Articles

THE LEGALITY OF THE NSA WIRETAPPING PROGRAM

By: Evan Tsen Lee*

In December 2005, the *New York Times* revealed that the National Security Agency (NSA) was engaged in the warrantless wiretapping of calls involving Americans.[1] In the several subsequent lawsuits challenging the wiretapping program,[2] the government had a relatively rough go of it. One district judge stridently ruled the program unconstitutional on multiple grounds,[3] and another rejected the government's invocation of the "state secrets" doctrine.[4] Now, the Bush Administration has reached an agreement with the Foreign Intelligence Surveillance Court permitting that court to review all warrants on all wiretaps in terrorism investigations.[5] Presumably, this moots the existing litigation, which focuses on prospective injunctive relief.[6] Thus

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1. *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

2. The lawsuits include Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006); American Civil Liberties Union v. National Security Agency, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (mem.); Center for Constitutional Rights v. Bush, No. 06-CV-00313 (S.D.N.Y. filed Jan. 17, 2006); Al-Haramain Islamic Foundation v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006); and Electronic Privacy Information Center v. Dep't of Justice, 416 F. Supp. 2d 30 (D.D.C. 2006).

3. *See* ACLU, 438 F. Supp. 2d at 782 (mem.).

4. The district court in *Hepting* denied the government's motion for summary judgment based on the state secrets doctrine. *See Hepting*, 439 F. Supp. 2d at 1011. However, the Ninth Circuit has granted the government's petition for an interlocutory appeal of the denial. *See* "AT&T Case: Game on in Ninth Circuit," posting of Kurt Opsahl to Deep Links, http://www.eff.org/deeplinks/archives/004988.php (November 7, 2006, 2:40 PM). Most recently, the government has apparently requested a stay of all other suits against telecommunications providers pending the Ninth Circuit's resolution of the interlocutory appeal. *See* "Government Wants Stay in AT&T Case," posting of Rebecca Jeschke to http://www.eff.org/deeplinks/archives/004995.php (November 9, 2006, 10:57 AM).

5. *See* "Court to Oversee U.S. Wiretapping in Terror Cases," http://select.nytimes.com/gst/abstract.html?res=FA0810F83A540C7B8DDDA80894DF404482&n=Top%2fReference%2fTimes%20Topics%2fSubjects%2fP%2fPrivacy (January 18, 2007).

6. The exception would seem to be Al-Haramain Islamic Foundation, 451 F. Supp. 2d at 1218, in which the plaintiffs have asked for damages as well.

it now appears that there will never be a final judgment adjudicating the legality of the wiretapping program, leaving the question to the legal academy. So far, most of the academic commentary has been confined to the blogosphere and op-ed pages.[7] Little of it has sought to dissect the relationship between presidential and congressional power with respect to foreign intelligence surveillance in support of a war. In this article, I seek a fuller answer to the question of whether the NSA program is legal, and I approach the question much in the way an appellate court would approach it if procedurally unencumbered.[8]

Procedure aside, the principal obstacle to determining the legality of the program is that it remains classified. I will assume that the administration's public statements about the program's contents are true. That is, I will assume that the NSA only engages in the warrantless wiretapping of calls into and out of the United States where one of the parties is "affiliated" with Al-Qaeda.[9] The word affiliated is ambiguous; at its most restrictive, it could mean members of Al-Qaeda cells only, or anyone who has spoken with such people on the phone, while, at its most expansive, it could include anyone who has spoken with anyone who has had contact with a cell member. One should bear in mind that I have accepted the administration's claims at face value, just as a court assumes the allegations in a complaint are true when deciding a motion to dismiss.

The most orthodox analytical sequence would start with the question of presidential power – did the President have either statutory or

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7. *See, e.g.*, Posting of Geoffrey Stone to The University of Chicago Law School Faculty Blog, http://uchicagolaw.typepad.com/faculty/2006/07/hamdan_nsa_and_.html (July 5, 2006, 11:16 PM); Vikram Amar & Alan Brownstein, *Why the President's Defense of Executive Power to Wiretap Without Warrants Can't Succeed in the Strict Constructionist Court He Wants* (Feb. 17, 2006), http://writ.news.findlaw.com/commentary/20060217_brownstein.html; Posting of Julian Ku to Opinio Juris, http://www.opiniojuris.org/posts/1135482900.shtml (Dec. 24, 2005, 9:55 PM); Edward Lazarus, *Warrantless Wiretapping: Why It Seriously Imperils the Separation of Powers, and Continues the Executive's Sapping of Power from Congress and the Courts* (Dec. 22, 2005), http://writ.news.findlaw.com/lazarus/20051222.html; Posting of Cass Sunstein to The University of Chicago Law School Faculty Blog, http://uchicagolaw.typepad.com/faculty/2005/12/presidential_wi_1.html (Dec. 20, 2005, 10:18 AM). One law student has written a comprehensive analysis of the issue. *See* Brian R. Decker, Comment, *"The War of Information": The Foreign Intelligence Surveillance Act,* Hamdan v. Rumsfeld,, *and the President's Warrantless Wiretapping Program*, 9 U. PA. J. CONST. L. 291 (2006). A group of prominent academics and lawyers has sent two letters to congressional leaders arguing the illegality of the NSA program. *See* Letter from Curtis A. Bradley, David Cole, Ronald Dworkin, Richard A. Epstein, Harold Hongju Koh, Phillip B. Heymann, Martin S. Lederman, Beth Nolan, William S. Sessions, Geoffrey R. Stone, Kathleen M. Sullivan, Laurence H. Tribe, and William W. Van Alstyne, to Hon. Bill Frist, et al. (July 14, 2006), http://www.acslaw.org/files/Implications%20of%20Hamdan%20for%20NSA.pdf); Letter from Curtis A. Bradley, et al., to Hon. Bill Frist, et al. (Feb. 2, 2006), http://www.law.duke.edu/publiclaw/pdf/second_letter.pdf.

8. I do not attempt to analyze the legality of the "data mining" of telephone numbers that was revealed a few months later. *See* Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA TODAY, May 11, 2006, at 1A.

9. George W. Bush, President Bush Discusses NSA Surveillance Program (May 11, 2006) (transcript available at http://www.whitehouse.gov/news/releases/2006/05/20060511-1.html).

inherent constitutional authority to engage in such wiretapping? The problem is that the answer to this question is likely to turn in substantial part on whether the program is consistent with congressional pronouncements. Thus, I begin with the question of whether the program violates the Foreign Intelligence Surveillance Act of 1978 (FISA).[10] After concluding that the program does violate FISA, I ask whether Congress impliedly exempted the program from the requirements of FISA in its Authorization for the Use of Military Force (AUMF) following the attacks of September 11, 2001.[11] Because I conclude that the AUMF did not create any such exemption from FISA, I then reach the question of whether any provision in Article II of the Constitution authorizes the President to engage in such wiretapping. My conclusion is that the Constitution does authorize the President to order such a program. The next question is whether Congress has the power to regulate the exercise of this presidential power, and if so, whether FISA constitutes a valid regulation. This, in my view, is the most important question in this paper, and answering it takes me through the relationship between presidential and congressional powers in warmaking and foreign relations, the circumstances that led to the adoption of FISA, and the uniqueness of the terrorist threat after 9/11. All this considered, I conclude that FISA is a valid regulation of presidential powers, and therefore that the wiretapping program is illegal. Because I conclude that the program violates a valid statute, I need not consider whether the program also violates the Fourth Amendment; however, for posterity, I very briefly review existing Fourth Amendment law on the question.

I. STATUTORY ANALYSIS

The electronic surveillance provisions of FISA appear at Title 50, United States Code, Sections 1801–1811. Section 1809(a)(1) provides for criminal liability: "A person is guilty of an offense if he intentionally engages in electronic surveillance under color of law except as authorized by statute."[12] Subsection (b) provides a defense if "the defendant was a law enforcement or investigative officer engaged in the course of his official duties and the electronic surveillance was authorized by and conducted pursuant to a search warrant or court order of a court of competent jurisdiction."[13] Subsection (c) authorizes punishment consisting of a fine of not more than $10,000, imprisonment

10. 50 U.S.C. §§ 1801–1811 (2006).
11. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).
12. 50 U.S.C. § 1809(a)(1).
13. 50 U.S.C. § 1809(b).

of not more than five years, or both.[14] Section 1810 permits "aggrieved persons" to sue for damages and attorney's fees.[15]

Clearly, the NSA program qualifies as "electronic surveillance" within the meaning of Section 1809. Thus the program is illegal – indeed, criminal – unless "authorized by statute," or unless FISA is unconstitutional. As I have said, the constitutionality of FISA will form the main part of this paper. For the moment, the question is whether the program is "authorized by statute." Such statutory authorization might come from either of two places – FISA itself or the AUMF.

A. IS THE PROGRAM AUTHORIZED BY FISA?

Three provisions within FISA authorize the executive branch to engage in warrantless wiretapping under certain circumstances. Section 1802 authorizes the President, through the Attorney General, to conduct warrantless wiretapping to acquire "foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that," among other things, "there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party," and the Attorney General has adopted procedures to minimize effects on unconsenting United States persons.[16] Section 1805(f) permits the Attorney General to authorize emergency electronic surveillance if a judge is notified at the same time, and if a proper application for a court order is made no more than 72 hours after the Attorney General orders the surveillance.[17] Section 1811 states simply: "Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress."[18] No other provision in FISA permits warrantless wiretapping.

The administration has neither sought warrants nor sought to invoke any of these provisions.[19] Presumably, the administration believes it has explained this decision by arguing that the AUMF exempted the NSA program from the requirements of FISA, or, in the alternative, that FISA is unconstitutional insofar as it prohibits the program.[20] It is possible that the administration believes that the

14. 50 U.S.C. § 1809(c).
15. 50 U.S.C. § 1810.
16. 50 U.S.C. § 1802.
17. 50 U.S.C. § 1805(f).
18. 50 U.S.C. § 1811.
19. *See* Risen & Lichtblau, *supra* note 1.
20. U.S. Department of Justice, Legal Authorities Supporting the Activities of the

disclosure necessary for compliance with FISA would either jeopardize the security of the program or bog it down in paperwork. Section 1804 requires that an application for a court order approving electronic surveillance include the following: the identity, if known, of the target; a statement of the facts and circumstances supporting the belief that the target is a foreign power or agent of a foreign power; a detailed description of the nature of the information sought; a "statement of the facts concerning all previous applications that have been made to any judge . . . involving any of the persons, facilities, or places specified in the application"; and a statement of the duration of the surveillance.[21] If the surveillance will not terminate "when the described type of information has first been obtained," then the application must further describe the "facts supporting the belief that additional information of the same type will be obtained."[22] This paperwork requirement, though hardly trivial, could not cause the government to miss out on timely surveillance opportunities because of the availability of warrantless wiretapping under Section 1805(f). However, the administration may believe that the required disclosures are so onerous or sensitive that they would threaten the efficacy of the program. Compliance with Section 1805(f) presumably requires the same amount and type of disclosures as compliance with Section 1804, just after the fact. Section 1802 is presumably unavailable to authorize the NSA program because the Attorney General would be unable to certify that the wiretap is unlikely to acquire the contents of communications to which American citizens are parties. It is not clear that the paperwork burden is what actually caused the administration to eschew FISA; it is merely one possibility. The bottom line is that, for whatever reason, the administration has never made any effort to invoke the only forms of authorization that FISA makes available. The program is not authorized by FISA.

