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THE
CONSTITUTION
THAT DELICATE BALANCE

**The President Versus Congress:
Executive Privilege and Delegation
of Powers**

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Hon. Christopher Dodd, U.S. Senator, Connecticut
Gerald Ford, President of the United States, 1974-1977
Hon. Orrin Hatch, U.S. Senator, Utah
Hon. Barbara Mikulski, U.S. Representative, Maryland
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MEDIA AND SOCIETY SEMINARS

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The President Versus Congress:

Executive Privilege & Delegation of Powers

FRED W. FRIENDLY, Columbia University School of Journalism: From the birth-place of the United States Constitution in Philadelphia — can the President make a decision of national importance without consulting the Congress?

Rep. BARBARA MIKULSKI, Maryland: We're not dealing in powdered wigs and pewter mugs here, this is street fighting.

Dean BENNO C. SCHMIDT, Jr., Columbia Law School: You're trying to get inside that close, confidential conversation of the President, his closest advisors in the Oval Office.

GERALD FORD, President of the United States, 1974-1977: Why go through all this non-important activity when the gut issue is Congress gave a president the authority; if they don't like it, why don't they repeal it and use the traditional legislative process?

Lt. Gen. BRENT SCOWCROFT, Chairman, President's Commission on Strategic Forces: The decision is the President's and I think the key element in this whole thing is the national security aspect.

Sen. CHRISTOPHER DODD, Connecticut: They hide behind this national security argument every time they don't want to come up and give us the material we need.

Pres. FORD: You can't go through a tortuous, tedious, non-productive hearing on a lot of irrelevant information and that's what they're after.

Rep. MIKULSKI: I'm also smart enough to know that President — the President's going to float that my motives are political, so — and they are. *[laughter]*

* * *

Mr. FRIENDLY: The Constitution lays our government in three parts: The Congress, which makes laws; the President, who carries them out; and the Supreme Court, which interprets the Constitution and serves as a referee. Yet, as our society has grown more complex than the framers could have ever imagined, Congress has delegated, transferred, a lot of its authority to the President, and that has led to a classic contest of wills between the President and the Congress, as we are about to witness.

Now, moderator Benno Schmidt, Dean of Columbia Law School, begins his hypothetical case with a question of secrecy in the Oval Office.

Dean SCHMIDT: Mr. President, you have concluded that the nation faces disaster unless it reduces its dependence on foreign oil. Now, I'd like you imagine that you're sitting in the Oval Office with your Chief of Staff, General Scowcroft; your Secretary of State, Mr. Muskie — this is a coalition government, Mr. President. *[laughter]* Your counsel and close advisor, Mr. Cutler; and your Attorney General, Mr. Buchen. And you're discussing the prospects of imposing an import fee, a license fee on imported oil to reduce sharply our imports of crude oil from abroad. Now, Mr. President, how frank can you be in that conversation?

Pres. FORD: If a president, in making a major decision of that magnitude, cannot solicit from his secretary of state or any of the other advisors their frank and total objective recommendations, it would be almost impossible for a President to carry on the operation of the office in a very tough and controversial circumstance.

Dean SCHMIDT: So you need to be able to talk in complete candor and confidence with your Secretary.

Pres. FORD: Absolutely.

Dean SCHMIDT: How about if your Secretary gives you a written memorandum outlining

some of the foreign policy and other consequences of this import fee?

Pres. FORD: I would, personally, feel that a written memorandum from the Secretary of State or from the Chairman of the National Security Council would be just as controlled under the Executive Privilege decisions as a verbal or oral communication.

Dean SCHMIDT: Mr. Cutler, is his confidence misplaced?

LLOYD CUTLER, former counsel to President Carter: No, I think his confidence is well placed, until the Chairman of some Congressional committee says, "I want to see those papers," and then there'll be a big fight.

Dean SCHMIDT: Representative Mikulski, now, let's assume that the President has not yet taken a decision on this import fee, but you hear some scuttlebutt that the Executive Branch is moving in that direction. And let's suppose that, in your view, it's a disastrous policy. Are you interested in his decision-making?

Rep. MIKULSKI: Oh, we're very much interested in the decision-making process. We're going to want to know what's he going to do, when's he going to try to do it, and why is he going to try to do it.

Dean SCHMIDT: How are you going to find that out?

Rep. MIKULSKI: Well, two ways that we would have, initially: one would be to begin the process of oversight hearings. We have heard that the President is about to come in with a disastrous and inflationary policy that will wreak havoc with the balance of payments, put old people on their knees in paying for their home heating oil, and so we, as populists—

Dean SCHMIDT: Who do you call at this hearing? Can—

Rep. MIKULSKI: We start to call his Department of Energy people.

Dean SCHMIDT: Well, let's make Mr. Wattenberg his Secretary of Energy. And what are you going to ask him?

Rep. MIKULSKI: Well, I won't ask him; my committee and I will ask him. We're not going to have a little private conversation over crackers somewhere. [laughter]

Dean SCHMIDT: This is government in the sunshine!

Rep. MIKULSKI: That's exactly right. We're full disclosure here and—

BEN J. WATTENBERG, Senior Fellow, American Enterprise Institute: Ask me why I'm against old people. [laughter]

Rep. MIKULSKI: That's the third question. [laughter]

Mr. WATTENBERG: That's the third question. [laughter]

Rep. MIKULSKI: But we, if we intend to be— end up in a major confrontation with the President; you don't start there. You go through oversight and the whole point of an oversight hearing is to see how the legislation is working and what is the status of a situation within the government. Is there an energy crisis? Why do you say that?

Dean SCHMIDT: Does he have to answer those questions now, Mr. Cutler?

