Below, two Federalist Society members (David B. Rivkin, Jr., partner in the Washington, D.C. office of Baker & Hostetler LLP, Contributing Editor to the National Interest and National Review magazines, and Member of the UN Subcommission on the Promotion and Protection of Human Rights and Robert Levy, Senior Fellow in Constitutional Studies at the Cato Institute) pose and then answer questions about the administration's policy on domestic surveillance.

We begin with five questions by David Rivkin, with answers by Robert Levy and a rebuttal by David Rivkin at the end of this section:

Q1. Rivkin: *Why can't the President's use of warrantless surveillance in this instance be justified under the Foreign Intelligence Surveillance Act (FISA), especially since FISA requires a "reasonable expectation of privacy" to exist before a FISA warrant is required?*

Levy: The text of FISA §1809 is unambiguous: "A person is guilty of an offense if he intentionally engages in electronic surveillance … except as authorized by statute." That provision covers communications from or to U.S. citizens or permanent resident aliens in the United States. Moreover, Title III (the Wiretap Act) further provides that "procedures in this chapter and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance … may be conducted."

To be sure, FISA's prohibition on unauthorized electronic surveillance applies "under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes." §1801(f). Surely, U.S. citizens and permanent resident aliens have a reasonable expectation of privacy in their international phone calls and emails. Accordingly, warrants would be required for law enforcement purposes and, therefore, warrantless surveillance absent an authorizing statute would violate the FISA requirement.

I know of no court case that has denied there is a reasonable expectation of privacy by U.S. citizens and permanent resident aliens in the types of wire communications that are reportedly monitored by the NSA's electronic surveillance program. Perhaps there are some international satellite or radio communications that do not come under FISA's prohibition because the correspondents could not reasonably expect privacy. But the president has made no such showing to Congress, the courts, or the public.

Rivkin Rebuttal can be found at the end of this section.

Q2. Rivkin: *Why do you believe that FISA applies to the wartime gathering of intelligence from the enemy, since the statute was clearly drafted to deal with peacetime foreign intelligence gathering?*

Levy: First, the FISA text, as quoted above, makes no distinction between wartime and peacetime. To conduct a wiretap without statutory authorization, either in wartime or peacetime, is a crime, punishable by up to five years in prison.

Second, in FISA §1811, Congress expressly contemplated warrantless wiretaps during wartime, and limited them to the first 15 days after war is declared. The statute reads: "Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this title to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress."

Third, FISA warrant requirements and electronic surveillance provisions were amended by the USA PATRIOT Act, which was passed in response to 9/11 and signed by President Bush. If 9/11 triggered "wartime," as the administration has repeatedly argued, then the amended FISA is clearly a wartime statute.

Rivkin Rebuttal can be found at the end of this section.

Q3. Rivkin: *Even if you assume that FISA was meant to apply to this situation and the President did not comply with FISA, do you believe that he has no plenary constitutional powers of his own to order warrantless wartime surveillance? If so, how do you reconcile your opinion with the existence of numerous court cases, both pre-FISA and post-FISA, that specifically acknowledge the existence of such a power in the President?*

Levy: Yes, I believe that the president has constitutional powers to order warrantless wartime surveillance. For example, intercepting enemy communications on the battlefield is clearly an incident of the president's war power. But warrantless wiretapping of Americans inside the United States who may have nothing to do with Al Qaeda does not qualify as an incidental wartime authority. The president's war powers are broad, but not

"plenary" as your question implies. Indeed, Congress, not the president, is constitutionally authorized to suspend habeas corpus, "define and punish … Offenses against the Law of Nations," "declare War," "raise and support Armies," "provide and maintain a Navy," and "make Rules for the Government and Regulation of the land and naval forces."

With regard to the Fourth Amendment, the courts have recognized border control exceptions to the warrant requirement (e.g., *United States v. Montoya-Hernandez*, 1985). And a national security exception for foreign intelligence surveillance was addressed in the "Keith" case (*United States v. U.S. District Court*, 1972), which denied such an exception if a domestic organization were involved, but left open the possibility if a foreign power were involved. Moreover, the 2002 opinion by the FISA Appellate Chambers, In re: Sealed Case, cited several federal cases that found "inherent authority [by the president] to conduct warrantless searches to obtain foreign intelligence information."

