

July 13, 2007 (original broadcast date): TOUGH TALK ON IMPEACHMENT

Bill Moyers talks with Bruce Fein and John Nichols

BILL MOYERS: One of the fellows you're about to meet wrote the first article of impeachment against President Clinton. Bruce Fein did so because perjury is a legal crime. And Fein believed no one is above the law. A constitutional scholar, Bruce Fein served in the Justice Department during the Reagan administration and as general counsel of the Federal Communications Commission. Bruce Fein has been affiliated with conservative think tanks such as the American Enterprise Institute and the Heritage Foundation and now writes a weekly column for THE WASHINGTON TIMES and Politico.com.

He's joined by John Nichols, the Washington correspondent for THE NATION and an associate editor of the CAPITOL TIMES. Among his many books is this most recent one, THE GENIUS OF IMPEACHMENT: THE FOUNDERS' CURE FOR ROYALISM. Good to see you both. Bruce, you wrote that article of impeachment against Bill Clinton. Why did you think he should be impeached?

BILL MOYERS: Bruce you wrote that article of impeachment against Bill Clinton. Why did you think he should be impeached?

BRUCE FEIN: I think he was setting a precedent that placed the president above the law. I did not believe that the initial perjury or misstatements-- that came perhaps in a moment of embarrassment stemming from the Paula Jones lawsuit was justified impeachment if he apologized. Even his second perjury before the grand jury when Ken Starr's staff was questioning him, as long as he expressed repentance, would not have set an example of saying every man, if you're president, is entitled to be a law unto himself. I think Bush's crimes are a little bit different. I think they're a little bit more worrisome than Clinton's. You don't have to have--

BILL MOYERS: More worrisome?

BRUCE FEIN: More worrisome than Clinton's-- because he is seeking more institutionally to cripple checks and balances and the authority of Congress and the judiciary to superintend his assertions of power. He has claimed the authority to tell Congress they don't have any right to know what he's doing with relation to spying on American citizens, using that information in any way that he wants in contradiction to a federal statute called the Foreign Intelligence Surveillance Act. He's claimed authority to say he can kidnap people, throw them into dungeons abroad, dump them out into Siberia without any political or legal accountability. These are standards that are totally anathema to a democratic society devoted to the rule of law.

BILL MOYERS: You're talking about terrifying power but this is a terrifying time. People are afraid of those people abroad who want to kill us. Do you think, in any way, that justifies the claims that Bruce just said Bush has made?

JOHN NICHOLS: I think that the war on terror, as defined by our president, is perpetual war. And I think that he has acted precisely as Madison feared. He has taken powers unto himself that were never intended to be in the executive. And, frankly, that when an executive uses them, in the way that this president has, you actually undermine the process of uniting the country and really focusing the country on the issues that need to be dealt with. Let's be clear. If we had a president who was seeking to inspire us to take seriously the issues that are in play and to bring all the government together, he'd be consulting with Congress. He'd be working with Congress. And, frankly, Congress, through the system of checks and balances, would be preventing him from doing insane things like invading Iraq.

BRUCE FEIN: In the past, presidents like Abe Lincoln, who confronted a far dire emergency in the Civil War than today, sought congressional ratification approval of his emergency measures. He didn't seek to hide them from the people and from Congress and to prevent there to be accountability. And, of course, Congress did ratify what he had done. Secondly, sure, times can be terrifying. But that also should alert us to the fact that we can make mistakes. The executive can make mistakes.

Take World War II. We locked up 120,000 Japanese Americans, said they were all disloyal. Well, we got 120,000 mistakes. They lost their property. They lost their liberty for years and years because we made a

huge mistake. And that can be true after 9/11 as well. No one wants other downgrade the fact that we have abominations out there and people want to kill us. But we should not inflate the danger and we should not cast aside what we are as a people. We can fight and defeat these individuals, these criminals, based upon our system of law and justice. It's not a-- we have a fighting constitution. It's always worked in the past. But it still remains the constitution of checks of balances.

BILL MOYERS: A fighting constitution--

BRUCE FEIN: It's a fighting constitution that enables us-

BILL MOYERS: What do you mean?

BRUCE FEIN: That with the-- with the consent of Congress and the president working hand in glove with consistent with due process of law, we have the authority to suspend habeas corpus in times of invasion or rebellion. It has enabled us to defeat all of our enemies consistent with the law.

BILL MOYERS: Congress did not stand up to George Bush for five years when it was controlled by Republicans. And I don't see any strong evidence that the Democrats are playing the role that you think the Congress should be playing.

BRUCE FEIN: That is correct. But it doesn't exculpate the president that Congress has not sought immediately to sanctions his excesses.

BRUCE FEIN: --exactly right. And Bill, this could not happen if we had a Congress that was aggressive, if we had a Congress the likes of Watergate when Nixon was president and he tried to-- obstruct justice and defeat the course of law. We have a Congress that basically is an invertebrate.

BILL MOYERS: But why is Congress supine?

JOHN NICHOLS: They are supine for two reasons. One, they are politicians who do not-- quite know how to handle the moment. And they know that something very bad happened on September 11th, 2001, now five years ago, six years ago. And they don't know how to respond to it. Whereas Bush and Karl Rove have responded in a supremely political manner to it and, frankly, jumped around them. That's one part of the problem.