Mr. CUTLER: The Secretary, as a witness?

Dean SCHMIDT: Yeah.

Mr. CUTLER: Yes, he has to answer those questions.

Dean SCHMIDT: Even before a decision has been made?

Mr. CUTLER: Yes.

Dean SCHMIDT: And if she asked him to bring in all the analyses that have been produced in the Department of Energy on the impact of this proposed fee?

Mr. CUTLER: Then he'd better come see the Attorney General and the Counsel to the President.

Mr. WATTENBERG: That's just where I was going to go.

Mr. CUTLER: And ask the President what he should do. [laughter]

Dean SCHMIDT: Mr. Buchen, if you were the Attorney General in this administration and the Secretary came to you at this point, said, "This Mikulski's trying to torpedo this decision

before it happens. She's— there's some stuff here in my files that, taken out of context, would make this import fee look like bad policy." Does he have to turn that over to her now?

PHILIP BUCHEN, former counsel to President Ford: I think the first thing you'd do is— no, don't send up anything that you think is sensitive, that may cause us some problems as a government, and then we'll sit down and negotiate with the committee.

Dean SCHMIDT: Sounds like a nice friendly process. Are you happy with that?

Rep. MIKULSKI: It's a little too early to negotiate.

Dean SCHMIDT: You're worried that he's buying time here, the President may be on the verge of this decision?

Rep. MIKULSKI: What I would want to do is, first of all, I know that the more I begin to pressure, the more that a lot of information will come to me in a variety of forms.

Dean SCHMIDT: Ah. What forms?

Rep. MIKULSKI: Memos.

Dean SCHMIDT: GS13s in the Department of Energy who don't like the way the Secretary—

Rep. MIKULSKI: Dedicated public servants. [laughter] With little whistles around their necks. [laughter]

Dean SCHMIDT: Right. Now, I'd like you to assume, for purposes of argument, that now this import fee has been laid on imported oil, the prices have started to go up at the pump. You're pretty irritated because while you were negotiating with the Attorney General about trying to find out what was going on, you're presented with a fait accompli. Now, you spoke about bringing pressure to bear on the President through the use of this information. How do you do that?

Rep. MIKULSKI: Well, I really have three tools, and I've always had them, at my disposal. One was the law, and particularly the laws that govern Congress and then the laws under debate. Also, the formulation of public opinion and pressures; and then I might have, as a recourse, going to the courts, though that's a subject of debate. Right now, I've not exhausted all of my remedies in the Congress, so now we're going to move to a resolution of disapproval of the President's import fee.

Dean SCHMIDT: Now, aren't you going to need some oversight hearings before you do that?

Rep. MIKULSKI: Well, we have never stopped holding them, and at the same time, we are meeting privately or behind the scenes with members of the Executive Branch to negotiate. We're meeting with their own lawyers to see what we can do and how we can stick it to him. [laughter]

Dean SCHMIDT: Right. Let's just take this one— let's take it one step at a time. I'm interested now on the oversight hearings. Mr. Brand, if you were the counsel to Representative Mikulski, how can she "stick it" to Secretary Wattenberg and use these oversight hearings to put maximum pressure on the President?

STANLEY BRAND, General Counsel to the Clerk, U.S. House of Representatives: I'd open up my dragnet subpoena file.

Dean SCHMIDT: How broad is the dragnet?

Mr. BRAND: Very broad. [laughter]

Dean SCHMIDT: What do you want him to produce?

Mr. BRAND: Everything. [laughter] Drafts, memoranda, notes.

Dean SCHMIDT: Who else gets this dragnet subpoena served, besides the Secretary? How about the Department of State? We'll move Senator Muskie back there.

Mr. BRAND: We have one for them. [laughter]

Dean SCHMIDT: All the economic analyses from the Secretary of the Treasury?

Mr. BRAND: Yes.

Dean SCHMIDT: What about the analyses prepared in the President's own— within the President's own staff? Say, the Council of Economic Advisors?

Mr. BRAND: Well, as the delegee, as the Congress as the principal, and the President as their agent in this instance, we want to see what our agent is doing, and so we need to look at those documents and find out how that decision has been reached.

Dean SCHMIDT: How about the President himself?

Mr. BRAND: Sure.

Dean SCHMIDT: Are you going to— well, I mean, how far does it go?

Rep. MIKULSKI: No, I'm going to tell my—

Dean SCHMIDT: Is there a limit? [laughter] You're going to rein in this firebrand?

Mr. BRAND: Well—

Rep. MIKULSKI: Wait, I'm going to fetter in this guy. Very rarely will the Congress actually subpoena the President himself. You summon the Cabinet, over which we've had advice and consent; you summon all the materials. By this time, I would presume I had been summoned by the President, to meet with him, and he would probably say, "What in the heck are you doing?" He wouldn't say it quite that way. [laughter] But you just don't call for the President like you're whistling for a cab. [laughter]

Dean SCHMIDT: Mr. Cutler, she's graciously decided not to subpoena the President.

Mr. CUTLER: She's a very reasonable member of Congress. [laughter]

Dean SCHMIDT: But she has issued, or her committee has issued, these — I like the phrase: I bet you do too — these dragnet subpoenas. Mr. Cutler, what's your advice to Secretary Wattenberg and to the Secretary of State?

Mr. CUTLER: To negotiate; to provide all the factual, analytical material you have that is not of a classified matter, under formal security classification; to hold back on expression of either legal opinion or advice to the President or advice to Secretary Wattenberg as to what he should say to the President.

Dean SCHMIDT: Mr. President?

