October 26, 2007

BILL MOYERS: Welcome to the JOURNAL.

For our friends in California, we begin with condolences for the miseries of fire, fear, and evacuations. And to those of you living in the Southeast, where suddenly people are talking about an epic shortage of water, we'll be watching and hoping you show the rest of us how to meet one of the century's looming challenges. Where I grew up in Texas farmers would look up at the scorching skies and say: "You never miss the water until the well runs dry."

Now on to our report this week. Some of you will remember that back in July the conservative scholar Bruce Fein was here on the JOURNAL expressing outrage over expansion of presidential powers under Bush and Cheney.

BRUCE FEIN: Take for instance the assertion that he's made that when he's out to collect foreign intelligence, no other branch can tell him what to do. That means he can intercept your emails, your phone calls, open your regular mail, he can break and enter your home, he can even kidnap you, claiming I'm seeking foreign intelligence there is no other branch - Congress can't make it illegal, judges can't say this is illegal. I can do anything I want.

BILL MOYERS: Many others have joined Bruce Fein's chorus of concern. This week it's the muckraking populist Jim Hightower. Writing in his newsletter the Hightower Lowdown, shown here on the web site Alternet, he asks the question: "Is a presidential coup under way?"

He goes on to say, "The Constitution is being trampled, the very form of our government is being perverted, and nothing less than American democracy itself is endangered."

We've posted Jim Hightower's Lowdown on our web page at pbs.org so that you can read the whole of his argument about it.

But here's some background as to why so many people of different political stripes are alarmed. President Bush and Vice President Cheney espouse the theory of the unitary executive. That means the President's orders can't be reviewed, questioned, or altered by the other two branches of government. He alone can say what the law means, or whether or not it will be enforced or ignored. In effect, George W. Bush says his powers must be unilateral and unchecked.

Critics claim the President has used the war on terror to put himself above the law and that he has created a secret presidency of classified decisions and orders, that approve extraordinary renditions, torture, illegal detentions, and wiretapping without warrants with the collaboration of big telecom companies. This boundless secrecy and surveillance evokes images counter to American values.

Remember "The Lives of Others" - the movie that won this year's Academy Award for best foreign language film....a story of life under East Germany's secret police. The critic Roger Ebert said: 'The movie is relevant today, as our government ignores habeas corpus, practices secret torture, and asks for the right to wiretap and eavesdrop on its citizens. Such tactics, he said, did not save East Germany; they destroyed it, by making it a country its most loyal citizens could no longer believe in." You want to say it couldn't happen here but we've been close before. During the cold war with the Soviet Union and then the hot war in Vietnam, a secret government mushroomed in this country.

SENATOR FRANK CHURCH (1976): The attitude in the White House seemed to be, "If in
the wake of Vietnam I can no longer send in the marines, then I will send in the CIA.

BILL MOYERS: Thirty two years ago, at the end of the Vietnam War, Congress turned over the rock and found all kinds of things squirming under it — lethal activities from electric pistols and poison pellets to Mafia connections and drug experiments. As well as illicit acts by the executive branch ranging from secret attempts by the CIA to subvert foreign democracies to unlawful domestic spying under such code names as Chaos, Cable Splicer, Garden Plot and Leprechaun. The Select Senate Committee headed by Frank Church found, no mailbox, no college campus, no television had been safe. The Church Committee led Congress to reject presidential claims of ‘inherent authority’ and restore some checks and balances, including putting an end to electronic surveillance without warrants.

WALTER MONDALE: This kind of unrestrained, illegal, secret intimidation and harassment of the essential ability of Americans to participate freely in American political life shall never happen again.

BILL MOYERS: But advocates of presidential prerogatives chafed at the restrictions and began then to try to reverse them. One of the people who argued most vociferously that a president could exceed the laws was a former White House Chief of Staff who had been elected to Congress. His name. Dick Cheney. Look at this excerpt from the documentary ‘Cheney’s Law’ that was broadcast on FRONTLINE last week:

NARRATOR: Cheney had learned some hard lessons early in his political career.

NEWSCASTER: They are now boarding the helicopter, walking through the honor guard-

NARRATOR: He has been watching presidents for three decades.

NEWSCASTER: the president now at the door, a final wave-

NARRATOR: It began at the end of the Nixon administration.

NARRATOR: Thirty-three-year-old Dick Cheney saw it firsthand.

RON SUSKIND, AUTHOR, THE ONE PERCENT DOCTRINE: He viewed the searing moments of the Nixon administration, which he was there in the front seats for, as a diminution of what the president ought to be.

NARRATOR: Then in 1975, he became President Ford's Chief of Staff.

DAVID GERGEN: Dick Cheney was in about his mid-30s, for the first time in his life really having a substantial amount of power and responsibility.

SEN. SAM ERVIN (D-NC), WATERGATE COMMITTEE CHAIRMAN: The subcommittee will come to order-

NARRATOR: Cheney watched Congress assert its authority over the president.

JAMES MANN, AUTHOR, RISE OF THE VULCANS: You have a wave of Congressional investigations-

SEN. FRANK CHURCH (D - IDAHO): The program certainly appears to violate the 4th Amendment to the Constitution.

JAMES MANN: -and Cheney is trying to fight off these investigations.

PROF. JACK GOLDSMITH, UNIV. CHICAGO LAW SCHOOL, 1997–02: He's talked about how Congress unduly burdened the president and in a way that he believed was unconstitutional.
DAVID GERGEN: And Dick came out of that absolutely committed to the idea of restoring the powers of the presidency.

BILL MOYERS: When the terrorists struck on 9/11, Dick Cheney was Vice President, with the opportunity to claim extraordinary power in the name of national security. The FRONTLINE documentary showed how he did it.