So the president does have inherent powers, which stem from the Commander-in-Chief Clause of Article II, and the courts have so ruled. The dispute, then, is over the extent of that unilateral executive authority. And the key Supreme Court opinion that establishes a framework for resolving that dispute is Justice Jackson's concurrence in *Youngstown Sheet & Tube v. Sawyer* -- the 1952 case denying President Truman's authority to seize the steel mills. Truman had argued that a labor strike would irreparably damage national security because steel production was essential to the production of war munitions. But during the debate over the 1947 Taft-Hartley Act, Congress had expressly rejected seizure. Justice Jackson offered the following analysis, which was most recently adopted by the U.S. Court of Appeals for the Second Circuit in holding that the administration could no longer imprison Jose Padilla: First, when the president acts pursuant to an express or implied authorization from Congress, "his authority is at its maximum." Second, when the president acts in the absence of either a congressional grant or denial of authority, "there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." But third, where the president takes measures incompatible with the express or implied will of Congress -- such as the NSA program, which violates an express provision of the FISA statute -- "his power is at its lowest."

Even under *Youngstown*'s second category (congressional silence), the president might have inherent authority pursuant to the Commander-in-Chief Clause to interpret the "reasonableness" standard of the Fourth Amendment in a manner that would sanction certain warrantless searches. But the NSA program does not fit in *Youngstown*'s second category. It belongs in the third category, in which the president has acted in the face of an express statutory prohibition. In my view, he has overreached.

Rivkin Rebuttal can be found at the end of this section.

Q4. Rivkin: *Indeed, outside of the Fourth Amendment concerns, which only come alive in the context of an attempted Government prosecution of an individual, which specific constitutional provisions are violated by the President's unilateral decision to order warrantless wire-tapping?*

Levy: At the outset, I disagree that Fourth Amendment concerns "come alive" only "in the context of an attempted Government prosecution." Imagine police officers barging into a private home without a warrant, ordering the homeowner and his family around at gunpoint, installing bugs on phones and tracer software on computers, searching every room, closet, and drawer, then leaving, never to be heard from again -- no arrest, no indictment. Has the Fourth Amendment not been violated? The reason that the warrant requirement hinges on an expectation of privacy is that a key purpose of the Fourth Amendment is to protect privacy.

That said, I do not contend that the NSA executive order violates the Fourth Amendment. If there were no FISA statute barring the president's actions, the fuzzy text of the fourth Amendment, which protects only against unreasonable searches, probably leaves the president sufficient room for exercise of his inherent Commander-in-Chief authority. There is, however, a FISA statute that expressly forbids warrantless surveillance of the kind undertaken by the NSA. It is primarily for that statutory reason, not a constitutional reason, that the president's executive order is invalid.

Are there other constitutional provisions, besides the Fourth Amendment, that are infringed by the president's order? Perhaps. I mention two possibilities, but without elaboration because they are not the principal grounds for my objection to the NSA program. First, Article II requires that the president "shall take Care that the Laws be faithfully executed." He definitely has not done so with respect to FISA §1809. And even if he

believes in good faith that §1809 is trumped by his war powers, his use of secret executive orders is not the manner in which he should discharge his obligation to defend the Constitution and execute the law. Instead, he should have made his case to Congress, expanding on the list of FISA grievances that he would like to have amended by the PATRIOT Act.

Second, the Fifth Amendment proscribes deprivation of liberty without due process. Liberty, as we know from the Supreme Court's recent decision in the Texas sodomy case, *Lawrence v. Texas* (2003), encompasses selected aspects of privacy. A Fifth Amendment challenge to the NSA program might transcend the question whether particular surveillance was "reasonable" in terms of the Fourth Amendment's warrant requirement.

Rivkin Rebuttal can be found at the end of this section.

Q5. Rivkin: *If the President cannot order wartime surveillance of known or suspected Al Qaeda operatives, what is left of his Commander-in-Chief power? Does this power not inherently entail an ability to gather intelligence about the enemy?*

Levy: The question implies that the president, but for his ability to order warrantless wiretaps of U.S. persons, would be utterly impotent in the war on terror. Nothing could be further from the truth. First, he has expansive power outside the United States. Second, the PATRIOT Act and other statutes have given him broad leeway within the United States. Third, he has considerable, although not plenary, inherent authority under the Commander-in-Chief power when Congress has been silent on a war-related issue.

