The Search for a Ticking Nuclear Bomb: A Race to Save Human Lives or a Fourth Amendment Violation?

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By Alex Zektser

Introduction

Imagine that you are Washington D.C.’s chief of police. You are sitting in your office, having a normal workday, when all of a sudden you get a phone call informing you that police officers have obtained reliable information indicating that a nuclear bomb is hidden inside someone’s house in Washington D.C. In addition, the information indicates that this bomb is set to go off very shortly. You also learn that police officers have been able to narrow down the search to five neighborhoods, but that the search cannot be narrowed down any further. Thus, you are faced with a dilemma. On the one hand, you know that police officers will need to search every house within the suspect neighborhoods to prevent the catastrophic scenario of a nuclear bomb going off inside a United States city. On the other hand, you know that the U.S. Supreme Court has consistently refused to allow multi-house police searches without probable cause.

A ticking bomb scenario, such as the one described supra, has been the favorite issue of academics and the media ever since details of the torture performed at Abu Ghraib became public. One academic has even famously argued for the issuance of torture warrants in ticking bomb cases. However, discussion concerning the ticking bomb scenario has been focused on the use of torture, with most academics simply

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1 See, e.g., David Luban, Liberalism, Torture, and the Ticking Bomb, 91 VA. L. REV. 1425 (2005); Daniel Rothenberg, “What We Have Seen Has Been Terrible” Public Presentational Torture and the Communicative Logic of State of Terror, 67 ALB. L. REV. 465 (2003); Rosa Brooks, Op-Ed., Down the Slippery Slope with Hillary, L.A. TIMES, Oct. 20, 2006, at B13 (quoting Hillary Clinton as stating “that the president should have ‘some lawful authority’” to use torture or other “‘severe’ interrogation methods in a so-called ticking bomb scenario”).

assuming that a warrantless search to discover a ticking bomb would not violate the
Fourth Amendment.³

This article explores the question of whether a broad warrantless search to
discover a ticking nuclear bomb is indeed permissible under current Fourth Amendment
jurisprudence. In Part I, this article discusses how the U.S. Supreme Court’s decision in
*Kyllo v. United States*⁴ handicaps efforts to find a ticking nuclear bomb by limiting how
police officers can use high-tech devices to detect radiation emanating from said nuclear
bomb. In Part II, this article looks at the history and the original intent behind the Fourth
Amendment to discuss why exceptions to the warrant requirement are drawn very
narrowly. Then, in Part III, this article examines the exigent circumstances doctrine to
determine that there is a conflict within the exigent circumstances case law and that a
search of someone’s house without probable cause may or may not be constitutionally
permissible under this doctrine. Finally, in Part IV, this article argues that under the U.S.
Supreme Court case of *Hudson v. Michigan*,⁵ even if a warrantless search to discover a
ticking nuclear bomb does violate the Fourth Amendment, the proper remedy for this
violation does not consist of excluding evidence discovered during this search from the
subsequent trial of the offender(s).

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³ See, e.g., Charles Lugosi, *Mocking The Rule of Law: A Kangaroo Court for Australian David Hicks*, 14
TEMP. POL. & CIV. RTS. L. REV. 335, 361 n.222 (interpreting the *Guantanamo Detainee Cases* as holding
that exigent circumstances would be present in a ticking bomb scenario); Oren Gross, *Are Torture
Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1536
(2004) (“catastrophic cases, such as the ticking bomb case, are likely to fall into the ‘exigent
circumstances’ exception to the warrant and probable cause requirements of the Fourth Amendment”).
I. **Kyllo v. United States: Handicapping the Use of Radiation Detection Equipment**

The Fourth Amendment states that “[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Thus, when one thinks of a hidden nuclear bomb, the first question that comes to mind is why the police simply do not sweep the city with some type of radiation-detection tool to find the bomb? After all, nuclear weapons emit radiation that can be detected with certain sophisticated equipment and, by sweeping an area with a detection tool, the police can avoid physically entering and searching the houses in that area.

There are, however two problems with this approach. The first problem is that “radiation [emanating from a nuclear bomb] is weak and difficult to detect.” The second problem is the U.S. Supreme Court’s decision in *Kyllo v. United States*, in which the Court equated the concept of police pointing certain sophisticated detection equipment at a house with the concept of the police physically entering that house and searching it.