BILL MOYERS: Jumped around Congress?

JOHN NICHOLS: Jumped around Congress at every turn. I mean, they don't even tell them, they don't consult with them. They clearly have no regard for the checks and balances. But the other thing that's-- in play here-- and I think this is a-- much deeper problem. I think the members of our Congress have no understanding of the Constitution. And as a result, they-- don't understand their critical role in the governance of the country.

They-- it-- when the Republicans are in charge, they see their job as challenging-- or as supporting the president in whatever he does, defending him, making it possible for him to do whatever he wants. When the Democrats are in charge, they seem to see their role as trying to score political points as opposed to what ought to be sort of a-- common ground of--

BILL MOYERS: --because the fact of the matter is approaching an-- election year, you don't really think, do you, that the Democrats want to experience a backlash by taking on a Republican president in an election-

JOHN NICHOLS: Well, it--

BILL MOYERS: --or that the Republicans want to impeach an administration that they elected in 2000 and reelected in 2004? There is a political element here, right?

BRUCE FEIN: There's always going to be a political element, Bill. But in the past, there's always been a few statesmen who have said, "You know, the political fallout doesn't concern me as much as the

Constitution of the United States." We have to keep that undefiled throughout posterity 'cause if it's not us, it will corrode. It will disappear on the installment plan. And that has been true in the past. When we had during Watergate Republicans and remember Barry Goldwater, Mr. Republican, who approached the president and said, "You've got to resign." There have always been that cream who said the country is more important than my party. We don't have that anymore.

BILL MOYERS: It seems to me the country is ahead of Congress on this. How do you explain all this talk about impeachment today out across the country?

JOHN NICHOLS: People don't want to let this go. They do not accept Nancy Pelosi's argument that impeachment is, quote/unquote, off the table. Because I guess maybe they're glad she didn't take some other part of the Constitution off the table like freedom of speech. But they also don't accept the argument that, oh, well, there's a presidential campaign going on. So let's just hold our breath till Bush and Cheney get done.

When I go out across America, what I hear is something that's really very refreshing and very hopeful about this country. An awfully lot of Americans understand what Thomas Jefferson understood. And that is that the election of a president does not make him a king for four years. That if a president sins against the Constitution-- and does damage to the republic, the people have a right in an organic process to demand of their House of Representatives, the branch of government closest to the people, that it act to remove that president. And I think that sentiment is afoot in the land.

BILL MOYERS: This is the first time I've heard talk of impeaching both a president and a vice-president. I mean, this-- as you saw in that poll, more people want to impeach Dick Cheney than George Bush. What's going on?

BRUCE FEIN: Well, this is an unusual affair of president/vice-president, where the vice-president is de facto president most of the time. And that's why most of people recognize that these decisions, especially when it comes to overreaching with executive power, are the product of Dick Cheney and his aide, David Addington, not George Bush and Alberto Gonzalez or Harriet Miers, who don't have the cerebral capacity to think of these devilish ideas. And for that reason, they equate the administration more with Dick Cheney than with George Bush.

BILL MOYERS: Bruce, you talk about overreaching. What, in practical terms, do you mean by that?

BRUCE FEIN: It means asserting powers and claiming that there are no other branches that have the authority to question it. Take, for instance, the assertion that he's made that when he is out to collect foreign intelligence, no other branch can tell him what to do. That means he can intercept your e-mails, your phone calls, open your regular mail, he can break and enter your home. He can even kidnap you, claiming I am seeking foreign intelligence and there's no other branch Congress can't say it's illegal-- judges can't say this is illegal. I can do anything I want. That is overreaching. When he says that all of the world, all of the United States is a military battlefield because Osama bin Laden says he wants to kill us there, and I can then use the military to go into your homes and kill anyone there who I think is al-Qaeda or drop a rocket, that is overreaching. That is a claim even King George III didn't make--

BRUCE FEIN: --at the time of the Revolution.

JOHN NICHOLS: Can I-- can I--

BRUCE FEIN: That is clearly overreaching.

JOHN NICHOLS: Let me keep us on Cheney for a second here, because that is--

BILL MOYERS: You think Cheney should be subject to impeachment hearings?

JOHN NICHOLS: Without a doubt. Cheney is, for all practical purposes, the foreign policy president of the United States. There are many domestic policies in which George Bush really is the dominant player. But on foreign policy Dick Cheney has been calling the shots for six years and he continues to call the shots. Remember back in 2000, in the presidential debates, George Bush said America should be a humble

country in the world, shouldn't go about nation building. And Dick Cheney, in the vice-presidential debate, spent eight minutes talking about Iraq.

Now the fact of the matter is that on foreign policy, Dick Cheney believes that the executive branch should be supreme. He said this back to the days when he was in the House during Iran-Contra. He wrote the minority report saying Congress shouldn't sanction the president in any way, President Reagan.

BILL MOYERS: And he's always taken an expansive--

JOHN NICHOLS: Right.

BILL MOYERS: --view of presidential power.

JOHN NICHOLS: And put these pieces together. If Cheney believes in this expansive power. You've got a-- unique crisis, a unique problem because the vice-president of the United States believes that Congress shouldn't even be a part of the foreign policy debate. And he is setting the foreign policy. I mean--

BILL MOYERS: I served a president who went to war on his own initiative, and it was a mess, Vietnam, Lyndon Johnson. There wasn't serious talk about impeaching Lyndon Johnson or Hubert Humphrey. Something is different today.