But if Congress has exercised its own authority and expressly prohibited what the president would like to undertake, the president's power is limited. And yet, even then, if it is necessary and desirable to monitor the communications of U.S. persons, then the president should have sought a warrant or a change in the FISA statute.

The standard required to obtain a warrant from the FISA court is probable cause that someone may be "an agent of a foreign power," which includes international terrorist groups. That standard is far below the usual criminal-law requirement for probable cause that a crime has been, or is about to be, committed. Almost all FISA requests are granted, and emergency approval

for wiretaps can be handled within hours. In fact, the FISA statute (§105) allows the government in emergency situations to put a wiretap in place immediately, then seek court approval later, within 72 hours.

Finally, President Bush had a convenient vehicle to change the law within a week and a half of 9/11. The PATRIOT Act substantially enhanced the president's authority under FISA and expanded his ability to conduct foreign intelligence wiretaps. The president could have, but did not, seek new authority for the NSA -- authority that he has now decreed, unilaterally, without input from either Congress or the courts.

David Rivkin's Rebuttal to Robert Levy's responses:

FISA's Reach

Unlike Bob, I do not construe FISA as providing a comprehensive framework for regulating electronic surveillance by the U.S. government. Indeed, even a casual parsing of subsection (f) of § 1801, dealing with the definition of "electronic surveillance," demonstrates that FISA's entire set of strictures was meant to apply to a limited number of surveillance scenarios. In this regard, subsection (f)(1), which is the only one relevant to the post-September 11 special collection program, applies to "the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular known United States person who is in the United States if **the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.**" (emphasis added)

Quite aside from the reasonable expectation of privacy issue, which I flagged in my first round of questions, the above language would clearly not apply to a situation where the content of the intercepted communication is acquired by targeting an overseas-based al Qaeda member, rather than by targeting the U.S.-based person with whom that member is communicating. While neither Bob nor I know the precise algorithm or search programs used by the NSA, it is entirely conceivable, and even likely, that the surveillance is driven by the use of a particular overseas phone, whether in a sending or receiving mode; the very fact that the FISA language is so "spotty" underscores the proposition that Congress neither sought, nor could have

intended, to regulate the Executive's acquisition of foreign intelligence overseas.

As to the privacy expectations, as Bob would undoubtedly agree, these expectations in order to be protected either by the Fourth Amendment or by FISA have to be "reasonable" in nature. (Indeed, there is ample case law that makes clear that the reasonableness test is objective in nature and not driven by the subjective expectations of one or more persons involved.) In this regard, I find it highly unlikely that, even before September 11, any U.S. person would be unaware of the existence of the so-called Echelon – a joint multi-state intelligence collection program, featuring warrantless intercepts of phone calls and e-mails – and other similar international and regional efforts. To put it simply, whenever a U.S. person calls overseas, chances are quite high that his call would be intercepted by one or more intelligence services, either in the country to which the call is directed or somewhere else in the world. In the post-September 11 world, this expectation becomes a virtual certainty, especially if a U.S. person either calls to, or receives calls from, one or more countries in which al Qaeda is operating.

To use an analogy from past wars, it is a simple matter of common sense that an individual, who finds himself in a war zone, whether intentionally or not, cannot have the same expectation of privacy as a person operating in peacetime, far away from any battlefield. The communications sent and received by such a person can be intercepted, his very freedom of movement can be challenged and affected, either because of curfews or, for example, a requirement to limit the use of illumination or light-generating devices in nighttime. In this war, where the enemy seeks to attack Americans throughout the world, with a particular focus on launching attacks against targets in the continental United States, it is an unfortunate reality that the battlefield and the war zones have become geographically diffuse.

Unlike Bob, I also do not construe FISA § 1811 as being the sole venue for conducting wartime surveillance. In this regard, several points are worth making. First, since the entire FISA covers but a subset of electronic surveillance scenarios (as discussed above), it would be strange if § 1811 dealt with the entirety of wartime surveillance issues. Second, § 1811 is only triggered by a declaration of war, an event that occurred but a few times in American history, while in numerous other instances, Congress either

authorized the use of force or the President used force based upon his inherent constitutional powers. For § 1811 to be an exclusive venue, outside of FISA's normal procedures, to deal with the wartime surveillance problems, would mean that Congress intended the peacetime rules to apply to a vast majority of wartime scenarios. To put it mildly, this would be an anomalous result. Fortunately, there is a far more plausible, albeit less exciting interpretation of § 1811, namely, that Congress intended to lift for 15 days even those few regulatory restrictions contained in FISA, e.g., dealing with domestic surveillance, in case of a declared war. I find this interpretation particularly compelling, precisely because, in my view, the major significance of the declaration of war is to alter the legal regime governing relations within the United States.

