody else simply bow down and say we do.

>> John Yoo: Look, it maybe the case that in the long run it maybe counted productive, who knows I don't think lawyers can give me the answer whether the use of this tactics will produce more terrorist in the long run. I do believe that if you just take it face value what the administration has said and what intelligence officials have said. These tactics have lead to the production of information that has stopped. Further, following attacks to 911.

>> Peter Robinson: Interrogation, the wire tapping --

>> John Yoo: They all have -- right, they have all produced information, they have their give cases. They give examples and obviously I think they are not giving all the examples because somehow it would be too sensitive. Yeah, I could not too. But they have produced in the short run an increase in security. And so the question that Richard told as there's a tradeoff between the short term prevention of these attacks and some kind of a long-term harm that may come from having more terrorist. I don't think we can know that -- I mean we certainly don't know there's lawyers, there people in the government who make these judgments as a matter of policy and I think they're --

[ Simultaneous Talking ]

>> Peter Robinson: Well, this is -- I asked Richard a large question. We ask you a large question. On each of this points as we go through, it felt to me as though even you were willing to grant that the administration may have handle things badly, that if there had been a little more deafness, a little more willingness just to sit down, get on the phone and call a few people on Capital Hill, a few more dinners in the residence, on the upstairs corners of the White House, if there's a political held handedness has caused legal questions to assume an importance that they, not to have assumed, would you grant that much or not?

>> John Yoo: I do think that the administration could done some things different politically. I do think that they thought, the reason they weren't doing it was not because they just wanted to act by themselves, I think the Bush administration would love to act with the approval of congress. I think many times they felt the demands of operational security required not being too publicly open about what we are doing. This is a war, it is different, Richard is right, this is a war about intelligence and much of it is covert.

>> Peter Robinson: Give him a grade, and the legal aspects of the war on terror from A to E -- A to F.

>> Richard Epstein: The president?

>> Peter Robinson: Yeah, the current administration.

>> Richard Epstein: C minus to D plus.

>> John Yoo: I'd say B plus.

>> Peter Robinson: B plus? Okay. One sentence Richard, no dependent clauses. I'd like it to be a simple declarative sentence of advice to George W. Bush. He's got 2 more years to go.

>> Richard Epstein: Pull in your horns just a little bit.

>> Peter Robinson: John?

>> John Yoo: Just stay the course.

>> Peter Robinson: Stay the course? Even he's thrown that phrase over the side.

[ Laughter ]

>> Peter Robinson: Richard Epstein, John Yoo, thank you very much.