

A DISCOURSE:

# Presidential Powers in Time of War

“Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds,” said Supreme Court Justice Thurgood Marshall, who, as a misbehaving schoolboy, was once given the punishment of reading the entire U.S. Constitution.

In the spirit of such constitutional heritage and free thinking, Law School faculty regularly gather to challenge each other’s views, to take on legal issues pertinent to the current political and social landscape, and to engage in discourse that ultimately becomes scholarship. This kind of academic interaction has taken place in a variety of settings, from formal panel discussions to more intimate coffee-klatch style office get-togethers.

So it was just a matter of time, really, before the setting for intellectual discussions took a more technological turn. In this case, e-mail has facilitated a discussion of the merits and liabilities of expanding executive privilege in a time of war. Professors Michael Paulsen, Heidi Kitrosser, and Dale Carpenter bring their collective constitutional law interest, insight, and expertise to the following e-mail exchange, which took place in February 2006.—*Eds.*

## Associate Dean Michael Stokes Paulsen

**ONE OF THE HOTTEST** issues of the day is presidential power in time of war—specifically the president’s power unilaterally to order the interception of overseas communications by persons in the United States who have been in contact with al Qaeda forces and terrorists.

Some of my colleagues may well disagree, but I think the issue is relatively straightforward. The president’s power as military commander in chief, in time of constitutionally authorized war, of course includes the power to intercept enemy communications, including enemy communications with persons here in the United States who may be in league with the enemy, and to follow the chain of such

communications where it leads, in order to wage the war against the enemy and, of vital importance, to protect the nation against further attacks.

There is no doubt that we are at war. On Sept. 18, 2001, Congress issued what is arguably the most sweeping declaration of war in our nation’s history, authorizing the president to employ “all necessary and appropriate force” against those nations, “organizations or persons” that “he determines” planned, authorized, committed or aided the 9/11, attacks, or who harbor such persons or organizations. The last clause of the authorization is important: “in order to prevent future acts of international terrorism against the United States” by such organizations. We are at war.

Congress has declared the war, and granted the president sweeping authority to wage it as he sees fit, in order to defend against future attacks by al Qaeda and its allies.



Clearly, the commander in chief powers of the president are fully in play. Those powers unquestionably include the power to gather intelligence concerning communications with the enemy forces with whom we are at war. I would go so far as to say that if the president failed to monitor such communications, he would be grossly derelict in his commander in chief responsibilities.

As a straightforward matter of constitutional law, Congress may not by statute purport to take action displacing the president's constitutional power as commander in chief. If some action falls within the commander in chief's power, a statute may not limit it. In this sense, the Foreign Intelligence Surveillance Act (FISA) either must be construed as not limiting these powers—this seems the view most consistent with judicial decisions in this area—or else FISA is an unconstitutional restriction on the president's power as commander in chief in time of authorized war-making. My own view is that FISA is best understood as a “safe harbor.” Congress has provided a framework for obtaining a warrant (of a certain type) that should permit the introduction of evidence obtained by such surveillance in a criminal prosecution, if prosecution should be the course of action the executive branch chooses to take with respect to an al Qaeda operative or spy who happens also to be a U.S. citizen or resident alien.

But ordinary criminal prosecution is certainly not the only option for dealing with captured enemy persons in time of war. Such persons can simply be held as prisoners for the duration of the war (whether or not entitled to legal POW status under the Geneva Conventions). They may be subjected to “military commission” proceedings, for violations of the law of war, in which various civilian “exclusionary rule” principles may not apply. (Of course, detention and military tribunal prosecutions themselves have presented some of the most interesting constitutional questions before the courts in the past three years.)

Finally, the Fourth Amendment bars “unreasonable” searches and seizures and does not invariably require warrants. Just as airport metal detectors are deemed “reasonable” (I've never been presented with a warrant as I half-strip and empty my pockets), so too the interception of communications of persons in contact with enemy forces, in time of war, is surely not an unreasonable search and seizure.

## Associate Professor Heidi Kitrosser

**THE BUSH ADMINISTRATION'S** appetite for unfettered power has been observed with some frequency during the past several years. The NSA spying controversy marks one of the more alarming manifestations of this appetite.

In my view, neither constitutional text, with its careful balancing of military and domestic powers between executive and legislature, nor constitutional history, which is steeped partly in fears of an out-of-control monarch, can justify a unilateral presidential power to authorize the interception of American's overseas calls.