B. IS THE NSA PROGRAM AUTHORIZED BY THE AUMF?

In light of my subsequent conclusion that the President has the inherent authority to order the sort of surveillance conducted pursuant to the NSA program, it may seem unnecessary to analyze whether the AUMF authorizes such activity. However, not all will agree with the first conclusion, and for them, the statutory question will be critical. Even more importantly, the Bush Administration has argued that, because Congress authorized the NSA program under the AUMF, it

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National Security Agency Described by the President (Jan. 19, 2006), http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf [hereinafter White Paper].

21. 50 U.S.C. § 1804.

22. *Id.*

impliedly repealed the contrary portions of FISA.[23] If one concludes that the AUMF did not authorize the program, then the "implied partial repeal of FISA" argument dissolves.

On September 18, 2001, Congress enacted legislation authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[24] Obviously this text says nothing explicit about wiretapping or surveillance. The question is whether the NSA wiretapping program constitutes "necessary and appropriate force" within the meaning of the statute.

First, is wiretapping "force" at all? The American Heritage Dictionary defines force as the "capacity to do work or cause physical change; strength; power."[25] Alternatively, it defines force as "power made operative against resistance; exertion: *use force in driving a nail.*"[26] Wiretapping does not involve the exertion of physical coercion or physical strength; it causes no material physical change in the telephonic message being monitored; and it certainly does not exert any physical restraint on the people under surveillance. Accordingly, a plain meaning analysis of the text would conclude that the program is not authorized by the AUMF.

In *Hamdi v. Rumsfeld*, the Supreme Court recently interpreted "necessary and appropriate force" to include the military detention of a United States citizen who had fought against the United States in Afghanistan as a member of the Taliban.[27] Justice O'Connor's plurality opinion[28] stated that "detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[29] This opinion appears to equate fundamental and accepted incidents to war with necessary and appropriate force. Thus, it will be argued, executive branch activity need not strictly be "force" in order to fall within the AUMF; many incidents to war do not fall within the dictionary definition of force.

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23. *Id.*

24. Pub. L. No. 107-40, 115 Stat. 224.

25. The American Heritage Dictionary of the English Language 513 (Houghton Mifflin 1973).

26. *Id.*

27. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

28. On the interpretation of the AUMF, Justice O'Connor's plurality opinion can be treated as a majority opinion because Justice Thomas, who dissented on other grounds, surely would agree with a broad interpretation of the statute.

29. *Hamdi*, 542 U.S. at 518.

This argument takes the *Hamdi* interpretive analysis out of context. No one doubts that physical detention by the military constitutes force. The question before the *Hamdi* Court was whether that particular detention could be characterized as necessary and appropriate; the plurality concluded that it could be because detention of enemy soldiers is a fundamental and accepted adjunct to the waging of war. In other words, the issue before the Court was the meaning of "necessary and appropriate," not the meaning of "force." That the Court found Hamdi's detention "necessary and appropriate force" hardly implies that all fundamental and accepted incidents to waging war are authorized by the AUMF. To take an obvious example, fiscal appropriations are a fundamental and accepted incident to waging war. No war can be fought without money. But appropriating funds is not force, and surely the President would not claim that the AUMF authorized him to spend as much as he felt was necessary to prosecute the war against Al-Qaeda. Appropriations must be, and have been, authorized separately. *Hamdi* tells us something about what force is necessary and appropriate, but it tells us nothing about what constitutes force in the first place.

For these reasons, I believe the best interpretation of force under the AUMF does not include wiretapping. Again, however, some may disagree, and for their benefit it is useful to reach the question of whether wiretapping is necessary and appropriate within the meaning of the AUMF. Professors Curtis Bradley and Jack Goldsmith have recently offered a useful framework for interpreting what types of force are authorized by the statute.[30] They argue that the courts should interpret the AUMF by looking to prior executive branch practice and international laws of war.[31] They further argue that the AUMF "need not specify all approved presidential wartime actions," meaning that not every use of force that Congress authorizes must be explicitly spelled out in the AUMF.[32] Finally, they argue that "it is appropriate for courts interpreting the AUMF to apply a clear statement requirement when the President acts pursuant to the AUMF to restrict the liberty of non-combatants in the United States."[33]

When interpreting a congressional authorization for the use of force, it makes sense to examine what activities prior presidents engaged in to support war efforts. It is reasonable to think that members of Congress, in voting for or against such legislation, make their decisions

30. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005).

31. *Id.* at 2085–2101.

32. *Id.* at 2054–55.

33. *Id.* at 2055. Although I find these aspects of Bradley and Goldsmith's interpretive framework useful, I express no opinion on the rest of their arguments, such as that Congress need not declare war in order to provide full authorization to the President to prosecute a war, and that the interpretation of the AUMF should be unaffected by the notion that the "war on terrorism" is not a "real war." Because I conclude that the AUMF does not authorize the NSA program in any event, I need not reach these issues.

against the factual backdrop of what types of force presidents have used in the past. A textually open-ended grant of authority, such as "necessary and appropriate force," is likely to be understood by all parties as encompassing the types of force that presidents have characteristically employed in past wars.

Prior executive branch practice supports the notion that the AUMF authorizes the NSA program. Both Franklin Roosevelt and Woodrow Wilson ordered warrantless domestic wiretapping in support of their respective wars.[34] Later in this article, I will show how this leads me to conclude that the President has inherent constitutional authority to order the type of surveillance involved in the NSA program. I will defer a fuller account of these wiretapping practices until my discussion of the President's inherent authority. For the moment, it is enough to say that this prong of Bradley and Goldsmith's interpretive framework supports a finding of congressional authorization for the NSA program.

If this prong of the interpretive framework supports the program, however, there is another prong that casts serious doubt on it. Bradley and Goldsmith argue that courts should apply a clear statement requirement when the President invokes the AUMF to support actions that restrict the liberty of non-combatants in the United States, under which, "courts would not interpret the AUMF to authorize a particular presidential action absent a clear statutory indication that Congress intended to authorize the action."[35] If such a clear statement rule were applied to the NSA program, it would be fatal, for the AUMF says nothing about wiretapping or surveillance.

It is not certain whether Bradley and Goldsmith would apply their clear statement rule to the NSA wiretapping program. Two factors give pause. First, Bradley and Goldsmith would apply the clear statement requirement only to presidential action that restricts the liberty of *non-combatants*. For the purposes of this paper, I assume that the administration has been truthful when it claims the warrantless wiretapping program is limited to calls where at least one of the parties is a known member of Al-Qaeda or is linked to Al-Qaeda. Members of Al-Qaeda cells might well be considered combatants. The more serious problem is with those linked in some unspecified way to Al-Qaeda. As noted above, this might mean non-members whom the criminal law would nonetheless deem accomplices (such as occasional or one-time participants in terror activities). On the other hand, it might merely mean people who have logged at least one call to or from an Al-Qaeda member, such as a relative, work associate, or friend who may be completely ignorant of the person's membership. Invoking a familiar principle of evidence law, and common sense, I am going to construe the

34. *See infra* notes 55-65 and accompanying text.

35. Bradley & Goldsmith, *supra* note 30, at 2102–03.

administration's claim to mean the latter. When the administration acknowledges that it is targeting some people who are merely linked to Al-Qaeda, it is making a statement against interests that deserves to be credited as true. If the NSA were only targeting people who could be construed as combatants, we can be certain that the administration would not describe this as wiretapping "Al-Qaeda members and those linked to Al-Qaeda"—it would simply describe them as "Al-Qaeda members," for that would meet with the least political disapproval. Even if I am wrong about that, it must be remembered that many, if not the vast majority, of the wiretapped calls involve one party who is neither an Al-Qaeda member nor independently linked to Al-Qaeda. Many of these people are sure to be non-combatant American citizens.

The other factor that complicates application of the clear statement rule is the definition of liberty. Bradley and Goldsmith state:

> Not every potential liberty intrusion during war warrants protection through a clear statement requirement. For example, Congress need not state clearly, beyond the general authorization to use force, that the President is authorized to drop bombs on members of the enemy armed forces on the battlefield abroad, even if they happen to be U.S. citizens. This is so because individuals who serve in enemy armed forces have no pertinent constitutional right in that situation, and thus there is no constitutional value for a clear statement requirement to protect. . . .
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> This analysis suggests that, in construing the AUMF, a clear statement requirement is appropriate when the President acts against non-combatants in the United States, but not when he engages in traditional military functions against combatants.[36]

It is not clear whether Bradley and Goldsmith would consider a citizen's privacy interest in his telephone calls to be a liberty within the meaning of their clear statement principle. If only constitutional rights qualify as liberties for their purposes, then the applicability of a clear statement requirement will depend upon whether the NSA program violates the Fourth Amendment, a matter I take up separately. But there is no good reason to restrict the notion of liberties to formal constitutional rights. We are trying to divine what Congress meant in the AUMF; we are not

36. *Id.* at 2104–06.

engaging in constitutional analysis *per se.* Most Americans, and most members of Congress, would probably consider the privacy interest in telephone calls to rise to the level of "liberty." As a consequence, there is reason to suspect that Congress would not want warrantless surveillance of such calls to be inferred from a general grant of authority to use force, but rather would prefer that such a program await more specific authorization. This suggests that the clear statement rule ought to apply.