JAMES RISEN, THE NEW YORK TIMES: They began to spy on Americans in an unprecedented way, in a way that they never had done before, by creating a special program to eavesdrop on Americans without warrants on their international phone calls and also by mounting a massive data mining operation.

NARRATOR: The data from billions of telephone calls and emails were being captured by The National Security Agency. But in the 1970s, Congress had prohibited such activities without the approval of a special court.

BARTON GELLMAN: The initial justification, legally, comes from yet another memo by John Yoo, in which he says that Congress may no more regulate the president's gathering of intelligence against enemies than it can decide where he deploys troops on the battlefield.

JOHN YOO: If it's part of the president's power as a constitutional matter to gather intelligence, including intercepting communications, then that's a power that's included and Congress can't seize it just because it wants to.

NARRATOR: The program was top secret when Jack Goldsmith decided to review it.

JACK GOLDSMITH: It's the most important thing during my time in government, and it is central to the government’s counterterrorism policy. So the stakes were enormous.

BILL MOYERS: The stakes are still enormous and the argument over presidential power has grown more contentious because Democrats in control of Congress keep calling administration officials to testify only to be rebuffed by claims of executive privilege.

(SENATE JUDICIARY TESTIMONY, JULY 11, 2007)

SARA TAYLOR: ... asked me to follow the president's assertion of executive privilege ... I was a deputy assistant to the president. I was a commissioned officer. I took and oath and I take that oath to the president very seriously.

SEN. LEAHY: No the oath says that you take an oath to uphold and protect the Constitution of the United States. That is your paramount duty. I know the president refers to the government as being his-it's not. It’s the government of the people of the America.

BILL MOYERS: At recent Senate hearings over the president's nominee for attorney general, Michael Mukasey. The battle over presidential power flared again.

(MICHAEL MUKASEY ATTORNEY GENERAL CONFIRMATION HEARING 10/18/2007)

SEN. LEAHY: Can a president authorize illegal conduct? Can a president put somebody above the law by authorizing illegal conduct?

MR. MUKASEY: The only way for me to respond to that in the abstract is to say that if by illegal, you mean contrary to a statute -- but within the authority of the president to defend the country, the president is not putting somebody above the law, the president is putting somebody within the law. Can the president put somebody above the law? No. The president doesn't stand above the law. But the law emphatically includes the Constitution. It starts with the Constitution.
SEN. LEAHY: We'll go back to -- we'll go back to this. I'm troubled by your answer. I see a loophole big enough to drive a truck through...

BILL MOYERS: The question now: who defines torture?

(MICHAEL MUKASEY ATTORNEY GENERAL CONFIRMATION HEARING 10/18/2007)

SEN. SHELDON WHITEHOUSE (D-R.I.): So is waterboarding constitutional?

MR. MUKASEY: I don't know what's involved in the technique. If waterboarding is torture, torture is not constitutional.

SEN. SHELDON WHITEHOUSE (D-R.I.): If water-boarding is constitutional is a massive hedge.

MR. MUKASEY: No, I said, if it's torture. I'm sorry. I said, if it's torture.

SEN. SHELDON WHITEHOUSE (D-R.I.): If it's torture? That's a massive hedge. I mean, it either is or it isn't. Do you have an opinion on whether waterboarding, which is the practice of putting somebody in a reclining position, strapping them down, putting cloth over their faces and pouring water over the cloth to simulate the feeling of drowning -- is that constitutional?

MR. MUKASEY: If it amounts to torture, it is not constitutional.

SEN. SHELDON WHITEHOUSE (D-R.I.): I'm very disappointed in that answer. I think it is purely semantic.

MR. MUKASEY: I am sorry.

BILL MOYERS: But listen to this voice from the past. From 1974. The Watergate scandals had revealed astonishing crimes and secret abuses of power by President Nixon and the men around him. The House Judiciary Committee was deliberating Nixon's impeachment. Congresswoman Barbara Jordan of Texas went straight to the heart of the matter:

BARBARA JORDAN: My faith in the constitution is whole it is complete it is total and I am not going to sit here and be an idle spectator to the diminution, the subversion, the destruction of the Constitution.

BILL MOYERS: So are matters that critical today? That's the question I'll put to my guests who know this issue inside and out.

Charles Fried served as the Solicitor General of the United States during the second term of President Reagan and over the years has argued scores of cases before the Supreme Court. He went on to be an associate justice at the Supreme Judicial Court of Massachusetts and now teaches constitutional law at Harvard Law School.

Among his several books is this new one: MODERN LIBERTY AND THE LIMITS OF GOVERNMENT: A CLAIM FOR INTELLECTUAL BOLDNESS IN THE DEFENSE OF INDIVIDUAL RIGHTS.

Frederick Schwarz was the chief counsel 30 years ago of that Senate Select Committee known as the Church Committee. He wrote its report. He went on to become corporate counsel for the City of New York and then partner in a leading law firm here.

He's now senior counsel at the Brennan Center for Justice at New York University School of Law. He and his colleague there, Aziz Huq, co-authored this recent book UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR. Thanks to both of you for being with me. Fritz Schwarz, is the situation that dire today?
FRITZ SCHWARZ: Well, I think it’s worse today because the Bush Administration, for the first time in American history, a sitting administration, takes the position that the president has the right to break the law. Now, that’s been their position and that is their position. And they take it with respect for things like torture, where that’s against the law and they took the position the president can authorize torture and has authorized torture.

And they take that position with respect to warrantless wiretapping where that is also against the law. And they took the position starting on the day after 9/11 that the president has the right to wiretap and do other forms of surveillance even though they’re against the law.

BILL MOYERS: What was that famous sentence that Richard Nixon said to David Frost in those interviews many years ago?