Constitutional Issues

I am glad that Bob agrees with me regarding the President's plenary power to intercept enemy communications on the battlefield. I do find it puzzling that he does not see the President's post-September 11 collection program as falling squarely within the realm of battlefield/military intelligence. The very purpose of this program is to learn about al Qaeda's plans and dispositions; it is limited to the communications either originating from or received by al Qaeda members or operatives of al Qaeda-affiliated entities. (The very fact that it is not broad enough to encompass communications of other well-known terrorist entities, e.g., Tamil Tigers, underscores its limited, war-related nature.) The fact that a U.S.-based American person may be involved in these communications does not render them any less battlefield intelligence-like, for some rather obvious reasons.

Significantly, the fact that the Americans involved may have nothing to do with al Qaeda, in a sense of themselves not being al Qaeda operatives, also is not dispositive. To draw on another World War II-style analogy, the fact that a U.S. operative may be hiding in an attic of a French villager, while observing German military movements, certainly does not render the intelligence he gathers non-battlefield in nature. In this war, the U.S. person involved may be a casual acquaintance or a relative of an al Qaeda member, who, let's say, calls him from time to time just to blow off steam and chat. Yet, would Bob seriously argue that nothing of battlefield intelligence value can be learned from intercepting such communications, including such key facts as to where the al Qaeda operative is calling from, what his level of stress is, and what other important details he casually mentions in his

conversations? (Ironically, the fact that the American person involved may be entirely innocent of any wrongdoing, a fact trumpeted by Bob as a basis for questioning the application of the President's inherent power as the commander-in-chief to this situation, actually undermines Bob's pro-FISA argument. I am sure he would agree that a FISA warrant would not issue in such a situation, since there is no probable cause to believe that the U.S. person involved is an agent of foreign power.)

To summarize my views on this point, unlike the *Youngstown Sheet & Tube*-type situation, where the President sought to extend his executive authority over essentially domestic regulatory matters, albeit ones useful to war production, in the current situation, all that the Administration is doing is gathering battlefield intelligence about the very enemy that attacked us on September 11 and with whom we remain at war. If the President cannot do it, the commander-in-chief power means absolutely nothing. It is also worth noting that the authorization to use force contained language – "use all necessary means" – that is more than broad enough to accommodate the gathering of battlefield intelligence. While I am aware that, according to former Senator Tom Daschle's recollections, this issue – gathering of battlefield intelligence – did not come up in the White House discussions with Congress leading to the enactment of the authorization to use force resolution, and that Congress may have contemplated an even broader language in the resolution itself, these facts are quite irrelevant. The only thing that matters is that the language that ultimately passed was broad enough to accommodate intelligence-gathering. (By the way, Congress often uses generic language to cover a variety of specific situations; if the lack of specificity was a fatal defect, very little legislative business could be ever accomplished.)

Questions on domestic surveillance policy by Robert Levy, answers by David Rivkin and rebuttals by Robert Levy:

Q1. Levy: *If presidential authorization for NSA warrantless searches is an incident to Article II's Commander-in-Chief power, so too are sneak-and-peek searches, roving wiretaps, library records searches, administrative subpoenas, and national security letters. Would you therefore tell the president that he can proceed with those activities even if Congress declines to reauthorize the PATRIOT Act?*

Rivkin: I would not argue that the President, using his own authority, can bring about exactly the same results that can be accomplished using the PATRIOT Act's toolbox. However, the area in which the President's inherent power is deficient is primarily concerned with the use of any evidence, gathered as a result of wiretaps, sneak-and-peek searches, in criminal prosecutions. In this regard, the Fourth Amendment (and numerous court cases construing it) bars the use of evidence, obtained through warrantless searches, in criminal prosecutions. Significantly, to the extent that the evidence being gathered is used for non-prosecutorial purposes, the President indeed has plenary power to authorize all sorts of warrantless surveillance. This power is particularly formidable in time of war; if the President cannot gather intelligence about the very enemies -- Al Qaeda and affiliated groups -- against whom we are engaged in combat, his Commander-in-Chief powers have been entirely vitiated. It is worth noting that the President's authority to conduct warrantless surveillance has been acknowledged in dozens of pre- and post-FISA court cases; the November 18, 2002 decision of the FISA Appellate Chamber notes, after a careful review of all the relevant case law, that "The Truong court, as did all the other courts to have decided the issue; held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information….We take it for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power." (page 48). Significantly, this has also been the view of all of the Administrations since FISA was enacted in 1978; a number of them, including the Clinton Administration, have conducted warrantless electronic surveillance, by-passing FISA and relying solely on the President's inherent powers.