BRUCE FEIN: Yeah, of course, the-- difference is one thing to claim that, you know, Gulf of Tonkin resolution, was too broadly drafted. But we're talking about assertions of power that affect the individual liberties of every American citizen. Opening your mail, your e-mails, your phone calls. Breaking and entering your homes. Creating a pall of fear and intimidation if you say anything against the president you may find retaliation very quickly. We're claiming he's setting precedents that will lie around like loaded weapons anytime there's another 9/11.

Right now the victims are people whose names most Americans can't pronounce. And that's why they're not so concerned. They will start being Browns and Jones and Smiths. And that precedent is being set right now. And one of the dangers that I see is it's not just President Bush but the presidential candidates for 2008 aren't standing up and saying--

BRUCE FEIN: --"If I'm president, I won't imitate George Bush." That shows me that this is a far deeper problem than Mr. Bush and Cheney.

BILL MOYERS: That struck me about your writings and your book. You say your great-- your great fear is that Bush and Cheney will hand off to their successors a toolbox that they will not avoid using.

JOHN NICHOLS: Well, let's try a metaphor. Let's say that-- when George Washington chopped down the cherry tree, he used the wood to make a little box. And in that box the president puts his powers. We've taken things out. We've put things in over the years.

On January 20th, 2009, if George Bush and Dick Cheney are not appropriately held to account this administration will hand off a toolbox with more powers than any president has ever had, more powers than the founders could have imagined. And that box may be handed to Hillary Clinton or it may be handed to Mitt Romney or Barack Obama or someone else. But whoever gets it, one of the things we know about power is that people don't give away the tools. They don't give them up. The only way we take tools out of that box is if we sanction George Bush and Dick Cheney now and say the next president cannot govern as these men have.

BRUCE FEIN: Well, that's accurate but also we do find this peculiarity that Congress is giving up powers voluntarily. because there's nothing right now, Bill, that would prevent Congress from the immediate shutting down all of George Bush's and Dick Cheney's illegal programs. Simply saying there's no money to collect foreign intelligence-

BILL MOYERS: The power of the purse-

BRUCE FEIN: --the power of the purse. That is an absolute power. And yet Congress shies from it. It was

utilized during the Vietnam War, you may recall, in 1973. Congress said there's no money to go and extend the war into Laos and Cambodia. And even President Nixon said okay. This was a president who at one time said, "If I do it, it's legal." So that it we do find Congress yielding the power to the executive branch. It's the very puzzle that the founding fathers would have been stunned at. They worried most over the legislative branch in, you know, usurping powers of the other branches. And--

BILL MOYERS: Well, what you just said indicts the Congress more than you're indicting George Bush and Dick Cheney.

BRUCE FEIN: In some sense, yes, because the founding fathers expected an executive to try to overreach and expected the executive would be hampered and curtailed by the legislative branch. And you're right. They have basically renounced-- walked away from their responsibility to oversee and check. It's not an option. It's an obligation when they take that oath to faithfully uphold and defend the Constitution of the United States. And I think the reason why this is. They do not have convictions about the importance of the Constitution. It's what in politics you would call the scientific method of discovering political truths and of preventing excesses because you require through the processes of review and vetting one individual's perception to be checked and-- counterbalanced by another's. And when you abandon that process, you abandon the ship of state basically and it's going to capsize.

JOHN NICHOLS: Can I mention another branch of government?

BILL MOYERS: Yeah, sure.

JOHN NICHOLS: Let me mention the unspoken branch of government, which is the fourth estate: The media. The fact of the matter is the founders anticipated that presidents would overreach. And they anticipated that at times politics would cause Congress to be a weaker player or a dysfunctional player. But they always assumed that the press would alert the people, that the press would tell the people. And the fact of the matter is I think that our media in the last few years has done an absolutely miserable job of highlighting the constitutional issues that are in play. You know, you can't have torture and extraordinary rendition. You cannot have spying. You cannot have a-- lying to Congress. You cannot have what happened to Joe Wilson and Valerie Plame, you know?

BILL MOYERS: When she was outed and they tried to punish--

JOHN NICHOLS: Plotted out of the vice-president's office without question. Notations of the vice-president on news articles saying, "Let's go get this guy." Right? You know, you can't have that and not have a media going and saying to the president at press conferences, you know, "Aren't-- isn't what you're doing a violation of the Constitution?" Now, just imagine if the-- if the members of the White House Press Corps on a regular basis were saying to Tony Snow, "But hasn't what the president's done here violated the Constitution?" The whole national dialogue would shift. And Congress itself would suddenly become a better player. So I'm not absolving Congress. I'm certainly not absolving Bush and Cheney. But I am saying that we have a media problem here as well.

BRUCE FEIN: Let me underscore one of the things that you remember, Bill, 'cause I was there at the time of Watergate. And this relates to one political-- official in the White House, Sara Taylor's testimony. And claiming that George Bush could tell her to be silent.

BILL MOYERS: That was a great moment when Sara Taylor said, "I took an oath to uphold the president." Did you see that?

BRUCE FEIN: Yes. And that was like the military in Germany saying, "My oath is to the Fuhrer, not to the country." She took an oath to uphold the Constitution of the United States. I did, too, when I was in the government. There's no oath that says, "I'm loyal to a president even if he defiles the Constitution."