FRITZ SCHWARZ: Yeah. He said in that interview, "If the president does it, that means it’s not illegal." Now, Nixon and then when you go to the play, the FROST AND NIXON play in--

BILL MOYERS: Now in New York.

FRITZ SCHWARZ: --a good play -- the audience laughs. But it’s a very serious matter. Nixon didn’t say that until he left office. This administration says it when they’re in office.

BILL MOYERS: When the president does it, that means it’s not illegal. Is that what we’re hearing now?

CHARLES FRIED: I don’t think that’s what we’re hearing. I think Nixon was a disaster. I’m a rock-ribbed Republican and I never voted for him because he was a scoundrel, a bad character, and I knew we would be paying forever. And we’re still paying for Nixon, among other things, FISA is one of the bad prices we’re paying for Nixon.

BILL MOYERS: The-- Federal--

CHARLES FRIED: That’s the wiretapping--

BILL MOYERS: Foreign Intelligence--

CHARLES FRIED: The Church Committee, which you did, was one of the unfortunate prices that we have to pay for Nixon and we’re still paying. But, I don’t think that’s what President Bush is saying. What President Bush is saying is that the president has powers, constitutional powers, which Congress may not take away from him. So that if Congress purports to do that, those attempts are unconstitutional. And as we have known since the beginning of our Constitution, since the time of John Marshall, the Constitution is the supreme law.

Now, that doesn’t mean that the president is right in his claims. And some of his claims are or may be wrong. But the principal point that the president may disregard acts of Congress is something which has been understood since the beginning of the republic.

BILL MOYERS: When you say that some of the president’s decisions may be wrong, I think of what Fritz Schwarz wrote in his book. You know, he says the administration has violated international norms for treatment of detainees, created secret foreign prisons, employed extraordinary renditions to countries that torture, and claimed power to detain anyone as an enemy combatant, all, you say in your book, without regard to the Constitution. That’s not just an-- occasional lapse, is it?

CHARLES FRIED: No. But we’re not talking about regard for the Constitution. What I think Fritz and others — and they may on some occasions be successful in making the point — they have to demonstrate that these actions are in violation of the president’s constitutional powers. That is to say, the powers which the law of the Constitution give him.
I'll give you an example which is perhaps a pathetic one. But it's much in our memories. You'll remember that President Clinton, at the end of his administration, issued some very dodgy pardons--

BILL MOYERS: Oh, yes.

CHARLES FRIED: --for very dodgy reasons. Now, Congress, in the Church-like frame of mind, could say, "Well, we got to put an end of this. And we've got to say that the president has got to turn over the pardon power to an independent agency, and he cannot issue a pardon which the agency does not authorize."

I can easily imagine a Republican Congress responding to Bill Clinton's pardons of Rich doing that. And it would be unconstitutional because the Constitution says the pardon powers the president and the president who would be entirely within his rights and acting lawfully if he totally disregarded it.

FRITZ SCHWARZ: Well, it's true. The pardon power is an example, one of the few examples of something that is given to the president clearly to act on his own. Charles would be right. That would be unconstitutional to try and stop the president from pardoning people.

The acts of, for example, authorizing torture, which this administration has done, is clearly something that is within Congress's power to prohibit. Congress has the power to issue rules governing the military and has the power to set forth what the law of nations are. Torture is something which is the military or NSA or CIA--

BILL MOYERS: National Security Agency.

FRITZ SCHWARZ: And I think, Charles, you would agree with me, that Congress does have the power to prohibit torture — constitutional power. And the president has no constitutional power to authorize torture, even though this administration has done that both by American forces and by rendering people to Egypt and Syria to torture people when we send them there.

CHARLES FRIED: Well, I feel very differently about torture than I do about warrantless eavesdropping.

BILL MOYERS: Why do you see a difference between those two?

CHARLES FRIED: Because torture is horrible, immoral, and causes the total meltdown of our human inhibitions and about how we treat each other. While the warrantless eavesdropping that I think was going on under the NSA and perhaps still is going on is absolutely necessary. The FISA restrictions on it, if they were restrictions, were mindless, foolish. And I don't think the American people care. They do no harm. They do a great deal of good.

BILL MOYERS: Let's stay on that for just a moment. Because it actually was only when I read - a column you wrote recently in THE BOSTON GLOBE that I understood what they're talking about when they come to this electronic surveillance. You wrote about how these computerized scans sort of impersonally roam cyberspace, looking for messages to and from the United States with certain keywords in them, certain e-mail addresses, certain patterns of rhythm to their ... and certain destinations.

And you say that then something in that message triggers further scrutiny. That it's impersonal. It's not Colonel Wiesler sitting upstairs in the attic, listening to the--

CHARLES FRIED: Listening to people making love.

BILL MOYERS: Yeah. Listening to the lives of others. And suddenly you say this is not something that we really should be concerned about. Because unless you're linked in some way with terrorists, you're not going to be affected. You know--
BILL MOYERS: Am I summing that up?

CHARLES FRIED: You remember the old G-men movies where the G-men were parked outside a mob funeral or a mob wedding and take down license numbers? And then they'd check them out and see. And those are the people they would then investigate. This is like that. Except, you know, the--

BILL MOYERS: --there's no G-men outside. There's a--

CHARLES FRIED: There's no G--

BILL MOYERS: --there's electronic--

CHARLES FRIED: --it's even less harmful. The idea is, in general, before you can investigate somebody, you have to have some kind of an inkling why you want to investigate.

BILL MOYERS: An inkling of a crime.

CHARLES FRIED: An inkling that something is not right. The cop on the beat, he notices that this person looks a little uncomfortable as he's walking. That door shouldn't be ajar. All kinds of things like that. Well, this is the electronic version of that. And to shut that down makes no sense. And you can't, of course, get a warrant for it.