Levy Rebuttal #1: David Rivkin denies that the President could unilaterally "bring about exactly the same results" that Congress authorized under the PATRIOT Act. Yet he offers no intelligible principle foreclosing such executive power while permitting NSA domestic surveillance. Instead, he asserts, without substantiation, that other Presidents have violated FISA. Then he cites, wholly out of context, the FISA Appellate Chamber's dicta that "FISA could not encroach on the President's constitutional power." The holding in that case was that FISA permissibly *amplified* the President's power. FISA §1809, proscribing certain warrantless surveillance, was not an encroachment, but a clarification of the President's expanded authority.

Q2. Levy: *The attorney general has asserted that the NSA program rests on the congressional Authorization for Use of Military Force and the Commander-in-Chief power in Article II. He or his predecessor has made similar claims for military tribunals without congressional authorization, secret CIA prisons without Red Cross access, indefinite detention of US citizens without access to counsel, enemy combatant declarations in Guantanamo without hearings as required by the Geneva Conventions, and interrogation techniques that may have violated the Convention Against Torture. Which if any of those activities exceed the president's Commander-in-Chief/ Authorization for Use of Military Force powers? If none, please identify one or two plausible anti-terror powers that the president might assert, but you would deny.*

Rivkin: In time of war, the President's Commander-in-Chief power is entirely sufficient to support detention, for the duration of hostilities, of captured enemy combatants, irrespective of their citizenship. This principle was upheld on numerous occasions by the courts, including most recently, by the Supreme Court two years ago in the *Hamdi* case. I do not want to rehash here our previous debates about unlawful enemy combatants; it would suffice to say that, in my view, the President has ample power to classify captured Al Qaeda and Taliban members as unlawful enemy combatants, who are entitled to be treated humanely, but who are not eligible for the full set of Geneva Convention-level protections. As to interrogation techniques, I do not believe that the Administration has, a matter of policy, violated the Convention Against Torture; there is a range of stress interrogation techniques that do not rise to the level of either torture or cruel inhumane, or degrading treatment. With regard to your question as to what powers, while useful to the prosecution of this war against Al Qaeda and affiliated entities, the President cannot properly assert relying merely on his own inherent constitutional authority, the *Youngstown* case provides a pretty good illustration of such powers.

Levy Rebuttal #2: To his credit, David is consistent. He finds no fault with the President's actions in any of the areas I've mentioned – i.e., warrantless domestic surveillance, unauthorized military tribunals, secret CIA prisons, indefinite detention of U.S. citizens, enemy combatant edicts, and aggressive interrogation techniques. Incongruously, he agrees that President Truman could not seize the steel mills. We can only guess what notion of executive power justifies circumvention, if not violation, of FISA, the Non-Detention Act, Geneva Conventions, and the Convention Against Torture, yet prohibits

the President from trying to ensure the availability of steel, without which all war-making ends.

Q3. Levy: *Nothing in the Authorization for Use of Military Force covers wiretaps. By contrast, the FISA statute, implicitly ratified by President Bush when he agreed to the PATRIOT Act's relaxation of selected surveillance procedures, expressly criminalizes warrantless wiretaps that are not authorized by Congress. Do you nonetheless contend that Congress, in passing the Authorization for Use of Military Force, intended to make compliance with FISA optional? If so, why did the president and Congress bother to revise FISA in the PATRIOT Act, which was enacted at the same time as the Authorization for Use of Military Force?*