The Supreme Court's recent decision in *Hamdan v. Rumsfeld* confirms the clear statement approach.[37] In *Hamdan,* the government argued that the AUMF authorized the President to try Hamdan by a military commission that did not observe the same basic procedures as a court-martial. Justice Stevens's opinion for the Court disagreed:

> [W]hile we assume that the AUMF activated the President's war powers, see *Hamdi v. Rumsfeld*, and that those powers include the authority to convene military commissions in appropriate circumstances, there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ. *Cf. [Ex Parte] Yerger,* 8 Wall., at 105 ("Repeals by implication are not favored").[38]

Although this portion of Justice Stevens's opinion is less than forthcoming, it is clear that the *Hamdan* Court construed the AUMF strictly when it came to exertions of presidential power that overstepped congressionally prescribed bounds.[39] The *Hamdan* Court construed Article 21 of the Uniform Code of Military Justice (UCMJ) as permitting trial by military commission only when certain strictures, such as general compliance with the procedures of courts-martial, were met.[40] Since the military commission trying Hamdan did not meet those requirements, the Court effectively applied a clear statement rule to determine that the AUMF did not impliedly authorize such use of a military commission. Justice Breyer characterized the Court's approach most bluntly: "The Court's conclusion ultimately rests on a single ground: Congress has not issued the Executive a 'blank check.'"[41]

As applied to the NSA wiretapping program, *Hamdan* pushes powerfully toward the conclusion that the AUMF did not provide authorization. Just as the government in *Hamdan* argued that the AUMF

37. Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).
38. *Id.* at 2775 (some citations omitted).
39. *Id.*
40. *Id.* at 2759.
41. *Id.* at 2799 (Breyer, J., concurring).

repealed any relevant restrictions in Article 21 of the UCMJ by implication, the government here argues that the AUMF repealed anything in FISA that is inconsistent with the wiretapping program. It is difficult to believe that the Court would be any more persuaded by this argument than the one in *Hamdan,* particularly in view of the fact that, unlike Hamdan, a Yemeni citizen, some of the people under surveillance are American citizens.

In response to recent questioning by the Senate Judiciary Committee, Attorney General Alberto Gonzales asserted that the NSA wiretapping program has a stronger case for coverage under the AUMF than does the battlefield detention in *Hamdi.*[42] The wiretapping is designed to prevent future harm, whereas battlefield detention is concerned merely with aggressive acts. Gonzales contended that Congress is more likely to authorize force to prevent further American losses than to punish for past ones.[43] This argument comes up short on several counts. First, as I have just explained, it erroneously assumes that *Hamdi* equates wiretapping with "force" so long as it can be characterized as a "necessary incident to waging war." Second, it ignores the fact that battlefield detention is both forward- and backward-looking. Indeed, if anything, the more pressing reason to detain a captured enemy combatant is to prevent him from rejoining his forces and committing future aggressive acts, rather than to punish him for past ones. Third, the NSA program wiretaps conversations where one party is very possibly, perhaps even likely, innocent. In *Hamdi,* there is probable cause to believe that persons detained as enemy combatants have actually taken up arms against the United States

I conclude that the AUMF does not authorize the NSA program. Wiretapping is not "force," and nothing in *Hamdi* requires a contrary conclusion. Although it is true that past presidential practice includes warrantless domestic wiretapping in wartime, the fact that it impinges on the privacy interests of non-combatant American citizens makes it likely that Congress would not want wiretapping conducted without specific statutory authorization. The enactment of FISA strongly suggests that Congress would view authorization for such wiretapping independently of authorization for force employed against combatants.[44] The Court's narrow construction of the AUMF in *Hamdan* leaves little doubt that it would construe the AUMF narrowly with respect to the wiretapping program as well.

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42. *Department of Justice Oversight: Hearing Before the S. Comm. on the Judiciary* (July 18, 2006) (statement of Alberto Gonzales, Att'y Gen. of the United States), http://judiciary.senate.gov/testimony.cfm?id=1987&wit_id=3936.

43. *Id.*

44. The statements of surprise upon learning of the program from moderate Republicans like Arlen Specter also suggest that many members of Congress did not think they were authorizing such wiretaps when they voted for the AUMF. *See* Sheryl Gay Stolberg & Eric Lichtblau, *Senators Thwart Bush Bid to Renew Law on Terrorism,* N.Y. TIMES, Dec. 17, 2005, at A1.

II. CONSTITUTIONAL ANALYSIS

A. DOES THE PRESIDENT HAVE INHERENT AUTHORITY TO CONDUCT WIRETAPPING OF CALLS INTO AND OUT OF THE UNITED STATES?

In asking whether the President has inherent authority to order the NSA wiretapping program, we must first establish what we mean by "inherent." The American Heritage Dictionary defines "inherent" as "existing as an essential constituent or characteristic; intrinsic."[45] To say that the President has the inherent authority to order the NSA program is to say that such authority inheres either in the position of Commander-in-Chief of the armed forces or, more broadly, in the position of the President as the personification of the executive power of the federal government. As Reid Skibell has recently noted, it is hardly novel for a President to claim that he possesses inherent war powers.[46] What is novel about the Bush administration's claims is that they treat inherent war powers as *exclusive* of any concurrent authority in Congress. According to Skibell, past presidents generally have not feared congressional overruling in the exercise of war powers and have therefore found it unnecessary to risk judicial disagreement with the proposition of exclusivity.[47] In the next section, I will consider whether Congress has the power to regulate surveillance activity in support of a war, which in turn will require a determination of presidential war powers as either exclusive or shared with Congress. For purposes of the present section, I will assume that "inherent authority" means only that the President derives such power directly from the Constitution and not from any statute. I will not assume that "inherent" also means "exclusive."

Lower federal court decisions recognize the executive branch's authority to conduct electronic surveillance of communications going

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45. The American Heritage Dictionary of the English Language 676 (Houghton Mifflin 1973).

46. Reid Skibell, *Separation of Powers and the Commander-in-Chief: Congress's Authority to Override Presidential Decisions in Crisis Situations*, 13 GEO. MASON L. REV. 183, 183–84 (2004).

47. Skibell cites two exceptions, neither of which he finds significant. The first is the public comment by President Clinton's Undersecretary of State, Thomas Pickering, that Congress had no power to interfere with the President's decision to employ force in Kosovo. According to Skibell, the Clinton Administration did not further pursue the point. *Id.* at 190. The second is Attorney General Francis Biddle's claim in oral argument before the Supreme Court that Congress could not interfere with any exercise of the Commander-in-Chief power. Chief Justice Stone cut off Biddle's argument, saying that the Court would not decide the point, and Biddle dropped the matter. *Id.* at 190-91.

into and out of the United States for national security purposes. In *United States v. Butenko,* Judge Adams's opinion for the Third Circuit stated:

> [T]he President is charged with the duties to act as Commander-in-Chief of the Armed Forces and to administer the nation's foreign affairs . . . . To fulfill these responsibilities, the President must exercise an informed judgment. Decisions affecting the United States' relationships with other sovereign states are more likely to advance our national interests if the President is apprised of the intentions, capabilities and possible responses of other countries. Certainly one means of acquiring information of this sort is through electronic surveillance. And electronic surveillance may well be a competent tool for impeding the flow of sensitive information from the United States to other nations.[48]

In *United States v. Truong Dinh Hung,* a Fourth Circuit panel, in discussing the warrant requirement of the Fourth Amendment, implicitly recognized the power of the executive branch to engage in electronic surveillance of communications leaving the United States:

> For several reasons, the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following *Keith*, 'unduly frustrate' the President in carrying out his foreign affairs responsibilities. First of all, attempts to counter foreign threats to the national security require the utmost stealth, speed, and secrecy. A warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations.[49]

48. United States v. Butenko, 494 F.2d 593, 601 (3d Cir. 1974) (en banc).

49. United States. v. Truong Dinh Hung, 629 F.2d 908, 913 (4th Cir. 1980). The *Truong* Court claimed to be following the analytical framework of *United States v. U.S. District Court (Keith)*, 407 U.S. 297 (1972), in which the Supreme Court held that the executive branch must obtain a warrant before engaging in purely domestic national security surveillance. The *Keith* Court also stated, "[T]he instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." *Keith*, 407 U.S. at 308.

It is critical to note, however, that both *Butenko* and *Truong* occurred prior to the passage of FISA.[50] Normally, the passage of legislation would not affect the analysis of constitutional provisions. However, as Justice Jackson famously explained in his concurrence in *Youngstown Tube & Sheet Co. v. Sawyer*, the existence of legislation in the area of warmaking and foreign relations affects constitutional analysis, at least as a heuristic matter.[51] In FISA, Congress weighed the values of individual privacy and the imperatives of national security differently than did the courts in *Butenko* and *Truong*. That fact reduces the weight that *Butenko* and *Truong* can be given in resolving the question of inherent presidential authority to engage in the NSA program.

The Supreme Court has said nothing about the President's powers to conduct wiretapping of phone calls into and out of the United States. Indeed, with the exception of its celebrated decisions in *Ex parte Milligan*[52] and *Youngstown* (both discussed later), the Supreme Court has said next to nothing about the President's inherent powers with respect to foreign relations and war generally. As Louis Henkin writes:

> Lawyers have done less well than historians by constitutional developments in foreign affairs. That may be because constitutional law is largely judicial jurisprudence and the courts have not contributed to the law of foreign affairs as they have to constitutional jurisprudence generally, if only because few issues can overcome the hurdles to adjudication set up by requirements of case or controversy, standing to sue, justiciability. Constitutional questions that arose in the 18th century are still with us, and the infinite variety of international relations continues to throw up new issues, many of which remain unresolved. The Supreme Court has declared foreign affairs to be a discrete constitutional category, and one of its categorical qualities appears to be its jurisprudential uncertainties. A famous articulation by Justice Robert Jackson identified a 'twilight zone' where constitutional authority is uncertain; the conduct of foreign affairs has long been the principal tenant of that zone.
>
> The most intractable issues of the constitutional law of foreign affairs have been those disputing the

50. Although *Truong* was not decided until 1980—two years after the passage of FISA—the surveillance at issue took place from May 1977 to January 1978. 629 F.2d at 911–12.

51. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–39 (1951) (Jackson, J., concurring) (explaining how presence or absence of legislation affects judicial scrutiny of president's exercise of Art. II powers).

52. *Ex parte* Milligan, 71 U.S. 2 (1866).