JOHN NICHOLS: Ever.

BILL MOYERS: Just this week Harriet Miers, the president's former counsel, did not show up to testify before the congressional hearing. What do you make of that in regard to this issue of power?

BRUCE FEIN: Well, it shows how far we've come from even the mon-- monarchical days of Richard Nixon where he didn't have the audacity to tell John Dean, "No, you can't testify before the Watergate committee about conversations you had with me about obstructing justice or otherwise."

BILL MOYERS: John Dean was his counsel--

BRUCE FEIN: White House counsel--

BILL MOYERS: --just as Harriet Miers--

BRUCE FEIN: --is to President Bush. Yes.

BILL MOYERS: And Nixon said to Dean, "You must go up there and testify"?

BRUCE FEIN: No. He didn't attempt to impose any objection at all. And Dean, of course, broke the Watergate story that led to Nixon's impeachment and the House's judiciary committee--

BILL MOYERS: And look what--

BRUCE FEIN: --and resignation. And now we have a comparable situation where a Harriet Miers could perhaps expose things regarding President-- Bush's knowledge of the electronic surveillance program or the firing of U.S. attorneys, which seems to contradict what Alberto Gonzalez has said about White House involvement. And yet President Bush is saying, "You can't talk, Harriet Miers, because I don't want any of that political or legal embarrassment." And unlike John Dean who brought the Constitution forward with his testimony, Harriet Miers still is silent.

BILL MOYERS: And you would put that in the bill of particular about impeachment?

BRUCE FEIN: Certainly with regard to the one example of the abuse of presidential authority, seeking to obstruct a legitimate congressional investigation by a preposterous assertion of executive privilege. Remember, in a democracy, in-- under the Constitution, transparency and sunshine is the rule. The exception is only for matters of grave national security secrets. That certainly doesn't apply here.

BILL MOYERS: How does the Scooter Libby affair play into this? Do you think that people-- I mean, how did the Scooter Libby thing play into this? People seem really angry about this. And this is, to me, where the tipping point came.

JOHN NICHOLS: If it wasn't for the president's commutation of Scooter Libby's sentence, we would not be sitting at this table and talking right now.

BILL MOYERS: About impeachment?

JOHN NICHOLS: About impeachment. That sentence opened up a dialogue in this country and even in Congress. A number of members of Congress stepped up and signed on to Dennis Kucinich's articles of impeachment against Vice-president Cheney after the Scooter Libby commutation.

JOHN NICHOLS: We're talking tonight because of the Scooter Libby affair. And--

BILL MOYERS: You mean the impeachment--

JOHN NICHOLS: You-- we're at this table because the fact of the matter is that impeachment has moved well up the list of things we can talk about because of the Scooter Libby affair. Now, should it be the-- one that tipped it? I think Bruce and I would probably both agree no. There are probably more important issues. But the Scooter Libby affair gets to the heart of what I think an awfully lot of Americans are concerned about with this administration and with the executive branch in-- general, that it is lawless, that-- it can rewrite the rules for itself, that it can protect itself.

And, you know, the founders anticipated just such a moment. If you look at the discussions in the Federalist Papers but also at the Constitutional Convention, when they spoke about impeachment, one of

the things that Madison and George Mason spoke about was the notion that you needed the power to impeach particularly as regards to pardons and commutations because a president might try to take the burden of the law off members of his administration to prevent them from cooperating with Congress in order to expose wrongdoings by the president himself. And so Madison said that is why we must have the power to impeach. Because otherwise a president might be able to use his authority and pardons and such to prevent an investigation from getting to him.

BILL MOYERS: Are you suggesting that Libby had the goods on Cheney and Bush?

JOHN NICHOLS: I think the bottom line is Scooter Libby was involved in conversations that, frankly, if those conversations were brought up, the American people would be very helpful to our discourse about whether we entered this war illegally and whether we've continued this war in ways which we never should have.

BRUCE FEIN: I think the spark against the Libby commutation is a little bit different focus. I think it's less on the idea he's covering up for Cheney or Bush than the indication that Bush is totally heedless of any honor for law and accountability. That he has special rules for him and his cabinet. You may recall at the outset of the investigation he said, "Anybody in my office who is responsible for this leak will not work for me." Karl Rove was shown to leak and Karl Rove was still sitting in the White House. And he says, "Well, he will issue a commutation here." But he's not issued commutations in similar circumstances to anybody else.

Moreover, the perjury of the obstruction of justice of Libby is a carbon copy of Clinton, which Republicans, including me, supported. That's why I said you've got to give a stiff sentence here. How can you say that Clinton's deserves impeachment and here you're commuting someone who did the same thing. And it's that sort of outrage that this is now a sneering attitude towards everybody else. "I am king. You play by other people's rules, but as long as I am in the White House, I get to play by my rules." That is something that-

BRUCE FEIN: --offends everybody.

BILL MOYERS: Sneering is not an impeachable offense.

BRUCE FEIN: Sneering in isolation is not but this is combined with all of the other things he's done outside the law. The intelligence gathering, the enemy combatant status, the kidnappings in-- dungeons abroad, all in secret and never disclosing anything to Congress or the American people. Indeed, we couldn't even be discussing some of these issues here like the foreign intelligence collection program if it weren't leaked to THE NEW YORK TIMES. If he had his way, this would be secret forever.