In *Kyllo*, a federal agent suspected the defendant of growing marijuana inside his house. The federal agent knew that to grow marijuana indoors, the defendant would need to use high-intensity lamps that give off a significant amount of heat. Thus, the agent used a device known as a thermal imager to observe that parts of the defendant’s

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6 U.S. CONST., amend IV.
9 *Kyllo*, 533 U.S. at 40.
10 *Id.* at 29.
11 *Id.*
house were significantly hotter than the neighboring houses.\textsuperscript{12} Data from this thermal imager was used to obtain a search warrant, which ultimately revealed the fact that the defendant was growing significant amounts of marijuana inside his house.\textsuperscript{13}

When this case, ultimately made its way to the U.S. Supreme Court, the Court held that the use of a thermal imager in this instance was unconstitutional.\textsuperscript{14} The Court pointed out that “‘[a]t the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’”\textsuperscript{15} The Court then went on to find that this right was very significant at the time that the Fourth Amendment was adopted.\textsuperscript{16} Thus, the Court held that when “the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.”\textsuperscript{17}

Four justices dissented from this opinion and pointed out that the majority was ignoring the distinction between peering into a person’s house and picking up information that was already in the public domain.\textsuperscript{18} The dissenters found that the Fourth Amendment only protects the right of the people “‘to be secure in their houses’ against unreasonable searches and seizures.”\textsuperscript{19} Since the thermal imager was merely picking up heat that was already in the public domain because it was emanating from the outside walls of the defendant’s house, the dissenters in \textit{Kyllo} would have held that the use of the
thermal imager “did not amount to a search and was perfectly reasonable.”

Unfortunately, a dissent is not binding law and the Kyllo majority opinion is still good law today. Since radiation detectors are not a form of commonly used technology, a court is likely to apply Kyllo to hold that using a radiation detector to detect the amount of radiation emanating from a person’s house is a search that is presumptively unreasonable without a warrant.

It should be noted though, that the Kyllo majority never stated that police cannot use uncommon high-tech equipment to peer into a person’s home; the opinion merely equated the use of that equipment with a search. Therefore, if a valid exception to the warrant requirement applies to a search for a ticking nuclear bomb, then, Kyllo would not bar the police from using radar detectors to locate said nuclear bomb.

II. Original Intent: Why Exceptions to the Warrant Requirement Are Narrowly Drawn

Since a ticking nuclear bomb cannot be detected without a sweeping search of multiple houses, the only way that this search can take place is if the police can either secure a search warrant for each house within the suspicious neighborhoods or if an exception to the warrant requirement permits this type of search. A police officer can only obtain a warrant to search a residence if he can show that he knows certain facts that would lead a reasonable person to the belief that evidence of a crime will be found inside

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20 Kyllo, 533 U.S. at 44 (Stevens, J., dissenting).
21 See, e.g., United States v. Hammond, 351 F.3d 765, 769 (6th Cir. 2003) (“the government has stipulated that the thermal imaging can not be considered, in accordance with the recent Supreme Court decision of Kyllo v. United States”); United States v. Holmes, 183 F. Supp. 2d 108, 109 (D. Me. 2002) (applying Kyllo to suppress thermal imaging evidence).
22 See Kyllo, 533 U.S. at 40.
23 Id.
that residence (this concept is known as probable cause). Since the police do not know what house the nuclear bomb is in, when a police officer looks at a house, he cannot form a reasonable belief that he will find a nuclear bomb inside that house. Thus, the police will be unable to show the probable cause necessary to obtain a warrant and will instead be forced to rely on an exception to the warrant requirement.

To determine whether a search for a ticking nuclear bomb should be covered by an exception to the warrant requirement, it is useful to examine the Framers’ intent in imposing the warrant requirement in the first place. The Fourth Amendment came into existence as a result of the American colonists’ experience with British search warrants known as writs of assistance. Shortly before the American Revolution, officers of the Crown would give customs officials writs of assistance, which gave those officials “blanket authority to search where they pleased for goods imported in violation of the British tax laws.” One of the leaders of the young American colonies, James Otis, pronounced these writs of assistance to be “the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book.” These writs were so vehemently despised, that they were ultimately one of the major causes of the American colonies’ revolt against Britain. After the revolt was successful, the colonists’ memory of the broad searches permitted by the British writs of assistance led them to add the Fourth Amendment to the

\[\text{Note: Footnotes are listed below.}\]