BILL MOYERS: So, then if it's a big ear in the sky but it doesn't discriminate that carefully. What does the ordinary person out here in America have to worry about this electronic surveillance? Or do we? Do I have to worry about it? Do you have to worry about it?

CHARLES FRIED: I think you have to worry about it when you look, you know, on a Mapquest map, you zoom in. It-- at some point, the zooming in on the information that the big ear gives you becomes something which should be subject to further control. But at first, the first and second and maybe third-- sieving out of this information really can't be subject to a warrant because you don't quite know what you're looking at, yet. Warrants in that context are completely inadequate.

BILL MOYERS: Are you as benign about it as he is?

FRITZ SCHWARZ: No, I'm not because, number one, the law was in place. And the administration persuaded Congress on four separate occasions to amend FISA. And Congress did so when some technological argument was made Congress said, "That makes sense. We agree with you. We'll permit-- we'll change the statute." Four times they did that after 9/11.

BILL MOYERS: And FISA -- just so the audience is with us. FISA was the law that was passed to require warrants--

FRITZ SCHWARZ: Yes.

BILL MOYERS: --before you do--

FRITZ SCHWARZ: Electronic surveillance.

BILL MOYERS: --electronic surveillance, right.

FRITZ SCHWARZ: Now, so the first point is that they were able to get Congress to amend. And then at the same time, without telling anybody, and indeed with President Bush announcing, don't worry — we now know that starting right after 9/11, they were doing electronic surveillance without warrants. So there was something that was-
BILL MOYERS: Breaking the law.

FRITZ SCHWARZ: That was breaking the law and also sneaking around the Congress. The other point goes back to my experience with the Church Committee. You can have something that starts in a benign way. And then it spreads to the unbenign and that always happened.

And it was true with NSA, National Security Agency, as proven by our investigation. They got every single cable that left the United States for 30 years. But they started only wanting those because they wanted to get information from-- encrypted, that's in code, cables that were sent by foreign embassies to their home government.

And that's perfectly proper. That isn't even covered by the FISA law that was passed after the Church Committee. But starting with that benign purpose, they had mission creep, which always happens when you've got a secret power with no oversight. They started with that good purpose. They then went to getting the cables of civil rights leaders, all of them and any Vietnam War protesters, all of them. So if you have--

BILL MOYERS: Mission creep. So they went from--

FRITZ SCHWARZ: Mission creep.

BILL MOYERS: --from the least offensive to the most extreme and indefensible.

FRITZ SCHWARZ: Yes. Yes. And that will surely happen and I believe I would bet my bottom dollar is happening now. Because you have a regime that's untethered from any oversight. And secrecy plus lack of oversight leads to mission creep. And that leads to the move to the indefensible.

CHARLES FRIED: Well, I believe the reason we're not in a terrible fix such as people are saying is... that-- this is over. I think what--

BILL MOYERS: What's over?

CHARLES FRIED: Well, what's happening in Congress, the Republicans had Congress. They lost Congress in 2006. They're going to have an awful hard time holding onto the presidency. This is politics which responds to unsuccessful and dangerous behavior.

And the political check is the one in a democracy that I believe in. And I think there's reason to believe it. If you like, I'd prefer Jay Leno to Frank Church because the real check on these people is when they become the butt of late-night comedians. It's over with them then.

FRITZ SCHWARZ: --Charles, you know, in the first place, we've made a lot of progress between us. Charles agrees they don't have the power to torture. They can't break the law. That's an issue in the Mukasey hearings right now. Secondly, we agree, Charles agrees that there should be real--

CHARLES FRIED: I didn't quite say they don't have the power to torture. I say that they mustn't, as human beings, do it.

FRITZ SCHWARZ: Okay. Well, I would say clearly they don't have the power. But-- and you've also agreed there should be real Congressional oversight. Now, of course the people ultimately are the check. But unless the people know the truth, they can't be a check. And this administration has tried to hide the truth and has lied to the public. And I'll take the torture again if you want me to on an example.

BILL MOYERS: Yeah, well, I was going to say Fritz, in your book I learned something I did not know. And I try to follow these things. I learned that much of the case that Bush, Cheney, Rumsfeld, and Rice made for invading Iraq came from an al-Qaeda operative who had been rendered to Egypt where he was tortured--
FRITZ SCHWARZ: Right.

BILL MOYERS: --for information that came back to Washington. And that information which prompted Cheney, Bush, et al, to want to go to war and invasion was not credible.

FRITZ SCHWARZ: It was not. There's a man called al-Libi. He was a bad person. He was a high-ranking member of al-Qaeda. He was sent to Egypt for the purpose of being tortured. He was tortured.

In Egypt he said there was a connection between al-Qaeda and Saddam Hussein. That was one of the reasons that Cheney particularly but Powell and Rumsfeld and Bush relied on to go to war. But — they knew — they'd been told by the Defense Intelligence Agency before they relied on it, Rumsfeld called it bullet-proof evidence. They were told that the evidence was totally unreliable by the Defense Intelligence Agency.

It also, on the point of the public can't do their job unless the truth is told to them— Bush and in this case, Rice-- particularly lied clearly to the public about rendition. They said, "When we send people to Syria and Egypt," which the State Department condemns every year because they use torture regularly, "they give us a promise that they won't-- that for our people that we send them, they won't torture." Well, you know, that was simply unbelievable.

Also, as the book brings out, that was at the time that under the famous opinion of Mr. Yoo of the Office of Legal Counsel--

BILL MOYERS: John Yoo, whom you know, at Harvard.

CHARLES FRIED: No, he's at Berkeley.

BILL MOYERS: Berkeley, right. John Yoo, whom you know.

CHARLES FRIED: Jack Goldsmith is at Harvard.

BILL MOYERS: Goldsmith is at Harvard, right.