Rivkin: The Congressional authorization to use military force is important, insofar as it puts Congress on record as supporting the President's use of force and other "all necessary means" to win this war. The fact that the authorization does not refer to the gathering of battlefield intelligence is irrelevant; it did not authorize the President to order the use of artillery or air power either. To put it simply, Congress often uses generic terms and the lack of specific details does not detract from the legal force of the relevant statutory language. (I am sure that you would not argue that the Fourth Amendment's failure to reference specifically electronic wire-tapping means that it is not covered by the Amendment.) I also do not find it particularly relevant that this subject -- gathering of battlefield intelligence -- did not, according to former Senator Daschle, come up during the negotiations leading to the enactment of the authorization to use force resolution. Likewise, I am not much impressed by the fact that the President may have, also according to Daschle, sought an even broader language. The bottom line is that the language of the resolution, as passed by Congress, was broad enough to accommodate the gathering of militarily useful intelligence; to argue otherwise, would rob the term "all necessary means" of any meaningful content. By the way, I am not suggesting that either the Commander-in-Chief power or the authorization to use force are infinitely elastic and can enable the President to exercise an unlimited array of powers. However, I would hope you would agree that the Commander-in-Chief power must include an ability to gather intelligence about the enemy's plans, dispositions, etc.

As far as your point about the PATRIOT Act is concerned, I read it to mean that, in your view, there is somehow some tension between my interpretation of the President's inherent constitutional power to gather battlefield intelligence

and the Administration's relentless efforts to cause Congress to enact, shortly after September 11, the PATRIOT Act and its subsequent efforts to cause it to be reauthorized. However, in my view, the reverse is true; it is precisely because I construe the proper ambit of the President's Commander-in-Chief power quite modestly, limiting it to the collection of the battlefield intelligence (i.e., intelligence about the plans and dispositions of enemy belligerents), that the efforts by the President to bolster the legal framework for gathering domestic terrorism-related intelligence through the enactment of the PATRIOT Act make perfect sense. It is, of course, entirely proper to argue that, in the time of war, the President can rely on his inherent constitutional authority to gather all sorts of foreign intelligence, particularly as it bears upon possible terrorist attacks on American soil. The primary reason the PATRIOT Act, or for that matter, FISA, are needed is to ensure that the information gathered by the Executive Branch can be properly introduced into evidence, in case a criminal prosecution is being sought.

By the way, it is precisely because I believe that there is a difference between foreign intelligence and military/battlefield intelligence, that I am not troubled by the existence of FISA Section 1811, which blesses the President's warrantless acquisition, following a declaration of war, of foreign intelligence for 15 days. I construe this language to mean that Congress believes that, following the declaration of war, for a period of 15 days, intelligence gathered without warrants can be introduced into evidence in criminal cases.

Levy Rebuttal #3: Two comments. First, David finds it "irrelevant" that the AUMF nowhere refers to gathering intelligence. He's not troubled by "the lack of specific details" because "Congress often uses generic terms." He should be troubled. A settled canon of statutory construction states that specific provisions trump general provisions -- *lex specialis derogat legi generali*. When FISA §1811 specifically forbids "electronic surveillance without a court order," while the AUMF generally allows "necessary and appropriate force," it is quite simply bizarre to conclude that electronic surveillance without a court order is authorized. Second, David informs us that the debate over FISA and the PATRIOT Act is mostly about things the President could do on his own, except that he couldn't use the evidence in a criminal prosecution. In other words, Congressional enactment or rejection of the surveillance provisions in the two statutes would have no effect on the President's authority to implement those provisions. Just the rules of evidence are at issue, says David; and aside from those rules, FISA's authorization for war-time surveillance "for a period not to exceed fifteen

calendar days" really means no restrictions for fifteen days, then no restrictions after fifteen days. Never mind the text.

Q4. Levy: *At issue in* Hamdi v. Rumsfeld *was the requirement in the Non-Detention Act for a statute authorizing Hamdi's treatment. The Justice Department argued that the Authorization for Use of Military Force was such a statute. The Court plurality disagreed. It held, first, that the government "may detain ... individuals legitimately determined to be Taliban combatants who engaged in armed conflict against the U.S." But the Court added that Hamdi was entitled to "notice of the factual basis for his classification," access to counsel, and a "fair opportunity to rebut the government's factual assertions before a neutral decision-maker." Moreover, said Justice O'Connor, "Indefinite detention for the purpose of interrogation is not authorized." In light of the narrow scope given to the Authorization for Use of Military Force by the* Hamdi *Court, how can the Authorization for Use of Military Force serve as statutory authorization for warrantless searches that are not even mentioned in the statute?*