Pres. FORD: Well, it seems to me that if the Congress, in 1955, gave a President the authority to act in a crucial emergency involving the national security, it would be in the national interest for the Congress to understand that you have to act; you can't go through a tortuous, tedious, non-productive hearing on a lot of irrelevant information, and that's what they're after.

Dean SCHMIDT: General Scowcroft, if you were the President's Chief of Staff, you've heard Mr. Cutler, do you have any advice for him about how to deal with this?

Lt. Gen. SCOWCROFT, Chairman, President's Commission on Strategic Forces: Yes, I would strongly support Mr. Cutler's advice. The decision is the President's decision, and I think the key element in this whole thing is the national security aspect. The President is not taxing the people. The President is trying to protect the country from a possible attack; an attack by withholding oil, which could be as devastating as a military attack on the United States.

Dean SCHMIDT: Senator Dodd? Are you satisfied with what you've heard from the President and his— these two advisors?

Sen. DODD: Not at all. This is an historic, traditional argument you hear from every President, regardless of party. They hide behind this national security argument every time they don't want to come up and give us the material we need, and—

Dean SCHMIDT: Why do you need to see that memo that's in Secretary Wattenberg's file?

Sen. DODD: Well, I think we may find out the real reason for this imposition of this fee, because, with all due respect to the Chief Executive — the President and his staff, they will publicly state reasons, you can predict the reasons, in effect, but I think we have a right to know exactly what those reasons are.

Dean SCHMIDT: Yeah. But doesn't—

Sen. DODD: The stated reason and the actual reason.

Dean SCHMIDT: But, Senator, if you say that everything that Secretary Muskie has said to the President, has sent to him on paper, is going to be hung out in the wash at your hearing.

how frank do you think he can afford to be?

Sen. DODD: I obviously don't want everything; I can't deal with everything. No matter how many staff people I have, we can't handle the buckets and carloads that I'm sure Mr. Cutler's going to send me, and that's a great ploy. He'll send me a railroad car full of papers if he can.

Mr. CUTLER: Especially those customs records.

Sen. DODD: That's right. [laughter]

Mr. CUTLER: I'd love to give you those.

Sen. DODD: I don't want to go through that; he doesn't either, so at this point, I would begin to start talking about exactly what we need to know.

Dean SCHMIDT: Before you issue any subpoenas?

Sen. DODD: Absolutely.

Dean SCHMIDT: Are you optimistic. Representative Mikulski? Do you think you can get what you need?

Rep. MIKULSKI: No, that goes on all the time. You know, we're not dealing in powdered wigs and pewter mugs here, this is street fighting. And I have to go after it in a more aggressive way. If they won't give us—

Dean SCHMIDT: So the subpoenas are flying, huh?

Rep. MIKULSKI: Well, the subpoenas are flying, and we're getting the data, and, sure, it's a lot of paperwork.

Dean SCHMIDT: Well, I don't know if you're getting the—

Rep. MIKULSKI: I have a lot of dedicated volunteers from the Columbia Law School helping me sift through this, but there's going to reach a point when I'm going to have the Secretary of Energy in front of me and I'm going to say to him, "Mr. Secretary, did you or did you not meet with the President on August fourth?" "Yes, I did." "What did you tell the President? What did you advise the President? What was the source of that?"

Dean SCHMIDT: You're trying to get inside that close, confidential conversation of the President, his closest advisors in the Oval Office, in order to do your job.

Rep. MIKULSKI: Well, everybody's saying they want to know what did he— why did the President do what he did? I want to know why the President did what he did, apart from this pap that I've been hearing.

Dean SCHMIDT: Mr. Wicker, who's right in this debate. Representative Mikulski or the President?

TOM WICKER, columnist, New York Times: My instinctive position as a newspaperman would be to be more nearly on Ms. Mikulski's side, simply for the reason that, as she put it, the people want to know why the President did this. And experience would teach me that, probably, there are factors involved here that the President really cannot, or feels he cannot, lay out publicly, either for political reasons or national security reasons, or something of the sort.

Dean SCHMIDT: But that's precisely what worried General Scowcroft. He doesn't want the analysis ventilated all over the Hill and hung out for public consumption.

Mr. WICKER: But, you see, you can't entirely leave that kind of judgment to people who have a political interest in it, possibly, who may have other interests that aren't apparent to the public. There've been too many examples in my own career in which Presidential decisions, with all due respect to all those who held that office, have not been made in the spirit of pure national interest.

Dean SCHMIDT: Mr. Nelson, if somebody had leaked one of these sensitive documents to you, now, do I, as a reader, get to learn who gave it to you, what the motives were of your sources of information?

JACK NELSON, Washington bureau chief, Los Angeles Times: If I knew the motive of the person was to torpedo the plan, I would say that it came from a source who was opposed to the plan, so you would know the motive but you wouldn't know the person.

Dean SCHMIDT: But why is your desire to protect your source, as a newspaper person, any different than the President's desire to protect the confidentiality of the advice he gets so he can do business? He can't do business unless he gets frank advice.

Mr. NELSON: Well, the difference is, I'm trying to get information out to the public and the President's trying to keep it from the public.

Dean SCHMIDT: But you're not giving me the information about who the source is. That may be critical to my appraisal of the story.

Mr. NELSON: Well, I can't afford to do that: I'd be out of business.

Dean SCHMIDT: Well, but that's what he's saying. *[laughter]* If he has to—

Mr. NELSON: Well, I say the President may be right about that, and he may be entitled to his executive privilege and to his confidential advice, but I have to protect the source, or I could never get any information.

Dean SCHMIDT: Well, then—

Mr. NELSON: I won't identify a source, but I'll do everything else.