As Professor Paulsen's reasoning reflects, the arguments in support of such a presidential power rely on two major points: (1) the executive has an inherent power to engage in such activity (or at least has such power in wartime—proponents of such power argue, pursuant to point #2 below, that we currently are in wartime as declared by Congress); (2) Congress' Sept. 18, 2001 Joint Resolution not only declared war and thus created the conditions underlying point #1, but also in fact directly authorized the claimed presidential power.

The first point proves way too much to be consistent with our constitutional system of balanced military and domestic powers. As Justice O'Connor noted in *Hamdi v. Rumsfeld*, “a state of war is not a blank check for the president when it comes to the rights of the Nation's citizens.” Indeed, Articles I and II of the Constitution outline a system of shared powers even with respect to military matters. Thus, while the president is the “commander in chief,” it is for Congress to declare war in the first place, to provide for the common defense, to raise and support the army and navy, to “make Rules for the Government and Regulation of the land and naval Forces,” and to make other laws “necessary and proper” to effectuate its own powers and those of the president. And of course, it is the legislative process through which domestic legislation and legislation affecting citizens' rights generally must pass.

**...the “Use of Military Force” in no way clearly or intuitively encompasses the power to intercept Americans' phone calls with persons overseas.**

Furthermore, a quick review of the nature of the legislative process elucidates why it is so crucial that wartime not be deemed a “blank check” for presidential activity, particularly presidential activity that impacts citizens' rights. The Constitution brilliantly provides for open, dialogic, multi-branch review before legislation may be passed. This process is among the Constitution's most important protections against government tyranny. Among other things, it reflects the founding generation's well-known fear of monarchical power. Were a declaration of war automati-

cally to generate presidential power to monitor American's phone conversations whenever the president claims a link to terrorism, the careful protections of Articles I and II would lose much meaning.

The second major point raised in support of the Bush administration's actions—that the Joint Resolution not only declares war, but also more directly authorizes President Bush's actions. This is inconsistent with the text and history of the legislation and with the constitutional system already described. First, the legislation's text speaks almost entirely of military force. Indeed, the Joint Resolution is entitled the "Authorization for Use of Military Force." Naturally, the use of military force will require some activities incidental to such use. But the "Use of Military Force" in no way clearly or intuitively encompasses the power to intercept Americans' phone calls with persons overseas. The counterintuitive nature of this association is exacerbated by the context in which the Joint Resolution was created—one in which existing legislation already comprehensively addresses the monitoring of calls made by U.S. citizens. Indeed, the Congressional Research Service recently concluded that FISA pertains to precisely the type of surveillance engaged in by the Bush administration.

Furthermore, were the Joint Resolution's text and FISA's existence insufficient to belie the Bush administration's interpretation of the Joint Resolution, the Resolution's history does just that. In a *Washington Post* op-ed piece of Dec. 23, 2005, former Senate Majority Leader Tom Daschle, who helped to negotiate the Joint Resolution with the White House counsel's office, states "categorically" that:

the subject of warrantless wiretaps of American citizens never came up. I did not and never would have supported giving authority to the president for such wiretaps. I am also confident that the 98 senators who voted in favor of authorization of force against al Qaeda did not believe that they were also voting for warrantless domestic surveillance.

In the same op-ed piece, Daschle explains that the administration had sought to include language in the Joint Resolution which, while not mentioning or encompassing wire-tapping, would generally have accorded the White House broader discretion than the Joint Resolution ultimately accorded it and would explicitly have authorized the use of force within the United States. Significantly, this proposed language was rejected.

Given the Joint Resolution's text and history and the existence of FISA, a construction of the Joint Resolution that would encompass the powers claimed by the Bush administration could stem only from a vision of presidential power so broad as to demand such construction. But this only brings us back to the Constitution's careful balance of powers. For such a vision of presidential power is antithetical to the checks and balances brilliantly reflected in Articles I and II of the Constitution.

## Professor Dale Carpenter

**THE PRESIDENT'S POWER** to authorize warrantless surveillance of communications in the United States must come, if it exists at all, from either (1) a power lawfully given him by Congress, or (2) a power he unilaterally and irrevocably enjoys under the Constitution.