> allocation of power between President and Congress—in recent years, notably, war powers and control of covert activities.[53]

Michael Reisman has written that, in lieu of a settled constitutional law of presidential and congressional powers in the war-making and foreign relations areas, practice has come to cohere around an "operational code":

> The consensus has been far less certain with regard to *who* will decide, and *how*, to initiate and use [military force], at varying intensities. The original terms of the Constitution have been invoked by partisans of opposing views, but debate in those terms has proved inconclusive. Behind the legal bickering, a complex, but unstated, operation code has developed, allocating competence to initiate, direct and terminate different types of coercion among the branches. . . .
>
> A constitutional common law developed early with regard to the use of force short of war. The President used the military instrument at his disposal in a variety of settings in which war had not been declared and for which the Senate or Congress as a whole had not voted specific authorization . . . . Congress, as a whole, rather than being an obstacle and competitor to the Executive's expanded role in foreign policy, was often accommodating and compliant. That trend was matched and validated by the judiciary.
>
> After World War II, this de facto accommodation, which had suffered episodic stresses, began to disintegrate, with a series of abortive war powers resolutions, increasing congressional efforts to assert control over agreement making, and more direct intervention in diplomatic protection. Congress, for example with regard to Cuba in 1962, sometimes urged a reluctant or vacillating Executive to apply force short of war. During the Vietnam War, the weakening of party discipline at the national level and the disintegration of a bipartisan foreign policy exacerbated divisions between Congress and the Executive. Although U.S.

53. Louis Henkin, *in* FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 2-3 (Louis Henkin et al. eds., 1990).

> participation in that conflict was authorized by a theoretically rescindable congressional resolution, members of Congress became concerned by what they saw as an erosion of their power in international relations. It is no surprise that this period witnessed the enactment of both the War Powers Resolution and the Case-Zablocki amendment, which purported to narrow asserted executive powers in, respectively, use of force and agreement making. These developments occurred at the nadir of executive-congressional relations in this century. The War Powers Resolution was passed within weeks of the 'Saturday Night Massacre,' without which it might well have fared no better than its predecessors.[54]

Given the paucity of Supreme Court precedent on the scope of the President's inherent authority as Commander-in-Chief, then, we cannot expect a definitive answer to the question of whether the NSA wiretapping program falls within those inherent powers.

Despite the absence of Supreme Court precedent, there is no lack of prior presidential practice in the area. There is solid historical precedent for a President ordering the wiretaps of calls going into and out of the United States in support of a war effort. Before examining this precedent, however, we must establish its relevance to the constitutional inquiry.

The fact that prior presidents may have abused their authority does not, through some kind of constitutional adverse possession, make it constitutional for future presidents to abuse their authority. To put it differently, a purely historical pedigree does not make up for the absence of legal authorization. Here, however, the problem is different: we do not know whether such practice violates the Constitution because neither text, history, structure, nor precedent establishes its legality or illegality. The text of the Constitution says nothing about wiretapping or even military surveillance in general. The same applies to the original intent of the framers and ratifiers of the Constitution. The structure of the Constitution simply gives both the President and Congress considerable authority to conduct war and foreign relations—it does not imply anything specific about wiretapping. If text, history, structure, or precedent established the illegality of presidential wiretapping without congressional authorization, then prior practice would not matter, as it could not trump the Constitution itself. But where text, history, structure, and precedent are silent, we must have *some* basis on which to determine constitutionality. I do not argue that prior practice is the only

54. W. Michael Reisman, *War Powers: The Operational Code of Competence*, *in* FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 72–73 (Louis Henkin et al. eds., 1990).

legitimate remaining basis for constitutional interpretation; I only argue that it is one such basis.

The most relevant prior presidential action was the secret executive directive issued by Franklin D. Roosevelt on May 21, 1940.[55] Earlier that month, with the drumbeats of war steadily loudening, the House of Representatives approved a joint resolution affirming the Federal Bureau of Investigation's authority to conduct wiretapping for national security purposes, notwithstanding the general prohibition on wiretapping contained in the Communications Act of 1934;[56] however, the Senate failed to approve the resolution. It was then that President Roosevelt acted unilaterally.[57] His directive authorized the FBI to engage in warrantless wiretapping of anyone "suspected of subversive activities against the United States, including suspected spies."[58] The FBI was required to obtain the permission of the Attorney General before wiretapping and was instructed to keep wiretaps to a "minimum" and limit them "insofar as possible to aliens."[59]

Like President Bush's, President Roosevelt's wiretapping program was ordered despite the existence of congressional legislation to the contrary. The Communications Act of 1934 provided that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; . . ."[60] In *Nardone v. United States,* the Supreme Court held that this provision applied to government agents seeking evidence for a criminal prosecution.[61] President Roosevelt took the position that this statute did not apply when the information was being gathered for intelligence purposes during wartime[62]—a plausible argument, but not clearly

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55. *See* ATHAN THEOHARIS, THE FBI AND AMERICAN DEMOCRACY 56-57 (Univ. of Kansas Press 2004). I am indebted to my students Alan Mehaffey and Robert Forouzandeh for edifying me about past presidential wiretapping activities and sources documenting them.

56. *See* Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978,* 137 U. PA. L. REV. 793, 797 (1985).

57. *Id.* at 797–98.

58. *See* William C. Banks & M. E. Bowman, *Executive Authority for National Security Surveillance,* 50 AM. U. L. REV. 1, 28 (2000)(citing S. Rep. No. 95-604, at 10 (1977)).

59. Confidential Memorandum from Franklin D. Roosevelt to the Attorney General, Robert Jackson, May 21, 1940, reprinted in Theoharis, *supra* note 55.

60. 47 U.S.C. § 605 (as quoted by Nardone v. United States, 302 U.S. 379, 381 (1937)).

61. 302 U.S. 379.

62. Roosevelt's memorandum to Attorney General Robert Jackson stated in part:

> I have agreed with the broad purpose of the Supreme Court decision relating to wiretapping in investigations. The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and it is also right in its opinion that under ordinary and normal circumstances wiretapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights. However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation. It is, of course, well known that certain

correct, given the *Nardone* Court's "plain meaning" textual analysis.[63] The point is not that President Roosevelt was right to disregard the Communications Act of 1934, but that he obviously believed he had inherent authority under the Constitution to order such wiretaps.

Another historical precedent occurred shortly after Congress declared war in April 1917. During the two prior years, saboteurs had placed explosives on ships docked in American ports and set fires at a munitions plant on Black Tom Island in the New York harbor.[64] President Wilson determined that American intelligence programs were insufficient to protect the nation against such threats. He issued Executive Order 2604, which purported to authorize the interception of all international telephone and telegraph communication to or from the United States.[65] Although the amount of telephone and telegraph traffic to and from the United States was much smaller in 1917 than it is today, Wilson's order swept far more broadly than the NSA's current wiretapping program. It was not limited to communications in which one party was a suspected saboteur, or even in which one party was suspected of sympathizing with enemy powers.

These historical precedents reinforce the common sense notion that the Commander-in-Chief clause must imbue the President with the power to order electronic surveillance in support of a war. The plain fact

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> other nations have been engaged in the organization of propaganda of so called 'fifth column' in other countries and in preparation for sabotage, as well as in actual sabotage. It is too late to do anything about it after sabotage, assassinations and 'fifth column' activities are completed. You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigating agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies. You are requested furthermore to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.

Roosevelt, *supra* note 59.

63. "We nevertheless face the fact that the plain words of section 605 forbid anyone, unless authorized by the sender, to intercept a telephone message . . . ." *Nardone*, 302 U.S. at 382.

64. Theoharis, *supra* note 55, at 21–22.

65. *See* Douglas M. Charles, Was Gonzales's Historical Defense of Eavesdropping Convincing? (February 20, 2006), http://hnn.us/articles/21722.html. Professor Charles attempts to minimize this historical precedent by saying:

> A reading of executive order 2604 reveals that it only required owners of telegraph, telephone, and undersea cable communications companies to not transmit or receive foreign messages except under the publicly known censorship "rules and regulations" established by the War and Navy Departments. The NSA secured the *voluntary cooperation* of telecommunications companies to win top secret access to their extensive communications switches through which most American phone calls are routed; they were not compelled to do so, and we know of no bureaucratic rules or regulations for the NSA snooping."

Id. There are two major problems with this attempted distinction of the Wilson executive order. First, it is highly doubtful that the cooperation of telecommunications companies was truly voluntary, given the coercive environment of the censorship rules. Second, even if the telecommunications companies can be said to have consented, the parties to the wiretapped phone calls certainly did not.

is that war cannot be waged without intelligence, and modern war cannot be waged without electronic surveillance. Saying that the Commander-in-Chief has no inherent power to order electronic surveillance in support of a war is little different than saying the Commander-in-Chief has no inherent power to provide for the feeding of troops or the requisition of maps. It is true that the acts of feeding troops or requisitioning maps do not infringe on anyone's constitutional rights, but that is another matter. We are currently considering whether Article II authorizes the President to engage in wiretapping to support a war, not whether the Bill of Rights places limits on that authority. It would be astounding to find that the Commander-in-Chief did not possess this basic tool for waging modern warfare.

Two points must be addressed. First, how is wiretapping any different from President Truman's attempt to nationalize the steel mills, which was rejected in *Youngstown*? In *Youngstown*, Justice Black's majority opinion struck down President Truman's seizure of the steel mills on the ground that Congress alone had the authority to order such seizure.[66] The difference between President Truman's action and the NSA program is that the latter rests on solid historical practice and the former does not. When analyzing inherent authority under the Commander-in-Chief clause, the question is whether the action is inseparable from the waging of war, because it makes no sense to deny the Commander-in-Chief any such powers. The large-scale nationalization of war material producers did not occur in either World War I or World War II; for President Truman to insist that it was essential to the conduct of the Korean War—a major, but less than all-consuming, military action—was therefore a stretch. As we have seen, however, Presidents Wilson and Roosevelt both engaged in large-scale wiretapping in support of World War I and World War II. It is critical to remember, however, that we are currently considering only the question of inherent authority, and that "inherent" does not mean exclusive.

Second, even if the President has inherent authority to wiretap in support of a war, is the campaign against Al-Qaeda really a "war," or is it more akin to the "War on Crime" or "War on Poverty?" This is not the place to enter the complicated debate about what is "war" and what it means to "declare" it. It suffices to say that, if the President has authority to engage in military action against Al-Qaeda, then Article II gives him the authority to intercept enemy communications in support of that military action. Again, assuming that Congress has the power to authorize the President to engage in military action without a formal declaration of war, then the Commander-in-Chief must have the authority to use tools essential to the conduct of that military action. Those who object to the wiretapping program on the ground that it does

66. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–89 (1951).

not support a valid "war" must challenge the constitutionality of the AUMF altogether. That subject is beyond the scope of this paper.