Dean SCHMIDT: Professor Cox, you're a great student of this problem of Executive Privilege. You've heard Representative Mikulski say that the subpoenas are flying. She's asked Secretary Wattenberg to come himself. Should he have to comply?

ARCHIBALD COX, Harvard Law School; Watergate Special Prosecutor: Well, do you mean, should he have to comply in a legal sense or a political sense?

Dean SCHMIDT: Well, both.

Prof. COX: Well, all right. That's the first thing that I'm going to advise the Congressional committees to face up to, that they are, in part, engaging in a political contest here; that they may have no legal sanctions at all, and that they'd be very wise to show that they've proceeded as Senator Dodd suggested. Also, that she would be very wise to proceed as she began by making her case on the facts, without asking for opinions and secret advice, and the like.

Dean SCHMIDT: Mr. St. Clair, now, if you were advising Secretary Wattenberg about the Wattenberg Papers, as a matter of law, does he have to comply with that?

JAMES ST. CLAIR, former Special Counsel to President Nixon: Well, as a matter of law, I think that the ultimate answer is he does not, but I think that's the very last step that's taken. And, in fact, in some of these cases that actually get into the courts, the courts, in fact, order the parties to sit down and negotiate before the court has to decide. However, we don't need to have Constitutional clashes of this magnitude every day, and as long as the parties are prepared to negotiate, to meet the legitimate interests of both sides, then I think it works.

Dean SCHMIDT: Mr. Buchen, what's your sense?

Mr. BUCHEN: One reason why negotiation is important is there's no easy remedy for a failure to submit to a subpoena.

Dean SCHMIDT: So you—

Mr. BUCHEN: And Congress knows that its subpoena power is very weak, in the last analysis.

Dean SCHMIDT: Do you know that, Mr. Brand?

Mr. BRAND: I know the opposite. We have done it. We have put executive officials in contempt, and that process has not reached the Supreme Court yet, but we have judicial decisions which affirm the right of the Congress to get this kind of material. And at the same time that that is going on, there is a public debate going on in the media about whether this claim of privilege is legitimate or not.

Dean SCHMIDT: What am I reading about this? What impression do I have about Mr. Wattenberg as I pick up my morning papers?

Mr. BRAND: I call up my friends in the *New York Times* and the *Baltimore Sun* and I tell them, "You know, they're trying to protect a memo from a GS5 to a GS18 on the oil import fee. Do you think that's the kind of stuff that ought to be subject to executive privilege?" You

know, there are two million GS5s in the government and the Congress would never get a shred of paper if we accepted that.

Dean SCHMIDT: Secretary, how do you feel about being here? You're right in the middle of this.

Mr. WATTENBERG: Well, I've started to make a few phone calls to some columnists I know, and I've told them that, in effect, what Congresswoman Mikulski is asking of me is really to make me an agent to wiretap, to confidential discussions of the President of the United States. And that's not a nice way to play politics, so we in the Executive Branch are beginning to call a few people as well.

Dean SCHMIDT: Senator Hatch, if you were faced with this, what's building up here as a confrontation, really, between—suppose it's your committee and Secretary Wattenberg, with the large shadow of the President standing behind Secretary Wattenberg's decision, how would you go about—would you follow the Brand approach?

Sen. ORRIN HATCH, Utah: If I really want to change what the President has done, then, the proper way for Congress to do it is to pass a resolution.

Dean SCHMIDT: What do you think, Representative?

Rep. MIKULSKI: My goal will be to move to what Senator Hatch has just talked about. I'm going to offer, from the House perspective, a resolution stopping the oil import.

Dean SCHMIDT: Mightn't your hand be strengthened in doing that if you've got the Secretary held in contempt?

Rep. MIKULSKI: I don't think we would be at that point yet. Because he's already made himself contemptible in the eyes of the American people *[laughter]* by appearing before me.

Mr. WATTENBERG: That's not what my columnists say.

Rep. MIKULSKI: Well, but my columnists—*[laughter]*—and my young voters.

Dean SCHMIDT: No, no, with all respect—

Rep. MIKULSKI: Well, what I have to be—this then becomes a political judgment which is, if I play that card, then do I create a backlash against my own cause? And I think that that's something that we would all have to consider.

Dean SCHMIDT: You mean, sympathy for the Secretary?

Rep. MIKULSKI: And the President's position.

Dean SCHMIDT: I see, Senator Hatch?

Sen. HATCH: I may disagree with Congresswoman Mikulski with regard to this issue, but knowing the press the way I do, in Washington, D.C. and New York, I feel that the press will come down wholesale behind her position. And, you see, there are two competing interests here. One is the interest of the President in being able to run the country and assert himself within the scope and spheres of his office, and the other is the interest of Congress to be able to oversee, to stop fraud, ferret out corruption, and, of course, to play its role to legislate. Ultimately legislate. Those two are two competing interests and, frankly, I think the President loses on executive privilege in almost every case in the public media today. And I can hardly blame the press for that, because they want the information and, frankly, they generally presume that the President has something to hide, even though, frankly, he may have legitimate security interests to protect.

Dean SCHMIDT: Mr. President, if Representative Mikulski plays that card, and gets a contempt citation against Secretary Wattenberg, now, does that change your position about whether he should give her everything that she wants, including those conversations with you?

Pres. FORD: Right from the outset, when certain members of Congress got this great interest, my suspicion would be, number one, that it was more political than substantive. Why go through all this unessential or non-important activity, when the gut issue is, Congress gave a President the authority; if they don't like it, why don't they repeal it and use the traditional legislative process, instead of trying to have all kinds of pressures indirect by putting a Secretary of State behind bars because he's refusing to comply. I mean, that's not the way to run the government of the United States of America. If Congress made a mistake

in 1955, why don't they straightforwardly stand up and repeal the legislation?