CHARLES FRIED: But--

BILL MOYERS: Who's been on this show and who is--

FRITZ SCHWARZ: Under the Yoo opinion, Y-O-O opinion — it was perfectly lawful to pull people's fingers out and burn them with cigarettes. So Tenet, when he said Egypt can do things we can't, was speaking against a background where the Bush Administration thought they had the power to pull people's fingernails out and burn them with cigarettes.

CHARLES FRIED: Well, you know, I'm the law professor. You're the practical man of law. But here I want to step back from law. I want to say that throughout our history and not only our history, world history-- great leaders have sometimes taken it upon themselves to say, "Well, this isn't the law but it must happen." Lincoln did that.

The Emancipation Proclamation was probably contrary to an act of Congress, the Confiscation Act. Roosevelt, Lend Lease, was probably in violation of the Neutrality Act to forbid this kind of action. He did it anyway.

BILL MOYERS: He was sending the destroyers and--

CHARLES FRIED: Which the British desperately needed.

BILL MOYERS: And Congress had not declared war.
CHARLES FRIED: Not only had it not declared war, it had passed the Neutrality Act to forbid this kind of action. He did it anyway.

BILL MOYERS: So are you saying--

CHARLES FRIED: Yeah. Smart lawyers. Now, the answer is-- it succeeded. It succeeded. They were great men in a great cause. And it worked. And in the end these are not such great men. And the cause has proven to be flawed. And their way of pursuing it was very badly executed. And it's failed--

BILL MOYERS: But if they had succeeded, would you have said what they've done is okay constitutionally?

CHARLES FRIED: Not constitutionally. It was okay, period. I don't add "constitutionally" because we don't-- we don't say that what Lincoln did was okay constitutionally. We just say it was okay. Now, if you fail, it becomes-- you know, a bad precedent.

FRITZ SCHWARZ: Gee, I-- would--

BILL MOYERS: Lincoln could have been hung if it had come out the other--

FRITZ SCHWARZ: --you mean if the war had been lost. But-- but--

CHARLES FRIED: Absolutely.

FRITZ SCHWARZ: But the-- I think much of what Charles said in that long answer was pretty good. But I think I'd disagree with him on the Lincoln and Roosevelt analogy because both of them acted in public. Lincoln did what he did--

CHARLES FRIED: Yes.

FRITZ SCHWARZ: --and the public knew what he did. Roosevelt did what he did after extensive dialogue with the Congress and the public. Lincoln-- who had good cause to suspend habeas corpus--

CHARLES FRIED: I don't disagree with that. I agree.

FRITZ SCHWARZ: So Lincoln went to Congress and Congress ratified his acts. This administration has tried to hide what they've done. Now, on picking up on Charles's point, they've done it badly. What they've done, particularly with respect to torture and extraordinary rendition, has hurt us in the effort to beat the Bin Ladens of the world. Hurt us for two reasons. First, it's been bad for our relations with our allies.

And secondly, it's given the Bin Ladens of the world a fantastic piece of propaganda. Because what we've done is to throw away our single-greatest asset, even greater than our military asset, which is our reputation. And I think you would agree with this, Charles, that our greatest asset is our reputation for being a government of laws and not of men.

BILL MOYERS: But, you know, the three of us around this table want to defeat the terrorists, right?

CHARLES FRIED: Certainly so.

BILL MOYERS: But if you come out and say, well, torture is wrong and rendition is wrong and all these are wrong, you're labeled soft on terrorism.

CHARLES FRIED: Well, this is why I keep wanting to make a distinction between torture and electronic-- impersonal, computerized, algorithmic searches of cyberspace. Torture is when I look you into in the eye, Bill, and I cause you great pain. That destroys not only-- that destroys my humanity.
I'm not talking about law. This is a law professor who's not talking about law. It destroys my humanity and it destroys the humanity of the people I'm working for. And at that point it doesn't matter what our cause is. We've lost.

BILL MOYERS: Because--

FRITZ SCHWARZ: And that's why they shouldn't be doing it. Because they've hurt us in their effort to take the president's power to the maximum extent and using torture, using water-boarding, which is now a current issue.

BILL MOYERS: In those hearings that-- the Senate's just had with Judge Mukasey, it was whether or not he should be attorney general-- he said water-boarding could only be illegal if it were defined as torture. Right?

FRITZ SCHWARZ: I think he's given about four answers on water-boarding, and I think they're not sufficiently clear. And that's why both Senator Specter and the ten Democrats are trying to--

CHARLES FRIED: I would imagine deliberately not sufficiently clear.

FRITZ SCHWARZ: But I think they're going to pin him down on it. And-- water-boarding is torture. And--

BILL MOYERS: What is water-boarding?

FRITZ SCHWARZ: Water-boarding is you lie someone down, you put something over their face, you pour water into them. They think they're drowning. It fills their belly. It's been used since the Spanish Inquisition. It's been condemned-- throughout history. We've condemned it.

FRITZ SCHWARZ: We prosecuted Japanese soldiers and officers for using water-boarding. We--

BILL MOYERS: After World War II?

FRITZ SCHWARZ: After World War II. We prosecuted prison officials in Texas and convicted them for using water-boarding.

And suddenly America, that was the leader in the world of cutting back on mistreatment of prisoners is now saying we think we have the power and we should use a technique we've condemned ourselves.

BILL MOYERS: But the president says we don't sanction torture. Do you believe him?

CHARLES FRIED: No.

FRITZ SCHWARZ: I'd give the same short answer: No.

BILL MOYERS: All right, let's talk about circumstance for a moment. Because we now know that within weeks of 9/11, Vice-president Cheney was arguing that the administration could ignore the laws to start intercepting e-mails and telephone calls. What he said he was doing what he had to do. Would you likely have done the same thing under those--

CHARLES FRIED: Yes.