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24 See Maryland v. Pringle, 540 U.S. 366, 369 (2003) (“no warrants shall issue but upon probable cause”) (quoting U.S. CONST., amend. IV); Ornelas v. United States, 517 U.S. 690, 696 (1996) (“probable cause to search [exists] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found”).
25 See Pringle, 540 U.S. at 369.
27 Id. at 481.
29 Id.
United States Constitution.\textsuperscript{30}

Thus, the Fourth Amendment was passed with the explicit goal of preventing a repeat of the broad baseless searches that were permitted by the British writs of assistance.\textsuperscript{31} As a result, the U.S. Supreme Court has repeatedly held that “it is a cardinal principle that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are \textit{per se} unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions.’”\textsuperscript{32}

The intent of the Framers’ to prevent broad searches through the Fourth Amendment poses a special problem for a search to find a ticking nuclear bomb. Since police officers cannot pinpoint the house that contains the bomb, the police would need to conduct a sweeping search of the suspect neighborhoods in order to locate the bomb. A sweeping search such as the one envisioned here necessarily conflicts with the Framers’ and the Supreme Court’s view that a sweeping search without probable cause is “\textit{per se} unreasonable.”\textsuperscript{33}

However, the U.S. Supreme Court has also held, in \textit{Vernonia School District 47j v. Acton},\textsuperscript{34} that the original intent behind the Fourth Amendment does not apply when “at the time the [Fourth Amendment] was enacted . . . there was no clear practice, either approving or disapproving the type of search at issue.”\textsuperscript{35} Instead, the decision about “whether a particular search meets the [Fourth Amendment’s] reasonableness standard ‘is

\textsuperscript{30} Stanford, 379 U.S. at 481.
\textsuperscript{31} Id.
\textsuperscript{33} Katz, 389 U.S. at 357.
\textsuperscript{34} 515 U.S. 646 (1995).
judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.”

At the time that the Fourth Amendment was drafted, there did not exist powerful nuclear bombs with the capability to level an entire city. The Framers did not need to address the possibility that a narrow search could allow a nuclear bomb to detonate and destroy a U.S. city and thus, there was no clear practice either approving or disapproving of the search for a ticking nuclear bomb. Since there was no clear practice during the Framers’ time of searching for weapons of mass destruction, under Acton, the U.S. Supreme Court would be able to examine the issue of the ticking nuclear bomb on its own merits without deference to the Framers’ dislike of the broad searches permitted by the British writs of assistance.

III. Exigent Circumstances: The Ambiguity Within Current Case Law

One of the current exceptions to the warrant requirement is a doctrine known as exigent circumstances. Under this doctrine, a police officer can bypass the warrant requirement if he can show that he “had an urgent need or an immediate major crisis in the performance of duty affording neither time nor opportunity to apply to a magistrate [for a warrant].” This Part discusses 1) whether a search for a ticking nuclear bomb qualifies as an exigent circumstance and 2) whether a showing of exigent circumstances is enough to justify a search of a person’s house without any probable cause.

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36 Id. at 652-63 (quoting Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989)).
A. *Is the Search for a Ticking Nuclear Bomb an Exigent Circumstance?*

The seminal case in which the U.S. Supreme Court articulated the doctrine of exigent circumstances is *Warden, Maryland Penitentiary v. Hayden.*\(^{39}\) In *Hayden*, the “police were informed that an armed robbery had taken place” and that the suspect had entered a certain house shortly before their arrival.\(^{40}\) Upon hearing this information, the police promptly entered that house (without a warrant) and began searching for the suspect and for any weapons that the suspect may have used in the robbery.\(^{41}\) The U.S. Supreme Court held that the police officers “acted reasonably” because “[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have [ensured] that [the suspect] was the only man present and that the police had control of all weapons which could be used against them or to [affect] an escape.”\(^{42}\)

Courts have subsequently applied this doctrine to cover all types of conduct in which emergency circumstances render it unwise for police officers to wait for a search warrant to be issued.\(^{43}\) More specifically, two exigent circumstance cases seem to be particularly applicable to the search for a ticking nuclear bomb.

First, there is the Eighth Circuit case of *United States v. Boettger.*\(^{44}\) In *Boettger,*

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\(^{39}\) 387 U.S. 294 (1967).

\(^{40}\) *Id.* at 298.