Dean SCHMIDT: All right. I think he's telling you to stand firm. *[laughter]* Mr. Secretary?

Mr. WATTENBERG: Yes, he certainly seems to be. *[laughter]*

Dean SCHMIDT: So what do you do with this contempt citation? You just stand firm and say, "I'm following the President's directions: I believe in what I'm doing"?

Mr. WATTENBERG: I'm in close touch—

Dean SCHMIDT: "This is a fishing expedition"?

Mr. WATTENBERG: I'm in close touch with Mr. Cutler. *[laughter]* Who is telling me exactly what the President wants me to do and probably telling me how to live in jail for awhile. *[laughter]*

Dean SCHMIDT: He's the President's lawyer. You may need your own lawyer. *[laughter]* What should he be doing now, Mr. Cutler? I mean, aside from negotiating.

Mr. CUTLER: He should respectfully decline to answer a very limited category of questions — those relating to advice to the President and advice to him about what he should say to the President.

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Dean SCHMIDT: So there's nothing that they can do to him, at least for awhile?

Mr. CUTLER: One thing you've left out is that while Congresswoman Mikulski has raised holy hell, and she's used all the powers of her committee, she's not even the House of Representatives. She's still got to win that contempt resolution on the floor and those get lost occasionally.

Dean SCHMIDT: Those occasionally are lost?

Mr. CUTLER: Yes.

Dean SCHMIDT: What are your chances? Can you win that?

Rep. MIKULSKI: You see, this then goes to being able, on my joint resolution, to be able to win on substance, and you only play your procedure points as far as it will move you into a tactical advantage. I'm afraid that that will take all of my credibility, and all the chips that I'm building up in the House, to win on procedure, against Wattenberg, but then will have squandered a certain amount of things when I go to really accomplish my policy objective. Procedure is a tool. It is a method. It is not an outcome. I'm also smart enough to know that the President's going to float, and his press person, that my motives are political. So — and they are. *[laughter]* Just as his are.

Dean SCHMIDT: I was just going to say, "You ain't alone," as —

Rep. MIKULSKI: And so, therefore, I would want to keep it as — begin to really be very careful on the procedure questions, so that my policy intentions retain an aura of purity about them.

Dean SCHMIDT: Well, now, if you decided to press the contempt, and if you got the House to back you, is that just a paper sanction? Can he thumb his nose at that?

Rep. MIKULSKI: No. We could enforce it and, then, we would probably then have to summons the Sergeant-of-Arms, or his officers, to summon the Secretary of Energy, and bring them to the House, and we would detain him there.

Mr. WATTENBERG: And I would go willingly.

Dean SCHMIDT: I see.

Mr. WATTENBERG: And I think, within two days, even Tom Wicker would be writing columns sympathetic to me in jail. The whole media equation is then changed.

Mr. CUTLER: You'd wait for the television cameras before you went.

Mr. WATTENBERG: Yes, sir. *[laughter]*

Dean SCHMIDT: And you'd insist that they manacle them, eh? Mr. St. Clair, if you were advising him, would you tell him to go? Where's he going to, by the way? Mr. Brand, where's the Sergeant?

Mr. ST. CLAIR: A room in the basement of the Congress. I think, someplace.

Mr. BRAND: There's a jail in the basement of the Capitol. *[laughter]*

Dean SCHMIDT: Anybody ever been in that jail?

Rep. MIKULSKI: Not yet, but we're on our way. *[laughter]*

Mr. ST. CLAIR: I think I'd be inclined to suggest that the papers be delivered to the President of the United States, and then see what happens.

Dean SCHMIDT: Oh, very interesting. Mr. Brand, how do you meet that?

Mr. BRAND: Well —

Dean SCHMIDT: Would you take these hot papers, Mr. President?

Pres. FORD: If the confrontation got to such a ridiculous point, yes, I would, because I think, at some point, under these unusual developments, you'd have to have a decision by the court. Perhaps by that time the Congress would start to use its head a little bit and actually work on the substance, which is to either repeal or reaffirm the basic legislation.

Dean SCHMIDT: Mr. St. Clair, can you get Mr. Wattenberg protected by the courts?

Mr. ST. CLAIR: I think that if he no longer has the papers, if the President of the United States has ordered him to deliver the papers —

Dean SCHMIDT: Well, they still want him to testify about those conversations. He can't get rid of those memories.

Mr. ST. CLAIR: He can't get rid of those memories and he cannot so testify, and then the Congress will have to do whatever it thinks it should do. I think, however, that a court should be asked to intervene in the process, because he's serving two masters. He's serving the President of the United States, acting under the President's orders; he's also supposed to respond to the Congress of the United States in response to a subpoena.

Dean SCHMIDT: Judge Wald, I'd like you to suppose that you're a district judge, and Mr. St. Clair, representing the Secretary, comes in and tries to get some sort of protection from this dragnet subpoena.

Judge PATRICIA WALD, U.S. Court of Appeals: If somebody has Mr. Wattenberg in their physical custody, whether it's in the basement of the House or not, I'd suggest they might try the old faithful writ of habeas corpus. Now, when we came to the merits, we might have to do what no court has, apparently, had to do over two hundred years, which is, basically, get at deciding Executive Privilege versus a Congressional subpoena. We've been able to avoid it for two hundred years, more or less. Hopefully, in the two weeks between the bail hearing and the merits hearing, I would figure out some way to avoid it without leaving Mr. Wattenberg still in the basement. But if I did eventually —

Dean SCHMIDT: Why are you so anxious to avoid this?