JOHN NICHOLS: Sneering is not an impeachable sentence. But the founders who had recently fought a revolution against a king named George would tell you that monarchical behavior, the behavior of a king, acting like a king, is an impeachable offense. You need not look for specific laws or statutes. What you need to look for is a pattern of behavior that says that the presidency is superior not merely to Congress but to the laws of the land, to the rules of law. And that is why we ought to be discussing impeachment. Not because of George Bush and Dick Cheney but because we are establishing a presidency that does not respect the rule of law. And people, Americans, are rightly frightened by that. Their fear is the fear of the founders. It is appropriate. It is necessary.

BILL MOYERS: So practically, what do you think should happen now? And what do people listening, what can they do?

BRUCE FEIN: I think what ought to happen is there needs to be these hearings in the judiciary hearing this is why we care.

BILL MOYERS: Impeachment hearing--

BRUCE FEIN: Impeachment--

BRUCE FEIN: This is why these are--

BILL MOYERS: You're saying you want the judiciary committee to call formal hearings on the impeachment of George Bush and Dick Cheney?

BRUCE FEIN: Yes. Because there are political crimes that have been perpetrated in combination. It hasn't been one, the other being in isolation. And the hearings have to be not into this is a Republican or Democrat. This is something that needs to set a precedent, whoever occupies the White House in 2009. You do not want to have that occupant, whether it's John McCain or Hillary Clinton or Rudy Giuliani or John Edwards to have this authority to go outside the law and say, "I am the law. I do what I want. No one else's view matters."

JOHN NICHOLS: The hearings are important. There's no question at that. And we should be at that stage. Remember, Thomas Jefferson and others, the founders, suggested that impeachment was an organic process. That information would come out. The people would be horrified. They would tell their representatives in Congress, "You must act upon this." Well, the interesting thing is we are well down the track in the organic process. The people are saying it's time. We need some accountability.

BILL MOYERS: But Nancy Pelosi doesn't agree.

JOHN NICHOLS: Nancy Pelosi is wrong. Nancy Pelosi is disregarding her oath of office. She should change course now. And more importantly, members of her caucus and responsible Republicans should step up. It is not enough--

BILL MOYERS: Well, Bruce is not the only conservative--

JOHN NICHOLS: --and others are. But--

BILL MOYERS: And Bob Barr, who's been here.

BRUCE FEIN: David Keene* ***The above assertion by Bruce Fein was a misstatement. David Keene, President of the American Conservative Union does not support impeachment, although supports legislation repudiating many of President Bush's usurpations.**

JOHN NICHOLS: But they do so, by and large, in a cautious way. They say, "Well, the president's done too much." Let's start to use the "i" word. Impeach is a useful word. It is a necessary word. The founders in the Constitution made no mention of corporation or political parties or conventions or primaries or caucuses. But they made six separate references to impeachment. They wanted us to know this word, and they wanted us to use it.

BILL MOYERS: You're-- does this process have to go all the way to the end? Do Bush and Cheney have to be impeached before it serves the public?

JOHN NICHOLS: I think that what Bush and Cheney have done makes a very good case that the public and the future would be well served if it did go all the way to the end. But there is absolutely a good that comes of this if the process begins, if we take it seriously. And the founders would have told you that, -- that impeachment is a dialogue. It is a discourse. And it is an educational process. If Congress were to get serious about the impeachment discussions, to hold the hearings, to begin that dialogue, they would begin to educate the American people and perhaps themselves about the system of checks and balances, about the powers of the presidency, about, you know, what we can expect and what we should expect of our government.

And so I think that when Jefferson spoke about this wonderful notion of his that said the tree of liberty must be watered every 20 years with the blood of patriots, I don't know that he was necessarily talked about warfare. I think he was saying that at a pretty regular basis we ought to seek to hold our-- highest officials to account and that process, the seeking to hold them to account, wherever it holds up, is-- a necessary function of the republic. If we don't do it, we move further and further toward an imperial presidency.

BRUCE FEIN: The great genius of the founding fathers, their revolutionary idea, with the chief mission of the state is to make you and them free to pursue their ambitions and faculties. Not to build empires, not

to aggrandize government. That's the mission of the state, to make them free, to think, to chart their own destiny. And the burden is on government to give really good explanations as to why they're taking these extraordinary measures. And on that score, Bush has flunked on every single occasion. And we need to get the American people to think. Every time that there's an incursion on freedom, they have to demand why. What is the explanation? Give me a good reason before I give up my freedom.

BILL MOYERS: But read that prologue of the Constitution. The first obligation is to defend the people, to defend their freedom, to defend their rights. And I hear people out there talking in their living rooms right now, Bruce and John, saying, "But wait a minute, you know, we've got these terrorists. We know. Look what happened in London just two weeks ago. We know they're out there. Who else is looking out for us except Bush and Cheney?"

BRUCE FEIN: And Cheney and Bush have shown that these measures are optical. Take, for instance, these military conditions that combine judge, jury, and prosecutors. What have they done? They tried the same offenses that are tried in civilian courts. American Taliban John Walker Lindh got 20 years in the civilian courts. And then we have the same offense, David Hicks, he gets nine months in military prison. Why are you creating these extraordinary measures? They aren't needed. We have the foreign intelligence--

BILL MOYERS: --we don't need to do what Bush-

BRUCE FEIN: No, we don't. They're doing these for optical purposes.