B. IS FISA UNCONSTITUTIONAL INSOFAR AS IT CONFLICTS WITH THE NSA PROGRAM?

For the reasons cited by Louis Henkin and Michael Reisman in the excerpts quoted in the previous section, it is impossible to state with any exactness existing law with respect to presidential versus congressional powers in warmaking and foreign relations. The Supreme Court has assiduously avoided concrete statements in this area. Armed with little in the way of judicial precedent, then, we must attempt to answer the key remaining questions: May Congress ever regulate the President's inherent Article II powers, and, if so, when? May Congress regulate the President's power to conduct surveillance of phone calls going into and out of the United States?

The most relevant judicial pronouncement on the second question is a dictum from the Foreign Intelligence Surveillance Court of Review's opinion in *In re Sealed Case No. 02-001*.[67] The court stated, "We take for granted that the President does have [the authority to conduct warrantless searches to obtain foreign intelligence information] and, assuming that is so, FISA could not encroach on the President's constitutional power."[68] The question before the court was whether FISA amplifies the President's power to conduct warrantless searches under certain circumstances, not whether FISA restricts presidential power, and so the statement was unnecessary to the decision of the case. But it is a clear statement by an Article III court that Congress may not restrict the President's power to engage in foreign intelligence wiretapping.

Some scholars have opined forcefully that the answer to the first, more general, question is also negative. In an article following the events of September 11, 2001, Robert Delahunty and Professor John Yoo argued that Congress may not restrict the Commander-in-Chief power.[69] The article's principal thrust was that the President enjoys broad constitutional power, even without supporting legislation, to deploy military force to retaliate against the perpetrators of the September 11 attacks. However, in the course of making that argument, Delahunty and

67. 310 F.3d 717 (FISA Ct. Rev. 2002).

68. *Id.* at 742.

69. Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487 (2002).

Yoo discuss the possible impact that the War Powers Resolution might have on those presidential powers.

> Section 2(c) of the War Powers Resolution (WPR) states:
>
> > The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.[70]

Delahunty and Yoo begin by noting that the executive branch has "consistently" taken the position that section 2(c) of the WPR does not constitute a legally binding definition of Presidential authority to deploy our armed forces.'"[71] Despite the WPR's non-binding nature, however, Delahunty and Yoo argue that its subsection (c)(3) "correctly identifies" one source of presidential authority to deploy military forces into hostilities. Thus, the WPR effectively acts not as a restriction on presidential power, but as a legislative confirmation of it.

The portion of Delahunty and Yoo's argument most relevant for present purposes is the discussion of what they refer to as the WPR's "substantive requirements"; in particular, the reporting requirements of Section 4[72] and the "cut off" provisions of Section 5:[73]

> [A]s we read the WPR, action taken by the President pursuant to the constitutional authority recognized in section 2(c)(3) cannot be subject to the substantive requirements of the WPR . . . . Insofar as the Constitution vests the power in the President to take military action in the emergency circumstances described by section 2(c)(3), we do not think it can be restricted by Congress through, e.g., a requirement that the President either obtain congressional authorization

70. 50 U.S.C. § 1541(c) (1994).

71. Delahunty & Yoo, *supra* note 69, at 513. *See also* Richard F. Grimmett, Congressional Research Service, War Powers Resolution: Presidential Compliance (Mar. 16, 2004), http://www.fas.org/man/crs/IB81050.html ("[S]ince the War Powers Resolution's enactment, over President Nixon's veto in 1973, every President has taken the position that it is an unconstitutional infringement by the Congress on the President's authority as Commander-in-Chief. The courts have not directly addressed this question.").

72. 50 U.S.C. § 1543 (1994).

73. 50 U.S.C. § 1544 (1994).

> for the action within a specific time frame, or else discontinue the action. Were this not so, the President could find himself unable to respond to an emergency that outlasted a statutory cut-off, merely because Congress had failed, for whatever reason, to enact authorizing legislation within that period.[74]

Thus, Delahunty and Yoo identify at least one circumstance under which they believe Congress may not restrict presidential action—a national emergency precipitated by an attack on the United States. They do not say whether there might exist circumstances under which Congress may restrict the exercise of other Commander-in-Chief powers, such as wiretapping.

The Delahunty and Yoo article is part of a larger academic debate about the division of warmaking powers between Congress and the President. Many prominent scholars, including the late John Hart Ely,[75] Dean Harold Koh,[76] Professor Louis Fisher,[77] Professor Thomas Franck,[78] Professor Michael Ramsey,[79] and the historians Charles Lofgren[80] and William Michael Treanor[81] have argued that Congress has exclusive power to make war. Other noted constitutional scholars, including Phillip Bobbitt,[82] Robert Bork,[83] Eugene Rostow,[84] Edward Corwin,[85] Henry Monaghan,[86] Michael Stokes Paulsen,[87] and John

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74. Delahunty & Yoo, *supra* note 69, at 514.

75. JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3-5 (1993).

76. HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990).

77. LOUIS FISHER, PRESIDENTIAL WAR POWER (1995).

78. THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992).

79. Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002).

80 CHARLES A. LOFGREN, "GOVERNMENT FROM REFLECTION AND CHOICE": CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM (1986); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972).

81. William M. Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997).

82. Phillip Bobbitt, *Courts and Constitutions: War Powers: An Essay on John Hart Ely's* War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath, 92 MICH. L. REV. 1364, 1370-88 (1994) (book review).

83. Robert Bork, *Erosion of the President's Power in Foreign Affairs*, 68 Wash. U. L.Q. 693, 698 (1990).

84. Eugene V. Rostow, *"Once More Unto the Breach:" The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1, 6 (1986); Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 864-66 (1972).

85. EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984, at 234, 256 (5th ed. rev. 1984).

86. Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. REV. 19 (1970).

87. Michael Stokes Paulsen, *The Changing Laws of War: Do We Need a New Legal Regime After September 11?: The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004) (symposium).

Yoo,[88] have argued that the President has the power to commence hostilities unilaterally. The power to commence hostilities is not exactly the same thing as the power to engage in electronic surveillance for national security purposes; one could make plausible arguments that the latter is either narrower or broader than the former. More to the point, Congress's role in commencing hostilities might diverge from its role, if any, in regulating military surveillance, owing to the existence of an explicit constitutional charge in the "declare war" clause. But some insights from the warmaking powers debate are helpful here. For example, Ramsey states:

> Everyone agrees that the President has the authority to direct the use of force once war is begun. While I join that consensus, I shall make two additional points from the perspective of a textual theory of war powers: First, that the President's strategic and tactical control of warmaking is confirmed by the textual theory of this Article; and second that, notwithstanding this presidential power, the textual theory demands that Congress retain some substantial ability to set war goals through its declare-war power.[89]

Note that Ramsey cites the "declare war" clause as the reason that Congress must have some say over the direction of a war. In the wiretapping context, Congress cannot rely on the "declare war" clause as authorization for regulatory legislation. Instead, such authorization comes from either or both of two other clauses in Article I, Section 8. One is Clause 14, which states: "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces."[90] This clause clearly authorizes regulation of the wiretapping program, so long as the program itself comes within the phrase, "land and naval Forces." Some insist that the NSA is not within the military, and it is probably true that Congress could have placed the NSA under the aegis of the Central Intelligence Agency or some other non-military arm of the government. On the other hand, the NSA was authorized by way of a Department of Defense directive, is chock-full of military personnel, and has the armed forces (and the President) as its principal clients.[91] There is some room for argument here, but I believe the NSA is within the "land and naval Forces" for purposes of the wiretapping program.

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88. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).

89. Ramsey, *supra* note79, at 1619.

90. U.S. CONST. art. I, § 8, cl. 14.

91. *See* About NSA, http://www.nsa.gov/about/about00018.cfm#3, questions 5–6 (last visited Feb. 10, 2007).

The other relevant provision is Clause 3: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[92] For the purposes of this paper, I assume the NSA program covers phone calls into and out of the United States. It is well established that "the commerce power includes all channels of interstate commerce, including the phone system."[93] Indeed, the Communications Act of 1934[94] and Title III of the Omnibus Crime Control and Safe Streets Act 1968,[95] both of which placed significant restrictions on the wiretapping of telephone lines, were premised on the Commerce Clause.[96] There is no good reason to think that telephonic communications would not be considered "commerce" for purposes of the Foreign Commerce Clause when they are uncontroversially considered commerce for purposes of the Interstate Commerce Clause.

Ultimately, *Hamdan* fatally undermines the Delahunty and Yoo argument and seriously marginalizes the dictum from *In Re Sealed Case.* It simply leaves no room for the assertion that the President's inherent powers are always exclusive of congressional regulation. Justice Stevens's majority opinion makes it clear that Congress may regulate the President's inherent powers, at least under some circumstances.[97] In *Hamdan*, petitioner Hamdan challenged the President's authority to convene a military commission to try him for conspiracy growing out of the United States' invasion of Afghanistan in 2001. The Court held that the President's authority to convene such commissions resides in Article 21 of the Uniform Code of Military Justice (UCMJ), which (according to the Court) did not authorize the particular commission convened in Hamdan's case.[98] When the government argued that the AUMF and the Detainee Treatment Act had expanded that authority, the Court disagreed, saying there was nothing in the text or legislative history of either statute to warrant the conclusion that they had expanded the President's power to convene military commissions.[99] Finally, confronting the possibility that the President might possess inherent

92. U.S. CONST. art. I, § 8, cl. 3. I am indebted to Krista Bell for her excellent research in this area.

93. Ameritech Corp. v. McCann, 403 F.3d 908, 913–14 (7th Cir. 2005); *see also* United States v. Carnes, 309 F.3d 950, 954 (6th Cir. 2002) ("[T]elecommunications are both channels and instrumentalities of interstate commerce.").

94. 47 U.S.C. §§ 151615 (2001).

95. 18 U.S.C. §§ 2510-2522 (2000).

96. *See* United States v. Anaya, 779 F.2d 532, 535 (9th Cir. 1985) ("Since the facilities used to transmit wire communications form part of the interstate or foreign communications network, Congress has plenary power under the commerce clause to prohibit all interception of such communications, whether by wiretapping or otherwise.").

97. *See also* Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in time of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.").

98. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2759 (2006).