Judge WALD: It's very obvious. The politicians are well aware of their arsenal of weapons that they have; the Executive is well aware of two hundred years of history and precedent which they have. I think there may come a time, it's conceivable, when there will be a hard-core question which cannot be settled by the kind of negotiation that goes on every day at every level. But I would hope that I would not be the first judge that had to so preside, but if I did, if it looks like it's a very narrow conflict at that point that, indeed, could benefit from another round of negotiations, then I, like most courts, wouldn't hesitate to say so.

Dean SCHMIDT: Well, right. Judge Adams?

Judge WALD: But eventually it might have to be decided.

Judge ARLIN ADAMS, U.S. Court of Appeals: Well, I agree with Judge Wald. We ought to do everything within our power to get the parties to reconcile their differences, and I suspect most courts would do that. But if all else failed, I'm not so sure the court ought to step in. I think the most important thing is to make sure that Mr. Wattenberg is released from his confinement and, undoubtedly, the political process would cure the problem.

Dean SCHMIDT: Professor Cox, do you think the — Judge Wald is right, if someone has to have the last word in this kind of a situation, it's the courts?

Prof. COX: Well, she has three possibilities. One is to say this is a political, not a justiciable question, and Secretary Wattenberg stays in the pokey, which seems to me quite intolerable.

The second would be for her to undertake to resolve the question of Executive Privilege, which for all of— with respect to these particular papers, which we haven't focused on, which I think would be unfortunate for the very reasons she stated. The third would be to say that the committee has the burden of justifying holding this man and, since it can't establish that it has any legal right to hold him, because it's doing it on a political question, she's got to free him without undertaking to decide the political question. You say, well, does that mean that the Congresswoman loses? No, it means simply that the Congresswoman doesn't get the help of the courts.

Dean SCHMIDT: Well, let's see now, Representative Mikulski, I'm not sure. I think you haven't probably been able to win in the end of the day in the courts.

Rep. MIKULSKI: And that's why I didn't want to do it. I had— [laughter]

Dean SCHMIDT: Now, let's move to—

Rep. MIKULSKI: I wanted to make out I was going to do it. [laughter]

Dean SCHMIDT: Mr. President, I want to leave Representative Mikulski now, for a moment. Now, I'd like you to assume with me, again, for purposes of argument, that you do believe that it's essential to the national interest to impose a license fee on imported oil. Now, you have the power, under the Trade Expansion Act, as I understand it, that you can do whatever you think is necessary to stop it. You can tax it, you can bar it, you can do whatever you want. Now, Mr. President, is that a Presidential kind of a problem for Congress to put in your lap?

Pres. FORD: Well, I suspect that when the Trade Expansion Act was enacted, the fathers of that legislation might not have contemplated a decision of this national magnitude. We have to act on a total basis, on a national coverage, and do it promptly. The problem you run into is that if you decide to go straightforwardly to the Congress and ask for a tax increase of one dollar, two dollars or five dollars a barrel on imported oil, we could go through a much more serious crisis, because time is of the essence. And with all respect to my friends in the Congress, they don't act promptly or expeditiously on tax matters because of their apprehension about political ramifications.

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Mr. FRIENDLY: Our dialogue is about to turn to a conflict over action by the President. The Constitution says that Congress shall make the laws, pass them, and present them to the President for his approval or his veto. But the complexities of the twentieth century have caused the Congress to pass laws giving away some of its powers— sometimes to administrative agencies, sometimes to the President, as in areas of taxing imported goods or selling grain to the Soviet Union. Justice Stewart, in many of these laws, Congress reserved the power to disapprove a particular action by an agency or the President through a simple resolution of one or both houses. That all ended in June of 1983. How come?

POTTER STEWART, Justice (retired), U.S. Supreme Court: Well, in June of 1983, the Court, the Supreme Court of the United States, decided the case known as the Chadha case, and said, and made very clear, that all vetoes by resolution of Congress were unconstitutional, because the Constitution clearly provides that the laws shall be passed by the Congress and presented to the President for his signature or his veto.

Mr. FRIENDLY: And the one-house veto, or the two-house veto, by the Congress over presidential agencies— that never was written into the Constitution?

Justice STEWART: Never was.

Mr. FRIENDLY: It just grew up and the Supreme Court said what?

Justice STEWART: Said the principle was that the Constitution provides a certain process through which Congress must go in enacting a law— i.e., presenting it to the President after it's been passed by a majority of both houses of the Congress, both the House of Representatives and the Senate, and that it be presented to the President.

Mr. FRIENDLY: And that legislatives vetoes were, in one word—

Justice STEWART: Invalid.

Mr. FRIENDLY: Unconstitutional. As we return to the seminar, the Congress seeks new

ways to check the powers it gave the President. For clarity, we've edited two separate parts of this discussion together.

* * *

Dean SCHMIDT: Senator Dodd, you've heard President Ford. Still, with all the problems of congressional action that he outlined, it does seem to me that what he's doing is a classic kind of legislative judgment. I mean, right at the beginning of the description of Congress's powers in Article I, it says Congress has the power to lay and collect taxes. It seems to me that Congress has just given the President here a blank check and said, "Here, if you think some import is threatening the national security, you do whatever you think is best."

Sen. DODD: Well, I don't believe that was the legislative intent. The assumption, I'm sure, would have been to have the Congress—the President, rather, consult as well with Congress. I noticed when you set up your first meetings, you included everybody—the Secretary of State, the President's chief legal advisor, the Attorney General—but you didn't include any members of Congress at all in those discussions. And I'm quite confident that the framers, or fathers, of that legislation never intended for this to be so exclusively a unilateral executive decision that they would be excluded from the process at all.