BILL MOYERS: What do you mean "optical"?

BRUCE FEIN: They're trying to create the appearance that they're tougher than all of their opponents 'cause they're willing to violate the law, even though the violations have nothing to do with actually defeating the terrorism. And we have instances where the president now for years has flouted the Foreign Intelligence Act. He's never said why the act has ever inhibited anybody. Remember, this act has been around for over a quarter of a century, and no president ever said it impaired his gathering of foreign intelligence. And suddenly the president's, "No, we have to violate it and flout it because it doesn't work." Well, why? He's never explained it. He's never explained why this act stopped gathering of all the intelligence that was needed to fight the terrorists.

BILL MOYERS: No president and no vice-president have been sitting in the White House or sitting in Washington when terrorists, when killers tried to come in airplanes and crashed into the White House, crashed into the Capitol. Can-- isn't there something to be said for--

BRUCE FEIN: Let me-- there's truth and then there's an inaccuracies. Certainly in the immediate aftermath of 9/11 we were in a fog. There could have been hundreds of thousands terrorist cells. You could understand the president, "I've got to take any action I need right now to uncover a possible second edition of 9/11." And, of course, as soon as I do that, I will go to Congress as soon as possible. I will seek ratification. That's an immediate aftermath of 9/11. We know a lot more in 2007, in July. We know this is not 100 or 1,000 terrorist cells.

We know this is not the danger of the Soviet Union or Hirohito or the Third Reich. And yet the president continues to insist. That's why we need military commissions. We need to say you're an enemy combatant and stick you in prison forever without any judicial review and otherwise. That is a total distortion of what the genuine nature of the problem is and our ability to fight and defeat these terrorists with ordinary civil - the criminal proceedings. And then-- and as you say, they have utilized, Bill, repeatedly. The World Trade Center bombings in 1993, in the aftermath of 9/11 we've had countless conspiracy cases that stopped the terrorist-- enterprises in the bud. And the-- fact is that the utilization of these extraordinary measures has been relatively infrequent, showing that they're largely, they're relevant to the quest to defeat al-Qaeda.

JOHN NICHOLS: Let's go to another zone of this where, you know, they've really been way off the deep end and that is torture. Has the use of torture has the vice-president sort of winking and nodding enthusiasm for the use of torture, has Abu Ghraib helped America? Are we in a better position in the world, in-- getting cooperation from other countries? Are we in a better position in Iraq because of those

pictures from Abu Ghraib? I would suggest to you that using these extraordinary powers and doing so in a non-transparent way, in a secretive way, which certainly suggests that even a-- an awareness of the illegality of it, that-- does more harm than good.

And this is, again, what the founders intended. They intended a consultative process. When the president seizes power, extraordinary power unto himself, he isolates himself. He isolates himself from the rest of the government, and he isolates himself from the people. And so I think that people out there in America who are worried, you know, "Wow, if we take on and try and constrain the president in a time of war, in a time of danger, we may be endangering the country," are actually going the wrong direction.

BRUCE FEIN: And, in fact, without the dialogue you continue the folly like in Vietnam when you shut off debate. And that's what's happened in Iraq, why we continue to persist. Like the 88th charge of the Light Brigade that keeps failing. You think it'll work on the 89th time. But I want to go to a more important point that John mentioned, with specifics as to how-- what the president has done, has made us less safe. We have now indictments in both Italy and Germany against CIA operatives because they abducted and threw into dungeons and tortured people abroad. We need their cooperation if we're going to defeat al-Qaeda.

BILL MOYERS: You mean the cooperation of those governments.

BRUCE FEIN: Of those governments. And now they're saying, "The heck with it. You know, you can't come on our soil and kidnap people outside the law and throw them into dungeons."

BILL MOYERS: That's what Putin does. Putin is doing that--

BRUCE FEIN: Polonium 210, you know? You-- can we borrow some from you? And moreover, think, Bill, of the precedent it sets. It is basically saying, "Mr. Putin, you can kidnap an American outside the Louvre in Paris, throw him in a dungeon in Belarus and say, "Hey, he said sympathetic things about the Chechyan." And therefore, you can operate outside the law because the Chechyan are people you oppose. That's the precedent the president is saying is legal. But the other element with regard to the abuses to point out are Abu Ghraib. That's-- those pictures are all on al-Jazeera television. And they get shown every single day, 24 hours a day, to the Muslim youth that's seeking some meaning in their life. And that's what increases the recruitment attractiveness of al-Qaeda. Those Abu Ghraib abuses--

BILL MOYERS: Well, did you see the Associated Press reported a day or two ago that al-Qaeda, according to intelligence reports, al-Qaeda is now at greater strength than it was before 9/11.

BRUCE FEIN: And that's because of the recruitment. That's-- and because of the abuses, they are able to portray the United States' conflict with terrorism as a conflict with Islam, not with terrorists.

JOHN NICHOLS: And let us--

BRUCE FEIN: And that is a terrible, terrible danger for the American people.