BILL MOYERS: --exceptional circumstances?

CHARLES FRIED: Yes.
BILL MOYERS: You would?

CHARLES FRIED: Yes. I certainly would have.

BILL MOYERS: You see those towers. You know you're under attack. The Pentagon has been--

CHARLES FRIED: Yes. Yes. Yes.

BILL MOYERS: You would have done it?

CHARLES FRIED: I certainly would have.

FRITZ SCHWARZ: I would--

CHARLES FRIED: And I-- so would you.

FRITZ SCHWARZ: I would have taken a deep breath. The president has power to do things immediately. They should have had planes in the air right away, so forth and so on.

But, on Charles's main point where-- the one point where he says he makes a powerful point about, well, maybe if it's just amorphous listening, no one's individual rights are being affected. Maybe that's true. But I am certainly that they're not only doing amorphous listening. And when you're actually zeroing in on someone, the requirement to get a warrant, even it's granted almost always, forces the government to think harder than when the government can act, knowing that there's no check on it, no check by a court and no check by a Congress because they will try and withhold the information from the Congress.

BILL MOYERS: But after 9/11 would you have gone to the court, FISA, and asked for a warrant to start trying to figure out who did it or if they have allies or sleepers or other agents?

CHARLES FRIED: You can't because--

BILL MOYERS: Don't let him off-- don't let him off the hook.

CHARLES FRIED: --he agrees with me on that.

FRITZ SCHWARZ: The but they didn't know what they wanted to do. If Cheney just had wanted to establish the principle of the president has the power to do whatever he wants to, they knew very soon what they wanted to do. And they went to Congress and they got amendments. Then at the same time, as they're going to Congress and get amendments, they're going off secretly without telling anybody and doing more.

FRITZ SCHWARZ: John Yoo takes the position that the American president inherited the power of the British king to violate the law and that somehow we who fought a revolution to get rid the monarchy silently adopted it. The trouble with that argument, among many others, is that the English themselves, a hundred years before our Constitution, in The Glorious Revolution and in the acts that follow that abandoned and rejected the idea that the king has the right to break the laws of England.

We try in this book, UNCHECKED AND UNBALANCED, to show that the theory, this dangerous theory which Nixon announced and people laugh at but you can't laugh at it today, this dangerous theory is one that needs to be put down.

BILL MOYERS: The theory that the president can--

BILL MOYERS: --become a monarchy.
FRITZ SCHWARZ: Yes.

CHARLES FRIED: And that's-- and that's not what I'm saying.

BILL MOYERS: I know you're not.

CHARLES FRIED: I'm saying that to be above the law is one thing. To be above a statute passed by Congress which exceeds Congress's power is not to put yourself above the law.

BILL MOYERS: Ah, but you were in-- you Were Solicitor General at the time of the Iran-Contra-- affair.

CHARLES FRIED: Right, right.

BILL MOYERS: Remember that?

CHARLES FRIED: I sure do.

BILL MOYERS: And Congress held hearings on that Iran-Contra affair, almost in the tradition of the Church Committee ten years earlier, accusing the president of breaking the law to support the rebels in Central America. That's a

CHARLES FRIED: --the Boland amendment.

BILL MOYERS: Yeah. The minority report of that congressional committee said, quote, the chief executive will on occasion feel duty-bound to assert monarchical notions of prerogative that will permit him to exceed the laws. The leading advocate in Congress of that particular--

BILL MOYERS: --position and sentence was--

CHARLES FRIED: Dick Cheney, yes.

BILL MOYERS: He's saying that the president--is a monarchy.

CHARLES FRIED: And- here is where I would fault that statement. But I would fault it because it's nothing that should be asserted as a legal proposition. It's something that has to be acknowledged as a fact of life. Lincoln did. Roosevelt did. And if you put it into a legal opinion, it becomes a precedent.

FRITZ SCHWARZ: It becomes a loaded pistol.

CHARLES FRIED: Becomes a loaded pistol which lies about for anyone to use. And if you then endorse it as a legal principle, it's very dangerous. But as a reality, it has happened, has always happened. Let me give you a--

BILL MOYERS: Well, as a political, I don't think Cheney-- who knows what he meant. But I don't think he meant it legally. I think he meant it politically that you do not--

CHARLES FRIED: But then he should have shut up about it.

BILL MOYERS: Well, but--

CHARLES FRIED: And just done it.

FRITZ SCHWARZ: And, of course, he resaid it after in 2002 or 2003. He said, if you want to understand my views, go back and look at what I said and what David Addington who works for me helped me say--
BILL MOYERS: He did--

FRITZ SCHWARZ: --in that Iran-Contra report.

CHARLES FRIED: --big mistake. Big mistake.

BILL MOYERS: But now he has the power. He has the opportunity. He's been doing what he said--

CHARLES FRIED: He has the power for a few more months. I'm afraid-- well, we're all paying the price.

BILL MOYERS: You know, back when you were in Washington, Dick Cheney said then that it was okay for Oliver North to lie to Congress because Congress shouldn't have been asking those questions in the first place. Congress was butting in. Remember that? When he--

CHARLES FRIED: Well, I think-- to take a somewhat-- to go from the sublime to the ridiculous-- Bill Clinton should not have answered those questions about Monica Lewinsky. And--

BILL MOYERS: Why?

CHARLES FRIED: He should not have answered them. But that's not the same thing as that he should have lied. And that's the point. If Oliver North thought that those were improper questions, which maybe they were-- he should have said, "I will not answer those questions. Go ahead and hold me for contempt." And-- Bill Clinton should have said, "These are indecent questions. I will not answer them. Go ahead. Default my lawsuit." But lying? No. Lying is a different story.