(1) FISA forbids electronic surveillance of communications in the United States unless approved by a court. By its own terms, FISA is the "exclusive means by which electronic surveillance...may be conducted." (18 U.S.C. Sec. 2511[2][f].) It covers the field. Except as allowed under FISA, such surveillance is criminal. The statute is not ambiguous on this point, so there is no reason to invoke the constitutional avoidance canon of statutory construction to read it some other way.



The Justice Department appears to concede that the NSA program is not affirmatively authorized by FISA procedures. Instead, it contends that Congress authorized warrantless surveillance, despite FISA, in the Authorization for Use of Military (AUMF) force of Sept. 18, 2001. It's true that the AUMF gives the president fairly broad power to

respond with force to the terrorist attacks of Sept. 11, 2001. (One consequence of the administration's aggressive claims of power under the AUMF is that future Congresses may be more careful—even too careful—in future force authorizations.) But two qualifications count against the DoJ's argument.

First, the AUMF does not give the president unlimited power to respond to the attacks. The AUMF gives the president power to respond only with "necessary and appropriate force." While gathering intelligence about foreign enemies is surely part of wielding military force, warrantless spying on Americans in the United States is—while not unprecedented—surely a very ambitious application of such force. Past historical examples of warrantless domestic surveillance of enemies—such as those conducted by FDR in World War II—were done with clear congressional approval, and never in the face of federal statutory disapproval.

Also, if the president could effectively conduct surveillance within the United States under FISA's own procedures, the NSA program is not "necessary" and thus not authorized under the AUMF. Since 1978, the executive branch has sought wiretap permission from the FISA court some 19,000 times. Only a handful of those requests have been denied. FISA even allows the attorney general to authorize surveillance for 72 hours on an emergency basis before seeking court approval. (The time period was increased from 24 hours after 9/11 by Congress in order to give the executive precisely what he says he needs here: more flexibility to conduct warrantless surveillance.) The administration has not established why the compliant FISA court and

flexible process under which it operates is too cumbersome to accommodate current surveillance needs. So it hasn't established that warrantless domestic spying is "necessary" under the AUMF. "Trust me on this" is simply insufficient.

Second, because the AUMF does not explicitly repeal or amend FISA, the president argues that it does so by implication. But implied repeals of legislation are strongly disfavored, accepted only when two statutes are irreconcilable. FISA and the AUMF are not irreconcilable; they can be read together to give the president broad power to deal with the aftermath of 9/11, limited by established and specific legal precommitments to prevent abuse of such power in the domestic sphere. On this view, if the NSA program violates FISA (as I have argued) and FISA is a constitutional exercise of Congress's power to regulate surveillance activities in the United States (as I'll argue in a moment), then the NSA program is not an "appropriate" exercise of force and is thus not authorized by the AUMF.

The administration proposed, but leaders in Congress rejected, language in the AUMF that would have extended the president's power to use force specifically "in the United States." The president is thus attempting to do under the guise of interpretation of the AUMF what he could not achieve in the actual legislation.

**...when [the president] directs that considerable power inward, toward the United States itself, special concerns arise from the history of the abuse of executive power and from the nation's commitment to civil liberties.**

The NSA program is thus contrary to existing federal law. Congressional opposition to warrantless domestic surveillance is far clearer here than was Congress's opposition to Truman's action in *Youngstown Steel*, where the court rejected a claim of broad executive authority to conduct war. Unless the president has some independent constitutional authority to conduct warrantless domestic spying and unless that independent authority is not subject to congressional limitation or regulation, he is acting unconstitutionally.

(2) The president's top priority must be to defend the country against attack, but he does not have limitless constitutional power to do so. Notably, there is no "necessity clause" in the Constitution giving the president authority to do whatever he thinks necessary to protect us. The security of the United States is no more the sole constitutional fiefdom of the president than legislation is the sole fief of Congress, or the Constitution itself is the sole fief of the Supreme Court. The president's powers over security are shared and blended with the other branches. The president is commander in chief of the army and navy, which most obviously means that he has operational control over the

military when force is authorized. This general presidential power, however, is subject to specific constraints elsewhere in the Constitution. One constraint on the president's general command authority is Congress's specific power "to make Rules for the Government and Regulation of the land and naval Forces." Art. I, Sec. 8, cl. 14. FISA is one such regulation.