JOHN NICHOLS: But let's take President Bush at his word. Let's take him at his word. He says that what he is doing is that this is a war on terror. That the goal is to weaken al-Qaeda, that is to make America more secure. And so throw out all this other discussion, all the other dialogue we've had. Has he been successful? Has-- is he doing it the right way? Well, I think we have an awful lot of evidence from the government itself, from the CIA itself is that it hasn't worked. It has been a highly ineffective strategy. And so the question of whether he's making us more secure really is a debatable one. And the role of Congress at such a point becomes absolutely critical. We don't-- you don't say, "Oh, well, you know, the Congress-- the president seems to be screwing up. And so-- well, let's sit back and see what he does next." And that seems to be what Democrats in Congress are saying.

BILL MOYERS: Remember in the setup to our discussion I pointed out that Tom DeLay, then the third most powerful Republican in the House, made it his mission to impeach Bill Clinton. Is there a Tom DeLay in the Congress today making it his or her mission to impeach Bush and Cheney?

JOHN NICHOLS: Look-- I'm glad there-- I'm glad there isn't a Tom DeLay. Because Tom DeLay was

seeking to impeach Bill Clinton for political reasons. He did not--

BILL MOYERS: Infidelity.

JOHN NICHOLS: No, it wasn't infidelity. It was he didn't like the fact that Bill Clinton was president. He wanted to remove the president by means other than an election. I hope there is someone there who seeks to constrain the presidents of the United States and constrains the presidency of the United States, not merely because they happen to disagree with the guy but because--

BILL MOYERS: I have to interrupt you and say, look, you guys don't live in la-la land. Both of you are in - in and around power all the time. Why doesn't Nancy Pelosi see it her duty to take on at least the impeachment hearings that you say would educate the public about the states that you think--

BRUCE FEIN: Because I think that politics has become debased so that it's a matter of one party against another and jockeying and maneuvering. There is no longer any statesmanship.

BRUCE FEIN: I go back to the real vulnerability and weakness of Congress, that they don't have anybody who can, as a chairman or even asking a question like John or me say, "Mr. Attorney General, you answer that question. This is the United States of America. Transparency is the rule here. We don't have secret government. That's what Alexander Solzhenitsyn wrote about in the Gulag. That's not the United States of America. We pay your salary. We have a right to know 'cause it's our duty to decide whether what you're doing is legal and wise, not yours. Answer that question or you're held in contempt right now." And that's - and all you need is that tone of voice. But what happens up there? "Well, would you please answer?" Well, are you sure? When-- could you get John Ashcroft? I mean, it's just staggering.

JOHN NICHOLS: And you know what?

BRUCE FEIN: All you would need a lecture like that and they'd answer. They'd be embarrassed--And you have to have a certain vision, Bill. You have-- you have to have a certain depth of conviction about philosophy and what the Constitution means, why those people died. They reached that last full measure of devotion, Cemetery Hill, Guadalcanal, Iwo Jima, the Battle of the Bulge, because there was something higher. You have to feel that in your body and your stomach cause you've mastered all those people who have sacrificed in the past and you know the danger of unchecked power 'cause you read history. You're not a novice. There isn't anybody in the Congress who's able to do that because they don't have that background. But they don't have that temperament.

JOHN NICHOLS: --there may be such people but their first step, their first step must be something that is very hard in these days of extreme partisanship and these days in money and politics and a media that doesn't cover politics very well. Their first step has to be to say, "I cherish my country more than my party and more than the next election." And so-- probably. We're talking about a Democrat.

BILL MOYERS: --to take the lead?

JOHN NICHOLS: And that Democrat's first responsibility is to go to Nancy Pelosi, the speaker of the House, the person who decides what committee assignments they may have and even how nice an office they may get, and say, "You know, Nancy, I respect you. I respect you greatly, Mrs. Speaker. But the country's more important. So you can-- you can get mad at me. You can, you know, push back internally and whatever. But I'm going to the American people and I'm going to talk to them like Bruce Fein just did. Now, my sense is the response to the American people and, frankly, the response of a lot of other members of Congress would be to stand up and applaud. But you have to have that initial courage to do so.

BRUCE FEIN: I think that you have to have not only the courage but you have to have that conviction because it's part of your being.

BILL MOYERS: But the--

BRUCE FEIN: You understand what the United States is about.

BILL MOYERS: But by your-- by what you're saying, you're admitting that nobody has that conviction because it's not happening.

BRUCE FEIN: I agree. And it's hard to know how to just make it happen by spontaneous combustion, Bill. And that's the frustrating element here. Because without that those intellectual and temperamental ingredients, it just isn't going to happen. You do need a leadership element in there. And I don't see it either in the House or the Senate now.

BILL MOYERS: You just said in one sentence there "impeach Bush and Cheney." You're talking about taking that ax against the head of government, both of them.

JOHN NICHOLS: No. No, no, no.

BRUCE FEIN: It's not an ax, Bill.

JOHN NICHOLS: We're talking--

BRUCE FEIN: It's not an ax-- it's not--Impeachment is not a criminal proceeding.

JOHN NICHOLS: You are being--

BRUCE FEIN: --we cannot entrust the reins of power, unchecked power, with these people. They're untrustworthy. They're asserting theories of governments that are monarchical. We don't want them to exercise it. We don't want Hillary Clinton or Rudy Giuliani or anyone in the future to exercise that.

JOHN NICHOLS: Bill Moyers, you are making a mistake. You are making a mistake that too many people make.

BILL MOYERS: Yes.