Dean SCHMIDT: Senator Hatch, it sounds to me like a funny way to run a railroad, if I may, for Congress to say to the President, "Here, Mr. President, you decide on this really monumental question of national policy."

Sen. HATCH: Well, periodically, the Congress has invested the President with license fee authority. We have done it continuously; it's because the Congress doesn't want to take the heat itself, doesn't want to have to stand up and make the decisions itself, so they allow the President to move. And I don't subscribe to the theory that the President of the United States, any time he wants to move in a national security way, or in a national interest way, he has to come to the Congress and get its approval. He has a separated power that is co-equal with the Congress, and he has a right to act.

Dean SCHMIDT: To lay taxes?

Sen. HATCH: Sure. In this case, he could do it.

Dean SCHMIDT: Senator Muskie, you've been on both sides of— on the Hill and in the Executive branch. Is it necessary—I mean, have we—is this the— modern world requires that Congress delegate so broadly in areas of this kind?

EDMUND MUSKIE, former Secretary of State; former U.S. Senator, Maine: Presidents have used this kind of general legislation enacted in one legislative environment to apply to unanticipated problems.

Dean SCHMIDT: Isn't that inevitable, Senator, if you write a statute that gives the President this completely unfettered kind of power?

Sen. MUSKIE: Well, it is not unfettered.

Dean SCHMIDT: Almost unfettered.

Sen. MUSKIE: Well, one standard that I think has been used and honored throughout our history is the national security standard.

Dean SCHMIDT: The President spoke of the difficulty of the legislative process, in terms of the time it takes. Didn't the framers understand that those difficulties are built into the legislative process, and isn't that one reason that they put the power to tax in Congress and not in the White House, just to slow down the—

Sen. MUSKIE: But the Congress can delegate its powers. Now, in so doing, of course, it undertakes to preserve its own prerogatives to the extent that it can.

Dean SCHMIDT: Professor Robinson, would the framers recognize this lawmaking process that we've been describing?

Prof. DONALD ROBINSON, Department of Government, Smith College: I think not. I think that this process turns the Constitution upside-down from their standpoint. They intended for the branch that is elected by the people to make the policy, and the job of the President is to carry that policy out, to take care that the laws are faithfully executed.

President Ford. I think, has made a good argument as to why, in this circumstance, that would be difficult. We need prompt action here: we need energetic action: we're involved with foreign policy. But I think for the President to make policy for this country turns the Constitution upside-down.

Dean SCHMIDT: Well, but he's just doing what Congress has invited him to do. Congress has specifically given him this very broad power.

Prof. ROBINSON: That's a good point. Congress is a co-conspirator in turning the constitutional process upside-down. *[laughter]*

Dean SCHMIDT: Well, but as long as Congress consents — what's lost from Madison's point of view?

Prof. ROBINSON: What's lost is that policy is not being made by the body that is intimately tied to the people. Now, whether that is possible under modern circumstances is arguable, but you asked me what the framers would have thought of this process—

Dean SCHMIDT: Yeah. Is this—

Prof. ROBINSON: —and my answer is they wouldn't have liked it. They would have thought that it was not republican government.

Dean SCHMIDT: Judge Wallace, is it up to the courts, do you think, to insist that Congress and the President play ball by the original rules, which is that Congress makes the policies, and then the President executes them?

Judge J. CLIFFORD WALLACE, U.S. Court of Appeals: Yes and no.

Dean SCHMIDT: Yes and no. *[laughter]*

Judge WALLACE: The Constitution, as it develops, sets up a structure of government. And the framers were very interested in that structure. It's clear that they felt that structure was fundamental to the protection of rights. It would seem to me that the question is, you allow the political process to work as much as you possibly can, and that the court should use restraint in involving themselves in an area such as this, except that where the structure itself is threatened, then the courts have a tendency to become involved. But it should be a very wide latitude, allowing the political process to evolve.

Dean SCHMIDT: But isn't the structure threatened when it's turned on its head? Here I have to pay this import fee that the President has imposed.

Judge WALLACE: You've made an assumption it's turned on its head.

Dean SCHMIDT: Yeah. My copy of the Constitution says that the senators and Representative Mikulski have to decide whether I have to pay that tax.

Judge WALLACE: That's true, but that's not always true in foreign policy. The foreign policy power went from the king to a confederation of units to the confederation of states to the President of the United States, and in the area of foreign policy he has a special power.

Dean SCHMIDT: He's the king.

Judge WALLACE: Well, in a sense, he has more responsibility for making policy in that area away from the Congress. The problem you pose here is that it's a little of each, and that's where it gets difficult.

Dean SCHMIDT: Justice Stewart, can I get any help from the courts? Should the courts be worried about overly broad delegations of power to the President?

Justice STEWART: Well, this harks back to a long time, many years ago, when I was in law school, and this was a very much mooted issue; but I think it's been decided. I think that it's been decided that Congress can delegate its legislative power to the President of the United States.

Dean SCHMIDT: Representative, what are you up to? You want to turn this oil import fee around; you want to abolish it, eliminate it. What can you do?

Rep. MIKULSKI: I can, on my side, and then encouraging and having the assistance of my good counterpart in the Senate, Senator Dodd, offer a joint resolution stopping the oil import fee.

Dean SCHMIDT: Can you get, now, what you want?

Rep. MIKULSKI: Well, it then goes to the President. He can veto it.

Dean SCHMIDT: What I'm asking is, can you get this import fee turned around without having to submit to his veto power? Because that means you need to get two-thirds of both houses, if he has the veto power. And let's suppose you can get majorities, but two-thirds is a different matter. Now, shouldn't you be able to turn this thing around by concurrent resolution?