\(^{41}\) *Id.*

\(^{42}\) *Id.* at 298-99.

\(^{43}\) *See, e.g., Koch v. Town of Brattleboro,* 287 F.3d 162, 169 (2d Cir. 2002) (“Police may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance”); *Ewolski v. City of Brunswick,* 287 F.3d 492, 502 (6th Cir. 2002) (holding that warrantless entry was justified because the police knew that a mentally unstable suspect had a shotgun).

\(^{44}\) 71 F.3d 1410 (8th Cir. 1995).
police were called to investigate an explosion at an apartment complex.\textsuperscript{45} During their investigation, the police entered a suspicious apartment where they found smoke, strange liquids, and a possibly active bomb.\textsuperscript{46} Police officers promptly evacuated the entire apartment complex and called in other government agencies to examine the chemicals and possible bomb at the apartment in question.\textsuperscript{47} This examination spanned several days and investigators ultimately found a firearm silencer and bomb-making literature inside the apartment.\textsuperscript{48}

On appeal, the defendant apartment resident argued that once police officers had secured his apartment, their conduct was no longer justified by exigent circumstances and they needed to obtain a warrant to remain inside his apartment.\textsuperscript{49} However, the Eighth Circuit Court of Appeals held that the normal expectations of privacy that are associated with a private residence “must be lowered where a resident admits working with explosive materials in an apartment complex with close neighbors.”\textsuperscript{50} The court went on to find that the continuous police presence at the defendant’s apartment was necessary “to ascertain the cause of the explosion and detect unknown explosive devices.”\textsuperscript{51} Therefore, the court held that the police officers’ conduct was justified by exigent circumstances.\textsuperscript{52}

The second exigent circumstances case that is applicable to a ticking nuclear bomb scenario is a Sixth Circuit case called \textit{United States v. Johnson}.\textsuperscript{53} In \textit{Johnson}, police officers entered the defendant’s home where they “observed, in plain view,
ammunition, gun clips, a dynamite wick or fuse, two pipes with end caps, books on how to make explosive devices, and a piece of white PVC pipe with tape on the end.”

In addition, one of the police officers “also observed a locked box . . . with a sign on it which stated: ‘This contains five pounds of black powder and if moved, will explode.’” The officers called in the bomb squad who in turn called in the Bureau of Alcohol Tobacco and Firearms (BATF). After arriving at the scene and analyzing the items in question at their lab, BATF investigators concluded that these items could be used to make a pipe bomb.

On appeal, defendant argued that exigent circumstances did not justify the presence of the bomb squad and BATF agents at his apartment. However, the Sixth Circuit Court of Appeals found that the items in the defendant’s apartment “led the [police] officers to believe that a real threat to public safety was presented by the potential presence of explosive devices on the premises.” Since this belief is what caused the police officers to call in the bomb squad and the BATF, the court held that the presence of these agencies was permitted under the exigent circumstances doctrine.

Johnson and Boettger are similar in that the courts in both cases allowed the investigating police officers to have greater leeway because of a substantial danger to public safety. If the Johnson and Boettger cases did not involve an explosive device that threatened public safety, neither court would have permitted police officers to investigate

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54 Id. at 507.
55 Id.
56 Id.
57 Id. at 508.
58 Id.
59 Johnson, 9 F.3d at 510.
60 Id. at 510-11.
the defendants’ premises for an extended period of time without a warrant.\textsuperscript{61} In fact, the *Boettger* court even explicitly stated that the expectation of privacy in a private residence is lower when a defendant makes an explosive device in his home and thereby endangers those around him.\textsuperscript{62}

Thus, since a ticking nuclear bomb presents an even greater danger to public safety than the non-nuclear bombs in *Johnson* and *Boettger*, courts should be able to find that officers searching for a ticking nuclear bomb are faced with exigent circumstances. However, there is a significant problem with applying cases such as *Johnson* and *Boettger* to the scenario of a ticking nuclear bomb lying in an unknown location. This problem consists of the fact that in both *Johnson* and *Boettger*, the police officers knew (or had strong reason to suspect) the exact location of the materials that threatened public safety. Neither case involved a sweeping search for dangerous materials because police officers in both cases were able to exhibit probable cause to search a specific residence. This fact inevitably leads to the question of whether a search of a private residence can be conducted solely based on exigent circumstances or whether probable cause to search that residence is also necessary.