JOHN NICHOLS: You are seeing impeachment as a constitutional crisis. Impeachment is the cure for a constitutional crisis. Don't mistake the medicine for the disease. When you have a constitutional crisis, the founders are very clear. They said there is a way to deal with this. We don't have to have a war. We don't have to raise an army and go to Washington. We have procedures in place where we can sanction a president appropriately, do what needs to be done up to the point of removing him from office and continue the republic. So we're not talking here about taking an ax to government. Quite the opposite. We are talking about applying some necessary strong medicine that may cure not merely the crisis of the moment but, done right-

BRUCE FEIN: Moreover, it's--

JOHN NICHOLS: --might actually cure--

BRUCE FEIN: It's not an attack on Bush and Cheney in the sense of their personal-- attacks. Listen, if you impeach them, they can live happily ever after into their-

JOHN NICHOLS: And go to San Clemente.

BRUCE FEIN: Yes, go to San Clemente or go back to the ranch or whatever. But it's saying no, it's the Constitution that's more important than your aggrandizing of power. And not just for you because the precedent that would be set would bind every successor in the presidency as well, no matter Republican, Democrat, Independent, or otherwise.

JOHN NICHOLS: The fact of the matter is that, again, the genius of impeachment is it tells the president that, wow, there is a Congress. And that Congress is on your case. And it causes, I think at its best, it causes a president to want to prove he can cooperate, to want to prove he can live within the law.

BRUCE FEIN: Can I interrupt just a second here?

BILL MOYERS: Yeah, sure, sure.

BRUCE FEIN: 'Cause it seems to me very important. I think that if impeachment proceedings began and the president and the vice-president sat back and said, "We understand now. We both understand. We renounce this claim. No military commissions. We're going to comply with the law," the impeachment proceedings ought to stop and they should. It's not trying to be punitive and recriminate against the officials but you've got to get it right. And it's that what I hope would happen.

I've said if the president now renouncing the power and said, "It was wrong and I now respect and honor the separation and the genius of the founding fathers," that's great. And all of the purpose of impeachment would have been accomplished. They could stay in office and we'd have the greatest precedent with regards to executive authority and the separation of powers and checks and balances. This is not an effort to try to blacken the names of the president and vice-president. And nothing would gratify me more than having them stand up and say, "Yeah, I've thought about this now. My mind is concentrated wonderfully," as Sam Johnson would say. The prospect of impeachment, I've been convinced.

JOHN NICHOLS: But also we would have hit that educational moment, that rare moment where a president of the United States has been forced to-- go before the American people and say, "Oh, yeah, I just remembered, you're the boss. You are the bosses. Not me. And that I am not a king." Again, this is why raising impeachment at this point, it's a very late point, is so important. Because we are defining what the presidency will be in the future today because we do know the high crimes and misdemeanors of George Bush and Dick Cheney. They have been well illustrated even by a-- rather lax media. They have been discussed in Congress

. If we know these things and we do not hold them to account, then we are saying, as a people and as a Congress, we are saying that we can find out that you have violated the rule of law. We can find out that you have disregarded the Constitution. You-- we can find out that you've done harm to the republic. But there will still be no penalty for that. If that's the standard that we've set, it will hold. It will not be erased in the future.

BRUCE FEIN: One of the lessons we should have learned from the Nixon impeachment is that it didn't quite fulfill its purpose because Nixon was never compelled to renounce what he'd done.

JOHN NICHOLS: Yes.

BRUCE FEIN: And after which he boasted that what the president does it it's legal. He wasn't repentant at all. If we had insisted maybe as a condition of the pardon or otherwise, you need to repent. We are a government of laws, not of men. And it's wrong for anyone to assert unchecked power. That would have had such a pedagogical effect that would have deterred anything in the future. We've got to make certain this time around we get that proper acknowledgement from the--

JOHN NICHOLS: --there was a group of members, Democratic members of the House, who went to Tippi O'Neil and to-

BILL MOYERS: Then speaker of the House.

JOHN NICHOLS: --back in 1974, after Nixon had resigned, and said, "We must continue the impeachment process." It's-- it is under the Constitution certainly appropriate to do so. And we must continue it because we have to close the circle on presidential power. And the leaders in Congress, the Democratic leaders in Congress at the time said, "No, the-- country has suffered too much." Well, this is the problem. Our leaders treat us as children. They think that we cannot handle a serious dialogue about the future of our republic, about what it will be and how it will operate. And so, you know, to an extent, we begin to act like children. We, you know, follow other interests. We decide to be entertained rather than to be citizens.

Well, you know, and Bruce makes frequent references to the fall of the Roman Empire. You know, that's the point at where the fall comes. It doesn't come because of a bad leader. It doesn't come because of a dysfunctional Congress. It comes when the people accept that-- role of the child or of the subject and are no longer citizens. And so I think this moment becomes so very, very important because we know the high crimes and misdemeanors.

The people themselves have said, if the polls are correct, that, you know, something ought to be done. If nothing is done, if we do not step forward at this point, if we do not step up to this point, then we have, frankly, told the people, you know, you can even recognize that the king has no clothes, but we're not gonna put any clothes on him. And at that point, the country is in very, very dire circumstances.

BILL MOYERS: Bruce Fein and John Nichols, thanks to both of you for being with us on The Journal. It's been a very interesting discussion.