FRITZ SCHWARZ: And particularly lying about matters of-- where the public has a legitimate interest. Neither one should have lied. But there is a difference between lying about a private matter and lying about a public matter.

BILL MOYERS: Let me get back to what it seems to me is the heart of this issue and this discussion. Fritz, you say in your book that for, quote-- I'm quoting, "For the first time in American history, the executive branch claims authority under the Constitution to set aside laws permanently." It's that-- it's that permanently that you nail there. You think that takes this whole question of imperial presidencies beyond any precedent in the past?

FRITZ SCHWARZ: Well, it's-- I do, without any question. It's beyond--

BILL MOYERS: That Bush is worse than anybody else?

FRITZ SCHWARZ: On this subject, I think he's worse than anybody else.

BILL MOYERS: Of power.

FRITZ SCHWARZ: Bush, siash, Cheney are worse than anybody else.

BILL MOYERS: And you say this is a frightening idea.

FRITZ SCHWARZ: It's a horrible idea. Because, the next president, by whatever party, of whatever party, if that idea is not nailed on the head-- we risk other people doing it. And the Mukasey hearings, interestingly, I think could create an important-- understanding in the nation. If he comes back in answering these questions and doesn't sort of weasel around the subject and says, "I do reject the idea that the president can defy the law," leaving aside Charles's example of temporary, tiny temporary--

CHARLES FRIED: But what about leaving aside the example of laws which
unconstitutionally constrain the president?

FRITZ SCHWARZ: Well, surely the torture one, which is the one on the subject--

FRITZ SCHWARZ: --does not do that.

CHARLES FRIED: Fine. but-- if there is a law which unconstitutionally constrains the president, surely he can lay that aside for as long as that law is on the books.

FRITZ SCHWARZ: You know, Charles, I would pick up your analogy about the people who are asked a question and-- they say "I'm not gonna answer it." If they truly believe and they think they can prevail that something's unconstitutional, they ought to first, they ought to veto the law. Bush didn't do that. He would sign these laws and then put a signing statement saying, "I'm not gonna pay attention to them."

CHARLES FRIED: So that's pretty open.

FRITZ SCHWARZ: Secondly, they should act to-- they should go to court or something to challenge the law.

CHARLES FRIED: Well, one thing that this administration has not done and even Nixon did not do-- was when there is an adjudication by the Supreme Court that, no, you do not have this power on this occasion that they have defied that, nobody-- none of these presidents-- and including this president, have not said the Supreme Court doesn't have the last word. And that's a very-- look, that's what drove Nixon out of office.

FRITZ SCHWARZ: Of course, they've tried to keep cases away from the Supreme Court. Just the-- just the minute it's about to get there, they send someone back to Saudi Arabia or they take them out of the brig and put them in a criminal case.

CHARLES FRIED: Well, you're an old litigator. You know that's what you do.

BILL MOYERS: Let me ask you--

FRITZ SCHWARZ: But it's a position of weakness, too, Charles.

CHARLES FRIED: Yes.

BILL MOYERS: On the issue of torture, if you believed that torture leads to important information that could save lives, would you want it stopped?

FRITZ SCHWARZ: Let Charles answer that first.

BILL MOYERS: Oh, all right.

CHARLES FRIED: I would want it stopped. But as-- you're-- you know, I'm under oath here, so to speak, the oath of public television. If it succeeded, you know, we-- you know, if-- treason succeeds, and I dare call it treason-- well, if it succeeded-- I'd have an awful lot of trouble with that. But I think my answer would still be "no."

BILL MOYERS: --you not want it--

CHARLES FRIED: I would want it stopped because of what it does to the torturer and to the person who instructs the torturer-- which is us.

BILL MOYERS: Why did you ask him to answer it first?

FRITZ SCHWARZ: Because I kind of thought he being a reasonable guy was going to come out that way. And that's pretty much where I would come out, too. And I think the
thing I would add to it is that it’s-- it-- hurts our reputation so badly. I mean, Shakespeare
has that wonderful line about he who-- I’m paraphrasing it ‘cause I don’t remember it
perfectly. But he who steals my purse, steals trash. But he who takes my good name takes
everything. And what we’ve allowed to happen is, through foolish acts and foolish
positions, we’ve allowed our wonderful reputation to be severely diminished.

BILL MOYERS: Well, it wasn't so wonderful after the Church hearings.

FRITZ SCHWARZ: Yeah, but the fact that this country had the courage to do those
hearings and make them public I think helped-- and Bill Colby, who was head of the CIA--
or had been until the last two months of our work, he said it actually strengthened the
intelligence community to have these things brought out.

BILL MOYERS: The president has acknowledged that he authorized this electronic
surveillance and did so without asking Congress. But he said Congress had already
approved his taking military action against al-Qaeda and that that approval of Congress for
military action against al-Qaeda and the inherent powers of the presidency-- made his
claim necessary--

CHARLES FRIED: A very plausible argument which I saw made most powerfully by that
great Republican publicist Cass Sunstein after, you know Cass.

CHARLES FRIED: Probably heard him on--

BILL MOYERS: --Chicago--

CHARLES FRIED: Big Democrat. Referring to the standard power of the commander-in-
chief to control and order signals intelligence. Goes back to George Washington.

BILL MOYERS: Signals intelligence is?

CHARLES FRIED: Is communications with-- potential communications with-- the enemy.

FRITZ SCHWARZ: You know, I - would have used about the argument based on the
authorization for military force, I would have used the word that it’s trivially embarrassing
for the government to make that argument. First place, the language doesn’t support it.
The language is focused on doing things in Afghanistan-- particularly.

Secondly, the history utterly rejects it because they went to the Congress and asked the
Congress to give them powers at home under that resolution. And the Congress refused to
do so. So on the-- first argument the administration makes, the authorization of military
force, I think it's an embarrassingly bad argument.