Rep. MIKULSKI: I'd really have to seek the advice of counsel. I'm not really sure.

Dean SCHMIDT: Should she, Mr. Brand?

Mr. BRAND: Not after June 21st, 1983.

Dean SCHMIDT: I mean, the Supreme Court has held, in the Chadha case, that Congress has to submit all of its lawmaking efforts to the President, has to present it for his veto.

Mr. BRAND: Well, when the Congress passed the Trade Expansion Act with the concurrent reservation, the President signed it; he was part of the deal. He agreed, at that time, that we could retain control over the delegation. We made a political deal. He wanted the ability to do that, and I were unwilling to give him carte blanche without some reservation, so we had a deal. And I'd argue to the President that he should respect the will of the two branches of the Congress and not issue that policy.

Dean SCHMIDT: Justice Stewart?

Pres. FORD: May I—

Dean SCHMIDT: Yes, Mr. President.

Pres. FORD: —interpose to set the record straight. When Congress passed the legislation in 1955, the then President, in his signing statement, raised very grave reservations on a constitutional ground as to the provision of the right of the Congress to override any decision by either joint resolution or concurrent resolution.

Dean SCHMIDT: But you took the delegation.

Pres. FORD: Well, we took that with a—

Dean SCHMIDT: Just without the limitation on the delegation.

Pres. FORD: Well, the then President took it as a responsible action by the Congress to delegate such authority to the Chief Executive, and the President then said, but this other provision is strictly unconstitutional. And it may eventually be decided by the Supreme Court, and it was in 1983 in concert with the views of three or four or five Presidents.

Dean SCHMIDT: Justice Stewart, the Chadha case, as I hardly need tell you, involved the fate of a single individual. But here we've got what everyone at the table has described from the beginning, a basic question of policy. Congress has this power in the first place.

Justice STEWART: Correct.

Dean SCHMIDT: It gives the President an almost completely blank check. Why shouldn't it say, "Mr. President, in the exercise of this delegated authority, if we say no, then you've lost your delegated power"?

Justice STEWART: Well, why doesn't Congress obey the Constitution and amend or repeal the statute that it enacted in 1955?

Dean SCHMIDT: Well, that's subject to his veto. That's the problem. The question here is, what can a majority do, or is now Congress in a box where it takes two-thirds to turn the President around?

Justice STEWART: Well, I think it does.

Dean SCHMIDT: Judge Adams, if you sat on appeal here of the Supreme Court's decision, do you think, in this sort of case, the Constitution forbids concurrent resolution from effectively turning his order around?

Judge ADAMS: You're dealing in the area of foreign affairs. It's a very delicate situation, and Congress, in its best judgment, believes that, at least in the first instance, it should give the power to the President, delegate the power. As has already been pointed out, that is not a new effort on the part of Congress. Here you have a little extra twitch, so to speak, and that is the recall of that power. Now, I think we're going way past what the founders contemplated.

I would worry about that last provision, using the concurrent power to overrule the President. If the Congress wants to do that, they ought to obey the Constitution and pass the legislation correctly.

Dean SCHMIDT: Mr. President, I started by asking you how confident you were about— in your conversations with your advisors about how frank you could be and how frank they could be with you that these confidences would not be exposed. Are you still confident?

Pres. FORD: My impression is that in the final analysis there is some reasonable resolution of the dispute without responsible people going to jail. A President just can't operate if every afternoon, after he's met with ten top people, and half of them Cabinet officers, all of the transcripts are distributed to the press. He just can't operate that way, and the conflict, or the head-to-head challenge, I think, in the past has been reasonably taken care of, and I think it will be in the future.

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Mr. FRIENDLY: Justice Stewart, problems concerning separation of powers and Executive Privilege have caused some of our great battles, dating back, I suppose, to Jefferson and Marshall, who were cousins and who hated each other. The founders wrote separation of powers into the Constitution to diffuse power. I guess.

Justice STEWART: That's correct.

Mr. FRIENDLY: Has it worked, or has it created a government, as some Presidents have moaned, that just can't work?

Justice STEWART: Well, I think it was deliberately made inefficient, and I think that has to be remembered, that the federal government, which was newly created by the Constitution of the United States, was deliberately made an inefficient government in two ways. First of all, by diffusing the power, to use your expression, between the Legislative, the Executive and the Judicial branches, so as— they wanted to be sure that they weren't creating the kind of tyranny from which they had just fought a revolutionary war to be free. And secondly, by the limitations upon governmental power contained in our Bill of Rights. It was made a limited government and a specific government and a government of divided power and deliberately made inefficient.

Mr. FRIENDLY: The judges on our panel seemed very reluctant to referee this fight between the President and the Congress. Why?

Justice STEWART: Well, I wondered why myself, because there are— but there are certain questions, Mr. Friendly, that are non-justiciable: that are not to be decided by any court in the land, or to be decided by the Supreme Court of the United States, and that a yes or no answer wasn't appropriate in a case like that, but that was a matter of political accommodation.

Mr. FRIENDLY: And yet, Justice Stewart, in matters like Brown versus the School Board, integration, segregation, school prayer, abortion, all those things, the Supreme Court has no problem getting involved in that. What's the difference between the Supreme Court getting involved in issues like that and issues between the President and the Congress?

Justice STEWART: Well, it's not the importance of the question but the nature of the question, and a contest between Congress and the President would be held by the Court to be in a non-justiciable question.

Mr. FRIENDLY: The battles over separation of powers will go on as long as the nation survives, because that's the way it was meant to be. Just a little bit messy.

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