Rivkin: I believe that your question incorrectly summarizes the relevant case law. It was only the Second Circuit, in the Padilla case, that held that the authorization for the use of force did not override the Non-Detention Act. In the *Hamdi* case, the Supreme Court ruled to the contrary, specifically holding that the Government may detain, despite the existence of the Non-Detention Act, captured enemy combatants like Mr. Hamdi for the duration of hostilities. The fact that the Supreme Court also indicated that unlawful enemy combatants were entitled to a modicum of due process, in the context of contesting their unlawful enemy combatant classification, is an entirely separate issue and has nothing to do with either the Non-Detention Act, or the Congressional authorization to use force, or the interplay between the two. (O'Connor's language "indefinite detention for the purpose of interrogation is not authorized" is both true and irrelevant. It is true because, under the laws of war, captured enemy combatants, whether lawful or unlawful, can be held only for the duration of hostilities and no more, and the desire of their captors to interrogate them is irrelevant for the purposes of determining how long they can be held. O'Connor's statement is also irrelevant because the Administration never argued that it can detain enemy combatants beyond the point at which hostilities have ended, just so they can interrogate them some more.) In light of these facts, I do not agree with your view that the Supreme Court in *Hamdi* construed the authorization to use force narrowly; indeed, it has construed it as broadly as it had to be

construed, buttressing the President's power to detain Mr. Hamdi as an unlawful enemy combatant and overriding the Non-Detention Act. Frankly speaking, for the purposes of the *Hamdi* case, I cannot conceive how the Court could have construed the authorization to use force more broadly.

Levy Rebuttal #4: David rejects my view that the Supreme Court in *Hamdi* interpreted the AUMF narrowly. Indeed, he "could not conceive how the Court could have construed the authorization … more broadly." Well, let's see. The government insisted that a U.S. citizen could be detained indefinitely, without access to counsel, without a hearing, and without knowing the basis for his detention. The Court plurality agreed that a U.S. citizen can be detained. But only "Taliban combatants;" only with access to counsel; only after "notice of the factual basis for his classification;" only after a hearing; and only if not "indefinite detention for … interrogation." How much narrower could the holding be? No one argued that the government had to release enemy soldiers captured on the battlefield. Yet the Court rebuffed each of the government's other contentions. Indeed, if *Hamdi* were a victory for the government, as David argues, why did the Defense Department release him after declaring in court papers that merely allowing Hamdi to meet with counsel would "jeopardize[] compelling national security interests" and "interfere with if not irreparably harm the military's ongoing efforts to gather intelligence?"

Q5. Levy: *President Bush, much like President Truman when he attempted to seize the steel mills, is asserting a power to act in a manner explicitly forbidden by Congress. Under those circumstances, said Justice Jackson in his* Youngstown Sheet & Tube v. Sawyer *concurrence, presidential "power is at its lowest." To uphold the president's NSA program would thus require finding that either (a) Congress has no authority at all to regulate domestic wiretaps of Americans, or (b) Article II's Commander-in-Chief Clause makes Congress's enactment in this area inoperative. Do you support either or both of those notions?*

Rivkin: Because, in my view, the 2001 Congressional authorization to use force squarely buttresses and supports the President's use of Commander-in-Chief powers, the current situation involves the use of Presidential powers at the zenith. However, even if one assumes that Congress has done something to prevent the President from using warrantless electronic surveillance techniques to gather intelligence about Al Qaeda and affiliated entities, such

an effort would trench upon the President's core constitutional authority and would, therefore, be null and void.

Levy Rebuttal #5: The Commander-in-Chief's power to authorize NSA domestic surveillance is at its "zenith," writes David, because Congress buttressed that power when it enacted the AUMF. Yet consider Sen. Daschle's contrary statements, which are nonchalantly dismissed by David in his response to Question #3. Daschle reminds us that the subject of warrantless wiretaps of Americans never came up during the AUMF debate; such wiretaps would not have been approved in any event; no one who voted for the use of force imagined that he was also voting for warrantless domestic surveillance; and more exacting authorization, sought by the President, was refused by Congress. No matter, argues David; even without the AUMF, FISA is "null and void" because it trenches on the President's core authority. Not so. In passing FISA, Congress exercised its undisputed authority to "provide for the common Defense" by, among other things, "defin[ing] and punish[ing] … Offenses against the Law of Nations." FISA's express prohibition of warrantless domestic wiretaps means that the President's power under the *Youngstown* framework is at its lowest, not its zenith. Thus limited, the President may not annul a duly enacted federal statute.