On the second one, that the president has some inherent power, I think it's clear that the
Congress has the stronger-- the greater power under the Constitution, if it chooses to act.
Congress often doesn't choose to act. And in that case, the president's power are greater.
But as Justice Jackson said in his really famous opinion, the Youngstown case, when
Congress has acted and the president then seeks to go beyond the rule of Congress, that--
the president's power's at its weakest-

BILL MOYERS: Here's what I see, as a journalist whose job is trying to connect the dots.
The president makes the claim, "Congress gave me the authority to attack al-Qaeda and I
can, therefore, justify all these secret acts and decisions because I'm the commander-in-
chief fighting a military enemy."

Now he wants to then apply the same logic of the commander-in-chief to military strikes
against Iran at his pleasure. And connecting the dots, that's what I see developing this
very week.

FRITZ SCHWARZ: It is a danger. And actually there's a-- there's a conservative senator
from the Republican Party from South Carolina, Lindsey Graham. And he has said they--
the Bush administration having made that argument about the Afghanistan authorization to use military force is going to force us, the Congress, to be more careful in the future. So that-- I mean, he didn't think the argument was any good-- the one that the Bush administration has made. But I hope this time they will be more careful.

BILL MOYERS: Don't you see the momentum leading to--

FRITZ SCHWARZ: Sure, sure.

BILL MOYERS: --military strikes against-- Iran--

BILL MOYERS: --on the theory that-- on the basis that Iran is a terrorist state, which, you know, I'm not-- I don't doubt that it sponsors terrorism.

CHARLES FRIED: The Revolutionary Guard.

BILL MOYERS: Yeah, the Revolutionary Guard.

FRITZ SCHWARZ: One-- once bit, twice shy. You know, once we've been bit, we should be-- ought to be really shy about doing something that takes us down the same path.

CHARLES FRIED: Fool me once, shame on you. Fool me twice-

FRITZ SCHWARZ: All those work.

BILL MOYERS: But unless Congress stands up and the press stands up, who is there to be the check and balance?

FRITZ SCHWARZ: Yes.

FRITZ SCHWARZ: --the public, ultimately--

CHARLES FRIED: Jay Leno.

BILL MOYERS: Jay Leno.

FRITZ SCHWARZ: The public can't be a good check and balance unless the truth is told to them, unless they know what's really going on.

BILL MOYERS: And you only learn the truth after the fact on the Church Committee.

FRITZ SCHWARZ: Yeah.

BILL MOYERS: Last question. What-- summing up, what is it that most concerns you about all this right now?

FRITZ SCHWARZ: Well, I think the most important thing is the claim the president can break the law. And the second thing that concerns me most is that what the Cheney-Bush administration has done has hurt us in our battle to defeat Bin Laden and his allies.

CHARLES FRIED: And what concerns me is, first of all, the greater partisanship that this has created. It was an opportunity for less partisanship. And it's created more partisanship with more extreme and unreasonable positions on both ends.

And also, that there will be a reaction just as there was after Watergate, which will be excessive and harmful to us, that what Bush-Cheney-Addington has done is to diminish the president's powers rather than increase them in practice. Because they will have produced such a reaction, that arguments, which in appropriate circumstances set by the right
people in the right way, will now be treated as unacceptable. And that's a great shame.

**BILL MOYERS:** Charles Fried, Fritz Schwarz, Thank you very much for joining me on THE JOURNAL.

**FRITZ SCHWARZ:** This has been fun.

**CHARLES FRIED:** Thank you.

**BARBARA JORDAN:** My faith in the Constitution is whole, it is complete, it is total and I am not going to sit here and be an idle spectator to the diminution, the subversion, the destruction of the Constitution.

**BILL MOYERS:** As we just heard, once a president claims extraordinary powers, free of checks and balances, the sky's the limit. President Bush launched a preemptive invasion of another country claiming superior intelligence and asked us to take his word for it; the case proved to be fictional. But four and a half years later, that war continues, no end in sight. Now he is threatening military action against another country, Iran, invoking the war on terror. This week the administration imposed sweeping new sanctions on Iran to the sound of rattling sabres.

But also, this week, the congressional budget office said spending on the first war, the war in Iraq could eventually cost almost two trillion dollars compared to the administration's original estimate of no more than 50 billion. The president now says he needs another 200 billion and analysts say some of these funds conceivably can be used for air strikes against Iran.

All of which reminds me of the famous French naturalist, Henri Fabre, who was intrigued by a species of worms, known as processional caterpillars, because they march single file in long unbroken lines. One day he came upon a line of them in the forest. He gathered them up, put them around the rim of a flower pot, and then started them walking. Round and round they went, like a tiny merry-go-round, hour after hour. They kept going for days and even though food was near at hand, they never strayed from their well-worn path. In the end, every one of them starved to death on end endless march to nowhere.

That's it for the JOURNAL. On our [web site at pbs.org](http://www.pbs.org), you can investigate the growth of secret government, weigh in on the limits of presidential power, revisit the history of civil liberties in wartime, and join the talk on torture.

See you next week. I'm Bill Moyers.

**ANNOUNCER:** On the next edition of BILL MOYERS JOURNAL...

**BILL MOYERS:** Big media decides what we see, hear and read.

**MELODY SPANN-COOPER:** Radio has moved from being in the business of empowering and educating people to Wall Street, to making money.

**COMMUNITY MEMBER:** If the FCC is here wanting to know if Chicago's residents are being well served the answer is NO, if community issues are being treated sensitively, the answer is NO, if minority groups getting the coverage and input they, need the answer is NO the answer is NO.

**BILL MOYERS:** That's next week on Bill Moyers Journal.

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