**B. Are Exigent Circumstances Without Probable Cause Sufficient to Allow a Warrantless Search of a Private Residence?**

The reason that police officers who want to search a private residence may need to demonstrate probable cause in addition to exigent circumstances is the fact that the U.S. Supreme Court treats the search of a private dwelling differently than it treats the

\textsuperscript{61} See United States v. Johnson, 588 F.2d 147, 157 (5th Cir. 1979) (holding that once an emergency is under control, investigators need to secure a warrant before conducting any further searches of a residence); United States v. David, 756 F. Supp. 1385, 1392-93 (D. Nev. 1991) (same).

\textsuperscript{62} United States v. Boettger, 71 F.3d 1410, 1414 (8th Cir. 1995).
search of any other place. The seminal case that created this distinction is *Payton v. New York*.

*Payton* consisted of a challenge to New York statutes that permitted police officers to enter a private residence without a warrant in order to make an arrest. When it examined these statutes, the U.S. Supreme Court found that “[i]t is a ‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable.” Therefore, the Court held that “absent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within.”

A reasonable interpretation of this holding is that police officers need either a warrant based on probable cause or exigent circumstances to enter a private dwelling. The probable cause language in the holding merely states that even if police have probable cause to enter a private dwelling, they cannot act on that probable cause unless exigent circumstances are also present. This holding simply limits the application of naked probable cause, it never imposes a probable cause requirement on the exigent circumstances necessary for police to enter a private dwelling without a warrant. However, the language that the Court used in the *Payton* opinion has spawned two conflicting lines of case law.

The first line of cases consists of both U.S. Supreme Court and U.S. Courts of Appeals cases and it stays true to the language of *Payton* and holds that, to enter a private

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64 *Id.* at 574.
65 *Id.* at 586 (quoting Coolidge v. N.H., 403 U.S. 443, 477 (1971)).
66 *Payton*, 445 U.S. at 577-78.
residence, police officers need either a warrant based on probable cause or exigent circumstances. However, the second line of cases, which also consists of both U.S Supreme Court and U.S. Courts of Appeals cases, inexplicably misinterprets the language of Payton to hold that “[a]s Payton makes plain, police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home.”

Thus, under one line of cases, police officers can enter a private dwelling without a warrant if they are faced with an emergency that qualifies as an exigent circumstance while under the other line of cases, police officers cannot enter a private dwelling unless they have probable cause in addition to an exigent circumstance.

Interestingly, in the recent case of Brigham City v. Stuart, the U.S. Supreme Court has dropped a hint about how it will resolve the conflicting case law if this conflict is ever brought before the Court as an issue. Stuart dealt, in part, with an examination of the Ninth Circuit’s so-called “emergency doctrine.” This emergency doctrine came into existence because the Ninth Circuit Court of Appeals, believing that Payton requires police officers to show probable cause in addition to exigent circumstances, created a doctrine under which police officers could conduct a warrantless search based solely on exigent circumstances without any probable cause. Police officers needed to satisfy the

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67 See, e.g., Steagald v. United States, 451 U.S. 204, 214 n.7 (1981) (stating that exigent circumstances or consent are sufficient to enter a private dwelling without a warrant); In re Sealed Case 96-3167, 153 F.3d 759, 766 (D.C. Cir. 1998) (holding that the government only needs to show exigent circumstances to enter into a private dwelling); United States v. Baldacchino, 762 F.2d 170, 176 (1st Cir. 1985) (same).

68 Kirk v. La., 536 U.S. 635, 637 (2002) (emphasis added). See also Loria v. Gorman, 306 F.3d 1271, 1283 (2d Cir. 2002) (quoting Kirk); United States v. Haynes, 301 F.3d 669, 676-78 (6th Cir. 2002); (finding that a search of defendant’s car was unconstitutional because, even though exigent circumstances were present, police officers did not have probable cause); United States v. Rivera, 248 F.3d 677, 680 (7th Cir. 2001) (holding that a warrantless search of a private dwelling is constitutionally permissible “where there is probable cause and exigent circumstances”) (emphasis added).


70 Id. at 1947.

following three elements for their search to be constitutional under the emergency doctrine:

(1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property.

(2) The search must not be primarily motivated by intent to arrest and seize evidence.