99. *Id.* at 2775.

constitutional authority to convene such commissions, the Court held that Article 21 of the UCMJ created a valid set of limits on any such powers:

> Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). The Government does not argue otherwise.[100]

The majority in *Hamdan* obviously accepted Justice Jackson's description of the relationship between presidential and congressional powers:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.
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> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act

100. *Id.* at 2774 n.23.

> of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, then his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[101]

Justice Stevens's majority opinion in *Hamdan* interprets the third prong of this framework as confirming congressional power to regulate inherent presidential powers. Conceptually, this may or may not be a correct reading; Jackson's idea may be more of an epistemological hedge by judges than a true power to countermand by Congress. That is, in light of the fuzziness of the lines between presidential and congressional power, Jackson may be saying that courts will presume an absence of presidential power whenever Congress has spoken to the contrary. With respect to *Youngstown* or the NSA wiretapping program, it makes no difference. Jackson's dictum and its confirmation in *Hamdan* effectively establish that Congress may regulate inherent presidential powers. This obviously eliminates the argument that the most ardent supporters of

101. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1951) (Jackson, J., concurring).

executive power would wish to advance, namely that Congress may never regulate the President's inherent constitutional authority. It does not, however, establish *when* and *under what circumstances* Congress may regulate exercises of the President's inherent authority. Thus, *Hamdan* does not in and of itself preordain the conclusion that Congress may regulate the President's authority to conduct foreign intelligence wiretapping. Logically, it can only be read to hold open the possibility that Congress has the power to regulate such executive activity.[102] In order to answer the question more completely and intelligently, we should investigate the whole range of possibilities regarding congressional regulation of presidential powers. In conducting this investigation, it will be useful to separate two distinct dimensions of the congressional power to regulate inherent presidential authority. One dimension is categorical—that is, which of the President's constitutional powers are subject to regulation? The other dimension is circumstantial—that is, under which circumstances may those powers be regulated?

1. ABSOLUTE RESTRICTIONS ON CONGRESSIONAL REGULATION OF PRESIDENTIAL POWERS.

It seems clear that there must be at least two presidential powers effectively beyond the regulation of Congress: the veto power and the pardon power.

The veto is the President's principal check on congressional power. If Congress could place any significant restriction on the exercise of the veto, it would overwhelm the balance of power between the two institutions. Of course, one can imagine trivial forms of regulation that would be unobjectionable—that vetoes be announced on a certain size of paper, for example. Congress obviously has no reason to trifle with that sort of regulation. Any non-trivial regulation that could be imagined would be quite troubling. If Congress were to require representatives of the President to meet and confer with congressional leaders before exercising a veto, or were to require the President to notify Congress of his intent to exercise a "pocket veto" before it votes on adjournment, the balance of powers between the executive and legislative branches would be significantly altered. The veto power, then, must be categorically immune from congressional regulation.

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102. Admittedly, the *tone* of Justice Breyer's opinion in particular seems to point toward a conclusion that Congress does have the power to regulate presidential foreign intelligence wiretapping ("The Court's conclusion ultimately rests on a single ground: Congress has not issued the Executive a 'blank check.'"). *Hamdan*, 126 S. Ct. at 2779 (Breyer, J., concurring). To be fair, however, that statement applies much more readily to the question of whether Congress in the AUMF authorized the military commissions at issue in *Hamdan* than it does to the question of whether the Constitution permits Congress to regulate certain of the President's powers.

The pardon power is another candidate for categorical exemption. Although the pardon power may appear to be more of a check against the judicial branch than against the legislative branch, that may be an illusion. In the absence of some sort of restriction, Congress could enact legislation selectively denying the effect of presidential pardons in court. Consider *United States v. Klein*,[103] a case usually cited for the proposition that Congress lacks plenary power to restrict the appellate jurisdiction of the Supreme Court. The Court's opinion, while not a model of clarity, also supports the proposition that Congress lacks power to regulate the pardon power. Accordingly, an in-depth examination of the case is necessary.

During the Civil War, Treasury agents seized cotton belonging to one Wilson.[104] They sold the cotton and paid the proceeds into the Treasury.[105] The seizure was carried out pursuant to the Abandoned and Captured Property Act of 1863, which authorized such seizure, but provided that any loyal owner whose property was abandoned or captured could recover compensation upon proof "that he has never given aid or comfort to the present rebellion."[106] In fact, Wilson had aided the Confederacy by guaranteeing some loans to Confederate officers; however, he had sought and received a presidential pardon.[107]

Wilson died shortly thereafter, and his executor, Klein, filed a petition in the federal Court of Claims on behalf of Wilson's estate.[108] After receiving evidence of the presidential pardon, the Court of Claims awarded Klein judgment for $125,300.[109] The federal government appealed to the United States Supreme Court.[110] During the appeal, however, Congress enacted a most unusual proviso to an appropriations bill:

> Provided, That no pardon or amnesty granted by the President, whether general or special, by proclamation or otherwise, nor any acceptance of such pardon or amnesty, nor oath taken, or other act performed in pursuance or as a condition thereof, shall be admissible in evidence on the part of any claimant in the Court of Claims as evidence in support of any claim against the United States, or to establish the standing of any claimant in said court, or his right to bring or maintain suit therein; nor shall any such pardon,

103. United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).
104. *Id.* at 142–43.
105. *Id.*
106. *Id.* at 131 (italics omitted).
107. *Id.* at 132.
108. United States v. Klein, 80 U.S. (13 Wall.) 128, 132 (1872)..
109. *Id.*
110. *Id.*

amnesty, acceptance, oath, or other act as aforesaid, heretofore offered or put in evidence on behalf of any claimant in said court, be used or considered by said court, or by the appellate court on appeal from said court, in deciding upon the claim of said claimant, or any appeal therefrom, as any part of the proof to sustain the claim of the claimant, or to entitle him to maintain his action in said Court of Claims, or on appeal therefrom; but the proof of loyalty required by the Abandoned and Captured Property Act, and by the sections of several acts quoted, shall be made by proof of the matters required, irrespective of the effect of any executive proclamation, pardon, amnesty, or other act of condonation or oblivion. And in all cases where judgment shall have been heretofore rendered in the Court of Claims in favor of any claimant, on any other proof of loyalty than such as is above required and provided, and which is hereby declared to have been and to be the true intent and meaning of said respective acts, the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction.

And provided further, that whenever any pardon shall have heretofore been granted by the President of the United States to any person bringing suit in the Court of Claims for the proceeds of abandoned or captured property under the said act, approved 12th March, 1863, and the acts amendatory of the same, and such pardon shall recite in substance that such person took part in the late rebellion against the government of the United States, or was guilty of any act of rebellion against, or disloyalty to, the United States; and such pardon shall have been accepted in writing by the person to whom the same issued without an express disclaimer of, and protestation against, such fact of guilt contained in such acceptance, and such pardon and acceptance shall be taken and deemed in such suit in the said Court of Claims, and on appeal therefrom, conclusive evidence that such person did take part in, and give aid and comfort to, the late rebellion, and did not maintain true allegiance or consistently adhere to the United States; and on proof of such pardon and acceptance, which proof may be heard summarily on motion or otherwise, the jurisdiction of the court in the case shall cease, and

> the court shall forthwith dismiss the suit of such claimant.[111]

In essence, this statute says that no pardon shall be admissible in evidence on the part of any claimant in the Court of Claims to support a claim against the United States. It also says that loyalty must be proved pursuant to the Abandoned and Captured Property Act without the aid of any pardon. Furthermore, in any case where loyalty has already been established by way of pardon (like Klein's), the Supreme Court shall, "on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction."[112] Finally, the statute says that when any such pardon recites that the person aided the Confederacy, and the person accepts the pardon without claiming innocence, the pardon shall constitute conclusive evidence of disloyalty.

The Supreme Court held that this statute was unconstitutional, and that Klein was entitled to the proceeds.[113] The question is: why? The decision could stand for a number of propositions. Chief Justice Chase's opinion began with a rather arcane taxonomy of different categories of property that was left in the Southern states at the end of the Civil War.[114] Chase then moved into an extended discussion of whether title to "abandoned and captured property" is automatically divested from the owner.[115] The Court concluded that this statute does not work a divestiture of title.[116] This was important for the narrow disposition of the case because Klein could not possibly have been entitled to the proceeds if title had been divested from his decedent, Wilson.[117]

During this discussion, the Court also made the point that the matter of title is analytically disconnected from the matter of remedy. That is, it is possible for a claimant to have good title, yet not be entitled to a remedy (restoration), on the ground that the claimant was disloyal during the war. In fact, this was Wilson's situation. But the Court then stated that a pardon entitles a claimant to a remedy: "The restoration of the proceeds became the absolute right of the persons pardoned . . . ."[118] The Court took pains to point out that a pardon is not free—the person must promise to be loyal to the government. To deny the pardon its legal effect, Chase wrote, constituted a breach of faith "not less 'cruel and astounding' than to abandon the freed people whom the Executive had

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111. *Id.* at 129.

112. *Id.* at 134.

113. *Id.* at 148 (denying government's motion to remand to Court of Claims with mandate to dismiss for want of jurisdiction and instead affirming Court of Claims judgment).

114. United States v. Klein, 80 U.S. (13 Wall.) 128, 138-39 (1872).

115. *Id.*

116. *Id.*

117. *Id.*at 148–49 (Miller, J., dissenting). Justices Miller and Bradley dissented on the ground that they thought title had been divested.

118. *Id.* at 142.

promised to maintain in their freedom."[119] Hyperbole aside, the majority apparently believed that Congress, by denying effect to pardons, was breaching the uneasy political compromise then in place between Congress and the President.

The Court discussed two important possible rationales for its holding. First, the proviso did not constitute a valid "exception" or "regulation" of the Supreme Court's appellate jurisdiction because "it [did] not intend to withhold appellate jurisdiction except as a means to an end." Second, the proviso constituted impermissible self-dealing by Congress. The Court also discussed yet a third distinct rationale: the statute violates the Pardon Power.[120] Chase wrote:

> The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive.
>
> It is the intention of the Constitution that each of the great coordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offence pardoned and removes all its penal consequences. It may be granted on conditions. In these particular pardons, that no doubt might exist as to their character, restoration of property was expressly pledged, and the pardon was granted on condition that the person who availed himself of it should take and keep a prescribed oath.
>
> Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the court to be instrumental to that end.[121]

119. *Id.* (quotation marks in original).
120. United States v. Klein, 80 U.S. (13 Wall.) 128, 145 (1872).
121. *Id.* at 147–48.