The Constitution further gives to Congress, not to the president, the power to make laws "necessary and proper" to carry into execution its own powers and "all other Powers" enjoyed by any part of the federal government, including the executive. (Art. I, Sec. 8., cl. 18.) This leaves to Congress the judgment about what legal authority is needed to make effective the president's own powers, including the commander in chief power. If gathering intelligence about the enemy is an incident of the president's commander in chief power over the military, then limiting the use of that power within the United States is an incident of Congress's Article I authority to legislate its execution.

Once Congress has regulated the president's use of his war powers inside the United States, he can no more violate the law for reasons he believes are good than he could collect more taxes than Congress has authorized because he thinks the government needs more money for the war or appoint more justices to the Supreme Court without the advice and consent of the Senate because he thinks the Court is deciding war-related cases incorrectly.

The president has expansive powers under the Constitution and under the AUMF to fight the country's foreign enemies. But when he directs that considerable power inward, toward the United States itself, special concerns arise from the history of the abuse of executive power and from the nation's commitment to civil liberties. When the president fights a war inside the United States, the balance between the needs of national security and the liberties of the people, between the danger of catastrophic attack and the danger of repression, is better struck by involving all three branches of the federal government than by acquiescing to the diktat of one.

If the president believes that FISA is inadequate to deal with the war on terror, he should make that case before the body that has the constitutional responsibility to make law in this republic—the Congress. He may believe with all his heart that he needs the authority to conduct warrantless spying on people in the United States in order to protect the country from another devastating attack. He may be right about that. But more than two centuries ago this nation rejected the principle that one person could run the country, even for very good reasons, in favor of a more cooperative and democratic approach that better serves both liberty and security.

## Associate Professor Heidi Kitrosser

I'D LIKE TO add one point to Carpenter's excellent arguments about FISA's provisions. FISA also authorizes the Attorney General to conduct electronic surveillance



without a court order for up to 15 days following a Congressional declaration of war. The legislative history suggests that this provision is intended to give Congress time to consider any necessary changes to FISA in light of the war declaration. This provision has three negative implications for the White House's arguments in the current controversy:

- First, it is very likely, as the Congressional Research Service has suggested, that this 15-day exemption does not apply to the AUMF, as the latter *does not constitute a congressional declaration of war*. (See Congressional Research Service, Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information at 26 [2006]).
- Second, assuming that the 15-day exemption does not apply here, it would be deeply counterintuitive to read an unspoken, substantially broader exemption into FISA allowing for years of secretive electronic surveillance following a resolution of force.
- Third, even if the 15-day exemption does apply to the AUMF, its terms clearly were exceeded by the president's secretive surveillance program of several years. And again, the notion that more substantial leeway implicitly is authorized by FISA is virtually unthinkable in light of FISA's careful enunciation of the 15-day exemption.

The president thus is left only with the argument that Article II allows him to operate in a manner contrary to FISA. For reasons already argued, such a reading of Article II is inconsistent with the Constitution's careful balance of powers.

## Associate Dean Michael Stokes Paulsen

**THE KEY PROBLEM** with my colleagues' extraordinarily thoughtful points about the NSA communications interception program is this: They read the Sept. 18, 2001, AUMF as if it were any old statute passed by Congress.

If (as I believe), the AUMF is in legal effect a Declaration of War, then arguments that "repeals by implication are disfavored," or that "the AUMF does not specifically mention surveillance," or that "Congress did not have this in mind" (or, in its weakest form, that former Senator Tom Daschle was not thinking about this specific question), or that the president might have been able to obtain FISA authorization, are almost entirely irrelevant.

If *war* has been authorized, then the commander in chief power to wage war against enemy forces has been unleashed in its entirety. That power is a fearful and formidable one, but properly so. Where war is declared or authorized, the president possesses the full military and executive power of the nation with respect to waging that war. The president determines matters of military strategy and tactics; the rules of engagement with the enemy; the means and methods to be employed; how resources are to be deployed; and whether, when, and under what circumstances hostilities will be terminated.

**Whatever the scope of the president's constitutional power as commander in chief in time of authorized war, no statute of Congress constitutionally may limit it.**

Where the commander in chief power is brought into play, it is the president's power alone. No statute of Congress may limit it. As Alexander Hamilton put it in *Federalist #74*: "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority."