(3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.\textsuperscript{72}

The reason that this doctrine and the \textit{Stuart} decision are interesting is because, when the U.S. Supreme Court examined the Ninth Circuit’s emergency doctrine in \textit{Stuart}, the Court did not strike down the entire doctrine. The Court merely struck down the second element of the doctrine by holding that a police officer’s “subjective motivation [for conducting a search] is irrelevant.”\textsuperscript{73} The Court then went on to find that the search at issue, which was arguably not based on probable cause,\textsuperscript{74} fell under the exigent circumstances doctrine and was “plainly reasonable under the circumstances.”\textsuperscript{75}

If the line of cases that requires probable cause in addition to exigent circumstances was controlling, the Court would have found that the third element of the emergency doctrine was likewise unnecessary because, under that line of cases, \textit{Payton} requires more than a mere “reasonable basis approximating probable cause”, it requires

\textsuperscript{72} United States v. Russell, 436 F.3d 1086, 1090 (9th Cir. 2006).
\textsuperscript{73} \textit{Stuart}, 126 S. Ct. at 1948.
\textsuperscript{74} \textit{Id.} at 1946-47
\textsuperscript{75} \textit{Id.} at 1949.
actual probable cause in addition to exigent circumstances. The fact that the Court did not strike down the third element of the emergency doctrine, a move that was required of the Court by the “probable cause + exigent circumstances” line of cases, means that the current Court does not find that line of cases controlling. Thus, it is likely that the current U.S. Supreme Court will likely overrule the line of cases that require probable cause in addition to exigent circumstances if the conflict within the exigent circumstance case law is ever brought before the Court.

IV. Why The Exclusionary Rule Should Not Apply to a Search for a Ticking Nuclear Bomb

Unfortunately, until the U.S. Supreme Court overrules the line of cases that requires probable cause for a warrantless search of a private dwelling, there is still the possibility that such a search could violate the Fourth Amendment if it is conducted without the requisite probable cause. However, under the U.S. Supreme Court case of Hudson v. Michigan,76 even if the search to find a ticking nuclear bomb does violate the Fourth Amendment, the proper remedy for this violation would not involve excluding evidence obtained during the search from the subsequent trial of the people responsible for creating the ticking nuclear bomb.

Hudson is a recent case in which the police found guns and drugs in the defendant’s apartment while executing a valid search warrant for that apartment.77 However, when the police entered the defendant’s apartment, they only waited a few seconds after knocking before unlocking the front door and entering the defendant’s

76 126 S. Ct. 2159 (2006)
77 Id. at 2162.
home. Under a Fourth Amendment doctrine known as the “knock and announce” rule, the police officers were required to “announce their presence and provide residents an opportunity to open the door” before they entered. Since the police officers in this case only waited a few seconds after knocking, the defendant was never given an opportunity to open the door and the police officers thus violated the knock and announce rule.

Because the knock and announce violation was undisputed, the only issue that the U.S. Supreme Court considered on appeal was the proper remedy for this violation. More specifically, the Court considered whether, as a remedy, it needed to apply the exclusionary rule to exclude from trial all evidence that the police obtained as a result of their knock and announce violation. The Court found that:

Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates substantial social costs, which sometimes include setting the guilty free and the dangerous at large. We have therefore been cautious against expanding it, and have repeatedly emphasized that the rule’s costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging its application. We have rejected indiscriminate application of the rule, and have held it to be applicable only where its remedial objectives are thought most efficaciously served, -- that is, where its deterrence benefits outweigh its substantial social costs.

The Court then went on to once again explicitly emphasize that “the exclusionary rule has never been applied except ‘where its deterrence benefits outweigh its ‘substantial social costs.’” In the case of the knock and announce doctrine, imposing the exclusionary rule on a knock and announce violation would entail considerable social costs, which included the “suppression of all [incriminating] evidence, amounting in

78 Id.
79 Id.
80 Id. at 2163.
81 Id.
82 Hudson, 126 S. Ct. at 2163-64.
83 Id. at 2165 (internal quotation marks and case citations omitted).
many cases to a get-out-of-jail-free card”. Since the deterrence benefits that would result from applying the exclusionary rule to a knock and announce violation were relatively small, the Court ultimately held that the exclusionary rule was not a proper remedy for a knock and announce violation. 