Whatever else *Klein* may say about jurisdiction-stripping or separation of powers, it clearly stands for the proposition that Congress may not eviscerate the pardon power through regulation.

Of course, the proviso in *Klein* is an extreme example of "regulation." The legislation not only nullified the effect of pardons in the affected class of cases, but actually sought to deploy the pardons *against* those holding them. One is tempted to say that Congress might be permitted to regulate the pardon power in gentler ways. But until now the nation seems to have resisted that temptation. Just before President Ford granted a "full, free, and absolute pardon" to President Nixon after Nixon's resignation in 1974,[122] Congress might have attempted to legislate against such a pardon. It is hard to imagine a more appropriate situation for restricting the pardon power: a President grants a pardon to his predecessor, who almost single-handedly put him in office. I do not claim that Ford and Nixon had a deal, tacit or explicit—there is no evidence of one. My only point is that the equanimity with which Congress and the nation accepted the pardon suggests a widespread belief in the absoluteness of the pardon power.

Still another presidential power that seems inappropriate for congressional regulation is the power to, "on extraordinary Occasions, convene both Houses, or either of them."[123] Presumably the President is given this power at least partly in anticipation of situations where Congress itself cannot, because of some stalemate or other collective action problem, agree to convene. Congress should not be permitted to "regulate" away the President's ability to cut the Gordian knot.

There may be other inherent presidential powers that deserve categorical exemption from congressional regulation. I have not attempted to assemble a complete list. My purpose in raising the powers to veto, pardon, and convene Congress is to establish that the approach to determining when Congress may regulate presidential powers must be, in part, categorical. It will not be sufficient, for example, simply to say that Congress may regulate presidential powers in any "reasonable manner."

Yet it also seems clear that the approach to limiting congressional regulation of presidential powers cannot be *exclusively* categorical. In other words, the categorical exemption of certain powers from regulation cannot reflexively lead us to the conclusion that all other powers must be subject to unlimited regulation. We know that the Commander-in-Chief power is not within the group of categories that receives blanket exemption from congressional regulation because precedent tells us it is not within that group,[124] and because historical practice—what Reisman calls the "operational code"—is inconsistent with any such blanket

122. Proclamation No. 4311 (Sept. 8, 1974), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=4696.

123. U.S. CONST. art. II, § 3.

124. *See infra* notes 126-27 and accompanying text.

exemption. But it is important not to jump to the opposite conclusion—that Congress may regulate the Commander-in-Chief power in any way it wishes, or any way that seems reasonable to judges.

2. NON-ABSOLUTE RESTRICTIONS ON CONGRESSIONAL REGULATION OF PRESIDENTIAL POWERS.

Let us begin with common ground. No one would deny that Congress is forbidden from ordering the President to move an infantry brigade from one hill to another, or to move an aircraft carrier from one body of water to another. The reason is simple: the tactical prosecution of a war must be in the hands of a single person, not a committee. As Chief Justice Chase stated in his *Ex parte Milligan* dissent, "Congress cannot direct the conduct of campaigns . . . ."[125] The Commander-in-Chief clause is the Framers' bow in the direction of this truism. Congressional regulation cannot be permitted to unduly hamstring the President in the day-to-day conduct of military action.

On the other hand, no one would deny that Congress is entirely within its power to enact the UCMJ. The Code sets forth regular procedures for courts-martial of armed services personnel. The Code unquestionably restricts what the Commander-in-Chief may do in terms of military discipline. For one thing, it prevents him from maintaining separate systems of military discipline in the several branches of the armed forces. Secondly, and more fundamentally, it imposes a rule of law regime on what might otherwise be a system of discipline characterized by the discretionary decisions of superior officers, all the way up to the Secretary of Defense and, ultimately, the President.

The Supreme Court early on held that Congress could regulate at least some of the President's Commander-in-Chief powers. In *Little v. Barreme*, an executive order purported to authorize the seizure of a ship, contrary to legislation limiting the permissible range of seizures.[126] According to Chief Justice Marshall, if Congress had never spoken on the subject, the Commander-in-Chief power might well have been sufficient to support the seizure; because Congress had specifically legislated against it, however, the executive order could not be enforced.[127] Thus, at least some of the President's Commander-in-Chief powers can be regulated by Congress.

Obviously, the question is what lies between these poles. For example, could Congress pass legislation prohibiting the use of nuclear weapons by a President in an existing conflict?[128] Let us suppose that a

125. *Ex parte* Milligan, 71 U.S. 2, 139 (1866) (Chase, C.J., dissenting).
126. 6 U.S. (2 Cranch) 170 (1804).
127. *Id.* at 177–78.
128. I am indebted to Laurie Levenson for this hypothetical.

majority of Congress considers the sitting President to be trigger-happy. Congress is not prepared to order the destruction of the entire nation's nuclear arsenal, but it does not want the President to use nuclear weapons in the existing conflict. Of course, Congress could eliminate future appropriations for nuclear weapons; it could even eliminate appropriations for rocket fuel or maintenance. But what about a ban on the use of already-deployed, currently-maintained, fully-fueled weapons? I believe the answer is that Congress may not pass such legislation.

First, it is questionable whether this hypothetical legislation is truly generally applicable. It applies only to this one President, in the context of a single conflict. Even more to the point, however, the decision of whether to deploy nuclear weapons at any particular moment is very much a tactical military decision. Indeed, existing practice recognizes the exclusivity of the President's powers over such a decision by giving him, and him alone, the so-called "football" that controls the launch of nuclear missiles.[129] It would surely be statesmanlike for the President to consult a few congressional leaders before deploying weapons, if possible, but Congress can have no formal role in the decision of whether and when to fire. If Congress believes the President has grossly abused his powers in launching such weapons, impeachment and conviction would seem to be the only remedy.

It may seem hazardous to generalize from this small number of data points, but these are important pieces of information. I would suggest that, taken together, they support the following statement: Congress may regulate the Commander-in-Chief power when (1) the regulation takes the form of prospective, generally applicable norms; (2) it does not unduly interfere with discretion to make tactical decisions; and (3) it is reasonable, in the sense that it represents a rational means of accomplishing a goal made permissible by some enumerated congressional power.

The second and third prongs of my proposed test largely speak for themselves. I have already noted the virtual consensus of opinion that Congress may not interfere with tactical military decisions. As for reasonableness, it is difficult to defend any doctrinal regime that would require the courts to enforce irrational legislation. It must be remembered that the rationality standard does not require that Congress subjectively intend a permissible rationale for a statute, only that a court be able to posit such a permissible rationale through *ex post* analysis.

My first prong merits a brief explanation. Requiring regulation to take the form of prospective, generally applicable norms is a prophylactic measure meant to protect the basic division between legislative and executive power. It is probably not sufficient to prohibit

129. *Military Aides Still Carry the President's Nuclear 'Football'*, USA Today, May 5, 2005, *available at* http://www.usatoday.com/news/washington/2005-05-05-nuclear-football_x.htm.

Congress from dictating tactical military decisions. One-time managerial decisions that might not be characterized as "tactical"—decisions about communications, requisitions, transportation, health care, even public relations—must be left to the executive. Congress must not, under the guise of "regulation," enact legislation to overturn one-time managerial decisions with which it disagrees.

Is Article 21 of the UCMJ a permissible regulation of presidential authority, in that case, to convene military commissions? I assume that the *Hamdan* majority was correct that Article 21 places a limitation on presidential power (though Justice Thomas did not think so).[130] Article 21 (entitled "Jurisdiction of courts-martial not exclusive") states:

> The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals.[131]

According to Justice Stevens's majority opinion in *Hamdan,* the Court in *Ex parte Quirin* interpreted this provision as preserving to the President whatever powers to convene military commissions that he possessed prior to 1916, and as simultaneously requiring that those commissions be conducted consistent with the laws of war.[132] Whether or not *Hamdan* correctly interpreted *Quirin* on this point, *Hamdan* itself clearly interprets Article 21 as limiting the President's power to convene military commissions to those consistent with the law of war.[133]

Insofar as Article 21 regulates the presidential power to convene military commissions, it runs into no difficulties with my proposed test. Article 21 sets forth a generally applicable standard on a prospective basis. It does not single out any particular military commission or any particular group of military commissions. It does not substitute Congress's discretion for that of the President in deciding whether to convene any specific commission. Nor does it constrain the President in making any tactical decisions.

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130. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2825 (2006) (Thomas, J., dissenting) ("Nothing in the language of Article 21 . . . suggests that it outlines the entire reach of congressional authorization of military commissions in all conflicts").

131. 64 Stat. 107, 115.

132. *Hamdan,* 126 S. Ct. at 2774 ("[t]hat much is evidenced by the [*Quirin*] Court's inquiry, *following* its conclusion that Congress had authorized military commissions, into whether the law of war had indeed been complied with in that case").

133. *Id.* (Article 21 creates "express condition that the President and those under his command comply with the law of war").

The remaining question is whether Article 21's restriction of the jurisdiction of military commissions to crimes committed in violation of the laws of war meets the rational basis test. Put another way, is the "laws of war" restriction of Article 21 a rational means of achieving goals made permissible by the "government and regulation of the land and naval forces" clause? It is critical to remember that the issue under rational basis analysis is not whether Congress actually had a rational basis for the legislation in mind, but whether a court could, *ex post*, conceive of any such rational basis. On that test, there exist at least two such rational bases to support the "laws of war" restriction of Article 21.

First, it is not clear that the presidential power to convene military commissions is limited to the trial of non-citizens.[134] In fact, one of the defendants tried before the military commission in *Ex parte Quirin* was a United States citizen. Given that, what is to stop the President from using military commissions to try ordinary United States citizens for violations of domestic criminal law? By specifying that the reach of Article 21 is limited to trials for violations of the "laws of war," Congress has eliminated that possibility. Surely this is a rational means of achieving an end permissible under the "government and regulation of the land and naval forces" clause. Second, it would be perfectly rational for Congress to limit the use of military commissions to "laws of war" violations in the hope that other nations would similarly limit their use of military commissions with respect to United States citizens.

I turn now to the main event. Is FISA a valid regulation of the NSA wiretapping program, judged by my proposed constitutional test? The first prong poses no problem whatsoever. FISA is clearly a prospective directive of general applicability. It does not attempt to usurp the President's managerial discretion with respect to any particular instance of surveillance. It applies to all acts of surveillance within a given category.