Here is the crucial point: Whatever the scope of the president's constitutional power as commander in chief in time of authorized war, no statute of Congress constitutionally may limit it. This is basic *Marbury v. Madison*: If the Constitution provides one thing, Congress may not pass a statute altering it. Congress has the choice whether or not

to trigger the commander in chief power of the president in time of war; but if it chooses to do so, it may not control the exercise of that power with collateral statutory restrictions. Put simply: When war is declared, the commander in chief chooses how to conduct it.

Nowhere is this more clear than in the Sept. 18, 2001 AUMF, which sweepingly gives the president power to use “all necessary and appropriate force” against those nations, organizations, or persons he finds to be connected to the events of Sept. 11, 2001.

If the interception of communications of persons in contact with the enemy is a legitimate part of the commander in chief’s conduct of war—and I think this almost impossible to deny—then no act of Congress may impair it. If FISA, designed as peacetime authorization for covert surveillance of suspected foreign agents, limits the commander in chief power in time of war, it is to that extent unconstitutional. That’s the endpoint of the game, when push comes to shove. Professor Kitrosser’s arguments about how to read FISA are excellent ones; but in the end if FISA cannot be construed in a manner consistent with the president’s overarching power as commander in chief in time of war, then it is the FISA statute that must yield, not the president’s constitutional power as commander in chief.

Professor Carpenter’s argument that Congress’s power to make “Rules for the Government and Regulation of the Land and Naval Forces” trumps the president’s power as commander in chief is, I think, unsound—and dangerous. Congress’s power to prescribe general rules for regulating our armed forces surely cannot be read as a power to dictate rules for how military and defensive efforts are to be conducted by the president. That would effectively read the commander in chief clause out of the Constitution! The same cannot be said the other way round:

Congress’s power to regulate the military still has content, as a general proposition; it is simply limited by the president’s power to direct and conduct offensive and defensive operations—to command—in wartime.

The alternative is to run war operations by committee—by Congress. That was one of the grave defects of the Articles of Confederation that the framers of the Constitution (including General George Washington) sought to remedy by making “a single hand,” the president, the commander in chief of the armed forces, and of the militia, when called into actual service.

## Professor Dale Carpenter

**PROFESSOR PAULSEN MAKES** several provocative policy assertions about the president’s wartime powers. Remarkably absent from his discussion is any sustained attention to the constitutional text or any consideration of the types of concerns that caused the founding generation to break from colonial and monarchical control. Nothing in the Federalist papers, including Hamilton’s writings, suggests that the president’s wartime power is illimitable. An energetic president, yes; wartime king, no.

*“If (as I believe), the AUMF is, in legal effect, a Declaration of War, then [standard arguments about statutory interpretation] are almost entirely irrelevant.”*

Having practically conceded the statutory arguments, Professor Paulsen now says they don’t matter because the president has unlimited war-making authority. Yet the Constitution does not provide that in time of war all bets are off—that all powers of government are put at the president’s disposal to use as he pleases. There are special provisions that deal with wartime emergencies (e.g., allowing Congress to suspend habeas corpus in cases of invasion or rebellion, Art. I, Sec. 9, cl. 2), but notably none of them are in Article II. There is no general “emergency clause” or “necessity clause” holding the usual rules automatically in abeyance, and certainly none that give the president such power.

*“If war has been authorized, then the commander in chief power to wage war against enemy forces has been unleashed in its entirety.”*

This is a restatement of the problem, not an argument. The very question here is what the “entirety” of the commander in chief power is and whether and to what extent it may be limited by the co-equal branches of the government. Those who resist the president’s claim of power to engage in domestic warrantless spying argue that his war power does not extend in this way to the domestic sphere where Congress has acted to the contrary, as it has in FISA.

*“Where the commander in chief power is brought into play, it is the president’s power alone. No statute of Congress may limit it.”*

What is the basis for this extraordinary claim? Congress has two explicit and specific powers that seem to limit, when exercised, the president’s commander in chief power: the power to make rules and regulations for the armed forces and the power to make laws effectuating the president’s own powers. Nothing in the text declares the president’s powers immune to these provisions, even in wartime. Indeed, the Constitution itself makes no general demarcation between wartime and peacetime powers.

*“Congress’s power to prescribe general rules for regulating our armed forces surely cannot be read as a power to dictate rules for how military and defensive efforts are to be conducted by the president... The same cannot be said the other way round: Congress’s power to regulate the military still has content, as a general propo-*

sition; it is simply limited by the president's power to direct and conduct offensive and defensive operations—to command—in wartime.”