Unfortunately, *Hudson*’s balancing test is not as easy to apply to a ticking nuclear bomb scenario as it is to a knock and announce violation. The social costs of applying the exclusionary rule in this scenario are relatively clear-cut: if the police violate the Fourth Amendment during their search for the ticking nuclear bomb, the terrorists who planted and armed that nuclear bomb will get an “out-of-jail-free card” because the nuclear bomb will be suppressed since it was obtained during an illegal search.

However, the deterrence benefits of applying the exclusionary rule to a ticking nuclear bomb scenario are a bit more nuanced. Facialy, it would appear that applying the exclusionary rule to this scenario would force police officers to focus on leads and obtain more information so that they could form the requisite probable cause before commencing a systematic search. However, on deeper inspection, this does not appear to be a likely benefit. Take, for example, the Washington D.C. police chief that this article discusses in the beginning of the Introduction section. If that police chief learns that a nuclear bomb is about to go off inside his city, he is going to order his agents to systematically search every home inside the city (either through a physical search or by using radiation detectors) until they find and disarm that bomb. At that time, the police chief is not going to care about the legal requirements of the Fourth Amendment, the only

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85 *Hudson*, 126 S. Ct. at 2165.
86 Id. at 2166-70.
thing that he is going to be thinking about are the thousands of lives that are going to be lost if the ticking nuclear bomb is not disarmed in time.

If the exclusionary rule is applied to the ticking nuclear bomb scenario there will be enormous social costs in the form of major terrorists being set free. The deterrence benefits that would be obtained in exchange are nonexistent because it is unrealistic to expect police officers to pause to consider the legal ramifications of their actions when a nuclear bomb is about to level their city. Since the social costs of applying the exclusionary rule to a ticking nuclear bomb scenario greatly outweigh the dubious deterrence benefits, under *Hudson*, the exclusionary rule is not a proper remedy for a Fourth Amendment violation that occurs during the search for a ticking nuclear bomb.

**Conclusion**

Current Fourth Amendment jurisprudence is ultimately unclear about how police officers may go about the search for a ticking nuclear bomb. This is naturally understandable since, thankfully, no court has had to deal with such a horrific scenario and thus no case law has ever been developed about the ticking nuclear bomb.

Under the current case law police officers would be unable to get around the Fourth Amendment by using radiation detectors because the U.S. Supreme Court’s *Kyllo* decision equates the use of uncommon technology to peer into the private areas of a house with an intrusive physical search. While most academics tend to think that exigent circumstances would automatically justify such a search in a ticking bomb scenario, this assumption is not as certain as these academics would like to believe. Most courts would likely agree with the academics that a ticking nuclear bomb is an “immediate major

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87 See *supra* note 3.
“crisis” and thus qualifies as an exigent circumstance. However, there is a conflict within the case law about whether police officers need to have probable cause in addition to the exigent circumstance to conduct warrantless searches of multiple private dwellings or whether police officers can simply rely on the exigent circumstance to conduct a broad search without probable cause. While the current U.S. Supreme Court has indicated that it will likely dispense with the probable cause requirement and allow police officers to respond solely to the exigent circumstances, such a ruling from the highest court in the land is still speculative at best. Ultimately, the cases in which courts require a showing of probable cause in addition to exigent circumstances have never been overruled and they are therefore still good law that police officers must adhere to.

The legal doctrine that winds up helping law enforcement the most if a ticking nuclear bomb scenario were to occur is the exclusionary rule balancing test articulated by the U.S. Supreme Court in the *Hudson* case. Applying this balancing test, if the exclusionary rule is imposed on the search for a ticking nuclear bomb, society would have to pay the high price of allowing the terrorists who managed to plant a nuclear bomb inside a U.S. city to go free. In exchange, society would not get any deterrence benefits because police officers will likely ignore the Fourth Amendment in favor of defusing an active nuclear bomb to prevent a catastrophic scenario. Thus, since the social costs greatly outweigh any possible deterrence benefits, the exclusionary rule should not be part of the remedy for any Fourth Amendment violations that occur while the police search for a ticking nuclear bomb. This would allow police officers to defuse the ticking nuclear bomb and prosecute the people responsible while at the same time allowing home

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89 See supra notes 69-75 and accompanying text.
owners to recover (in civil lawsuits)\textsuperscript{90} for any property damage that police officers caused while they were searching for the nuclear bomb.

\textsuperscript{90} See 42 U.S.C. § 1983 (creating a civil cause of action for deprivation of constitutional rights).