The administration would argue, however, that FISA interferes with tactical military decisions.[135] As noted above, Attorney General Gonzales has already argued that wiretapping under the NSA program is more of a tactical matter, and therefore closer to the core of Commander-in-Chief prerogative than the convening of military commissions, because wiretapping directly affects future military actions, whereas military commissions are concerned only with past ones.[136] This attempted distinction is highly questionable. The legal disposition of captured enemy combatants has just as much to do with preventing them from returning to the battlefield as it does with punishing them for their transgressions. If FISA is to flunk the "tactical military decision" prong

134. I am indebted to John Cooke on this point, and for his counsel with respect to the UCMJ generally.

135. U.S. Department of Justice, *supra* note 20.

136. *Id.*

of my proposed test, it must do so on some basis other than a simple prospective-retrospective distinction.

The real question is this: does FISA interfere with the univocal command indispensable to a military campaign? The Commander-in-Chief must be free to make such decisions as concentrating military resources in certain places, sacrificing the defense of certain positions in order to maximize the chances of obtaining more advantageous ones, using air or naval power to soften enemy positions prior to or in lieu of ground attack, and the like. The Commander-in-Chief must be the final arbiter of whether and when to attack and whether and when to retreat, which forces should advance and which should stay back and consolidate, and how to get the most out of the nation's fighting forces. There are many other choices that will have a profound, perhaps even decisive, effect on the outcome of war, but they do not fall within the same category. Military conscription may be essential to success in a particular war, but surely the President cannot accomplish this by executive order.[137] The level of appropriations for a war can certainly be decisive of success, but that must be established by Congress. Munitions production is essential to waging war successfully, but the President cannot unilaterally nationalize such industries to ensure their continuity. The test of what falls within the core of tactical military decision-making cannot be whether military success depends upon it—that is grossly overinclusive. The test must be more in the nature of whether military commanders are customarily permitted to make such decisions. To put it in an admittedly strange way, the President's core role as Commander-in-Chief is to affirm or overrule decisions within the customary jurisdiction of military officers. That is not to say that this exhausts the President's Commander-in-Chief powers, only that this core is immune to congressional regulation, whereas the remainder of his Commander-in-Chief powers are subject to such regulation.

Clearly, the customary jurisdiction of uniformed military commanders does not extend to ordering the wiretapping of phone calls between civilians. Therefore, such activity does not fall within the core of the President's Commander-in-Chief powers. Again, this is not the same thing as saying that the Commander-in-Chief lacks inherent authority to order such wiretapping—I have already concluded that he does. But ordering wiretaps between civilians is not the sort of executive activity that is categorically excepted from appropriate congressional regulation. Is FISA appropriate regulation?

Under my proposed third prong, the precise question is whether FISA is rationally related to a goal made permissible either by the "government and regulation of land and naval forces" clause or by the

137. Universal Military Training and Service Act, ch. 144, 65 Stat. 75 (1951); Military Selective Service Act of 1967, Pub. L. No. 90-40, 81 Stat. 100 (1967); Military Selective Service Act, Pub. L. No. 92-129, 85 Stat. 348 (1971).

foreign commerce clause. As the Supreme Court has explained, when a court applies the rational relation test, actual legislative intent is irrelevant.[138] The court should not ask whether the statute in question is a rational means of achieving the goal that the legislature had in mind. It should instead ask whether the statute is a rational means of achieving *any* goal that the legislature is permitted to pursue. The court is required to imagine such rationales.[139] If it identifies one, then the legislation must be enforced, even if there is no evidence whatsoever that the legislature was actually thinking of such a rationale to support the statute.

In the case of FISA, little imagination is required to ascertain a permissible rationale for placing restrictions on warrantless wiretapping by the President, even for asserted national security purposes. In the wake of Watergate, the Senate Select Committee to Study Government Operations (the "Church Committee") investigated accusations that the Nixon Administration had conducted illegal electronic surveillance in the name of national security.[140] According to one scholar:

> The inquiries of the 'Church Committee' into the activities of the intelligence agencies of the United States had uncovered far-ranging infringements upon individual privacy interests through the unfettered use of electronic surveillance and other intelligence collection techniques. Of particular concern were instances where warrantless electronic surveillance had been used against United States citizens who were not readily identifiable as reasonable sources of foreign intelligence information, who appeared to pose little threat to the national security, and who were not alleged to be involved in any criminal activity. The Church Committee reported that the abuses of executive discretion resulted from the absence of clear congressional or judicial standards and the unsettled state of the law in this area. . . . By 1978, the recommendations embodied in the Church Committee report appeared to have persuaded many in Congress of the need to regulate electronic surveillance for national security purposes. In particular, Congress was urged to

138. *See* Federal Communications Commission v. Beach Communications, Inc., 508 U.S. 307, 315 (1993) ("because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature").

139. *Id.* ("those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it'") (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

140. Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Intelligence Activities and the Rights of Americans, S. Rep. No. 94-755 (1976).

> act and adopt a legislative framework that would remove electronic surveillance for national security purposes from the sole discretion of the Executive.[141]

Made wary by claims of national security serving as a pretext for political harassment, Congress placed significant restrictions on when the executive branch may engage in warrantless wiretapping, even for national security purposes. It is inconceivable that anyone would find this an irrational or maladapted response to the serious abuses of the Nixon and other prior administrations.[142]

The reasonableness of FISA is manifest in its multiple provisions permitting the government to engage in wiretapping without first obtaining a warrant. As noted previously, three separate provisions make allowances for warrantless wiretapping under certain circumstances. Section 1802 authorizes warrantless wiretapping to acquire "foreign intelligence information for periods of up to one year" if the Attorney General makes the proper certifications.[143] Section 1805(f) permits the Attorney General to authorize emergency electronic surveillance if a judge is notified at the same time, and if a proper application for a court order is made no more than seventy-two hours after the Attorney General orders the surveillance.[144] Finally, Section 1811 permits warrantless wiretapping for a period of fifteen days following a declaration of war by Congress.[145] These provisions represent an assiduous attempt to avoid unnecessarily restricting the President in exigent circumstances.

Last, but hardly least, I must consider the assertion that what is rational and reasonable as a regulation of the President's national security and foreign intelligence gathering powers must be viewed through the lens of a post-9/11 world. To put it differently, the argument is that a court reviewing the legality of the NSA program must take judicial notice of the fact that our most dangerous enemies no longer wear uniforms or confine themselves to military targets, but rather blend into their innocent civilian targets. In such a world, intelligence takes a quantum leap in importance. According to this argument, to say that the President must protect innocent American lives by Marquess of Queensbury rules when the enemy plays by the law of the back alley is simply unrealistic.

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141. Cinquegrana, *supra* note56, at 806–07 (footnotes omitted).

142. Nixon was hardly the only President to abuse the tools of electronic surveillance. It is well documented that the Kennedy Administration illegally bugged telephone calls of the Rev. Martin Luther King, Jr., and of Teamsters boss Jimmy Hoffa, both for political reasons. *See* Intelligence Activities and the Rights of Americans, *supra* note 140, at 219–23; Editorial, *Court Warrants for Traps and Stings*, N.Y. TIMES, July 5, 1990, at A16.

143. 50 U.S.C. § 1802.

144. 50 U.S.C. § 1805(f).

145. 50 U.S.C. § 1811.

Perhaps this is so, but if it is, the appropriate judicial response is not to exempt the President from a valid statute, but to await congressional amendment of the statute to take this new reality into account. This is not one of those situations where the courts are waiting on Congress, an institution that best protects majorities, to protect underrepresented groups. There is no reason to think that Congress is systematically biased against protecting the American public from the threat of terrorism—quite the opposite.

C. DOES THE NSA PROGRAM VIOLATE THE FOURTH AMENDMENT?

Because I conclude that the NSA program violates FISA, and that FISA constitutes a valid and enforceable regulation of the President's inherent power to conduct wiretapping of calls into and out of the United States, I need not reach the question of whether the program also violates the Fourth Amendment. For posterity, however, I will briefly note why the legality of the program under the Fourth Amendment is not entirely clear.

In the *Keith* case,[146] the Supreme Court held that there is no national security exception to the general warrant requirement of the Fourth Amendment when it comes to domestic spying. This holding, however, does not tell us whether there is or is not such an exception to the warrant requirement for wiretapping of calls into and out of the United States. The most that can be said is that *Keith* does not rule out such an exception for foreign intelligence related to national security. Four out of the five circuits to deal with the question since *Keith* held that there is a foreign intelligence exception to the warrant requirement.[147] If those four circuits are correct, then it seems clear that the NSA program does not violate the Fourth Amendment. However, the Supreme Court has not ruled on the issue, so it remains in some doubt.

It must be noted that the issue of FISA's validity weighs heavily on the Fourth Amendment question. If FISA constitutes a valid regulation of when the government may and may not conduct warrantless wiretapping of calls into and out of the United States, then the Court may well shy away from interpreting the Fourth Amendment to impose a blanket warrant requirement, effectively preempting Congress's careful attempt to balance the need for action in exigent circumstances with the privacy interests of individuals. On the other hand, if FISA is

146. United States v. U.S. District Court (Keith), 407 U.S. 297 (1972).

147. *See* Decker, *supra* note 7, at nn.117 & 122 and accompanying text, citing United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980) (exception exists); United States v. Davis, 548 F.2d 841 (9th Cir. 1977) (same); United States v. Butenko, 494 F.2d 593 (3d Cir. 1974) (en banc) (same); United States v. Brown, 484 F.2d 418 (5th Cir. 1973) (same); Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) (en banc) (exception does not exist).

unconstitutional as it applies to the NSA program, then the Court may rationally believe that the Fourth Amendment must be interpreted to place some sort of limit on when the government may engage in warrantless wiretapping for foreign intelligence purposes.

CONCLUSION

The NSA wiretapping program violates FISA, a valid congressional regulation of the President's Commander-in-Chief powers. FISA creates criminal liability for those who conduct such wiretapping. Whether or not those persons would ever be prosecuted, they have committed federal crimes.

There are those who would say that the analysis contained in this essay, whether or not correct, is gratuitous. The administration has now agreed to clear the wiretapping activity through the FISA Court.[148] No one is going to be prosecuted for past acts, it will be argued, so inquiring into whether the law might technically have been violated can only serve to further divide us at a time when we need to unite as a nation against the terrorist threat. It has been the premise of this essay that a true democracy does not avert its eyes from the illegality of government conduct in the interest of furthering collective goals, however noble those goals. What the citizenry should do with the knowledge of that illegality is a question for another day.

148. *See supra* note 5.