This passage both errs and oversimplifies the division of war-related authority between Congress and the president. First, while Professor Paulsen suggests that the Rules-and-Regulations Clause “has content,” he appears to think that its content is alterable at the will of the president in the use of his power to conduct a war. But the president cannot unilaterally change the scope of congressional power: This is, one might say, basic *Marbury v. Madison*. No fewer than seven of the 18 clauses enumerating congressional power deal with military or war-related matters. We need a theory for what the content of the respective war powers of the president and Congress are, whose power prevails in the event of a conflict, and under what sorts of circumstances.

Second, while the commander in chief authority surely gives the president the power to control the operational details of military action, it does not obviously give him the power to do whatever he pleases to facilitate the use of military force, even where *war* has been declared, and especially where he turns that might inward toward the United States itself.

In the war on terror, even more than other wars, there is no clear line between domestic and foreign war-fighting. Thus, to accept Professor Paulsen's concept of unlimited executive war power is to cede to the president practically dictatorial control over the whole country.

The Constitution's blending of war powers among the branches does not reasonably admit the stark either-or, categorical approach Professor Paulsen advocates. It is helpful to think of the question of the president's and Congress's war-related authority as involving a continuum. On one end we have clear exercises of operational control of military forces against a foreign enemy abroad. The president's power to act on behalf of the whole country is at its height when he acts on matters of foreign affairs and/or matters of core operational control of the military directed outward, away from the United States itself. Shall we invade at the Pas de Calais or at Normandy? Shall we do so on June 5 or June 6? These are decisions it would indeed be “unsound” and “dangerous” to confide to Congress. These “military and defensive efforts” would be clearly within presidential command authority.

On the other end of the continuum are all the ways in which events at home may affect the war effort. Money is necessary for war; but the president could not raise taxes on his own, even if he believed it was absolutely vital to do so. Guns are essential; but he could not seize the steel industry against a contrary legislative command. Conscripts are critical; but he could not unilaterally institute a draft. Public support is vital; but he could not jail dissenters on the ground that they were sapping morale. The Constitution itself limits the president's command authority in each of these areas. All of them are for Congress to deal with in the first instance, if they can be dealt with at all.

One way to think of this continuum is that it ranges from actions clearly foreign and command-operational (and thus clearly within the president's commander in chief power) to actions purely domestic and non-operational (and thus clearly within Congress's legislative powers). The Constitution tells us the president is commander in chief “of the Army and Navy,” not “of the United States.”

There will be hard cases between these two poles. The president's authorization of warrantless surveillance within the United States is somewhere between the two ends of the continuum. The NSA program implicates military needs because it is gathering information about enemy plans. But it is not just a “military effort,” cut off from any domestic concerns. It occurs domestically and intrudes on the legitimate privacy interests of people inside the United States. As I'll explain, I believe the NSA program falls much closer to the congressional-power end of the continuum and is thus subject to congressional regulation, where Congress has chosen to regulate (as it has here through FISA).

So the question comes down to this: May the president order the warrantless surveillance of communications in the United States under his commander in chief power despite a congressional command that he may not? Or, may the Congress prohibit such warrantless surveillance under its Rules-and-Regulations power and its All-Other-Powers authority despite the president's strong desire to conduct warrantless surveillance?

Which war-related power controls the matter of warrantless domestic surveillance, the president's or the Congress's? Professor Paulsen does not even begin to grapple with this difficult question; he simply asserts the conclusion that the president's power controls no matter what.

Yet I can think of several reasons why the president's action turning force inward means that Congress's will, expressed in FISA, should prevail here. Briefly: (1) Congress enjoys the power to make laws relating to the president's own powers, including his commander in chief power, while the reverse is not true; (2) Congress, not the president, is given the power to regulate the armed forces; (3) domestic warrantless surveillance implicates, as the Justice Department acknowledges, not just military necessity but significant domestic civil liberties interests; (4) the history of abuse of domestic spying by presidents under the guise of protecting national security makes giving any president unchecked authority in this area very dangerous; and (5) the president has not shown how the legal alternatives he has under FISA are unworkable or, if they are unworkable, why he could not seek amendment of the law from a Congress that is responsible for making laws to protect national security.

I'm glad Professor Paulsen has reminded us of George Washington. General Washington understood the difference between running the war and running the country. President Washington would never accept a crown. We could use a bit more of that executive restraint today. ●