Of Exigent Circumstances and Constitutional Authority: Congress, the President, and Domestic Electronic Surveillance

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Abstract. In this article, we argue that the constitutional structures and doctrines that functioned well before September 11 have not become liabilities since then. In particular, the relative powers the Constitution allocates between the Congress and the President in matters of national security have, in the light of experience, served the nation well and are likely to continue to do so, for the careful balance the framers struck between legislative and executive authority has the virtue of adaptability to a changing—and dangerous—world. Further, experience has demonstrated that the Constitution’s default lawmaking scheme, which centers on bicameral legislative enactment, presentment, and all the democratic deliberation this process entails, can, and in appropriate circumstances should, be temporarily set aside in favor of the kind of swift national response that only the executive branch can provide.

In a real sense, the constitutional balance comes down, at a specific point, to how the true exigencies of the current situation—the threat of terrorist attacks on American interests, both in the United States and abroad—should be understood against a background of institutional powers separated so as to maximize representative democratic decision-making and accountability. The question we address here is how best to define, in a sufficiently flexible manner, the standards that should be applied to determine when exigent circumstances warranting a temporary departure from settled constitutional norms actually exist. Much of the argument about changed circumstances and what amounts to an ongoing emergency derives from a notion of exigency that does not reflect the best understanding of what the Constitution requires, or the reality of the way in which national security emergencies arise and responsive decisions are made. At a minimum, we hope this article will stand as a corrective to the argument that the threat of terrorism presents exigent circumstances that permit the exercise of enhanced executive authority for the foreseeable future.

We frame our argument as a response to sallies from the everything-is-different camp by Judge Richard Posner, Professors John Yoo, and Professor John C. Eastman. We focus on the defense these commentators have made of the Bush administration’s domestic electronic surveillance program, and the claim that the president has the inherent authority to establish such a program. Part I of this Article addresses the arguments made in support of a broad understanding of the executive’s authority in matters of national security vis-à-vis the terrorist threat; these arguments are at bottom founded upon the notion that, since September 11, the United States is at war with terrorists and al Qaeda in particular, and that this exigency ought to permit the President unusual latitude in national security decision-making. In Part II, we dispute this view of exigent circumstances. Relying upon an analysis of our constitutional experience as reflected in United States Supreme Court precedent, we explicate the framework for the ordinary distribution of authority between Congress and the President—the default

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lawmaking scheme—in national security matters, and the principle that, in the midst of exigent circumstances, that framework may be set aside temporarily.

We turn in Part III for guidance in understanding the metes and bounds of the executive’s exigent circumstances authority to Supreme Court cases developing the parameters of the exigent circumstances exception to the warrant requirement in the context of the Fourth Amendment. Those cases establish a sufficiently flexible understanding of exigency that may be adapted to the separation of powers between Congress and the president in respect to national security. Finally, in Part IV, we apply the lessons derived from our inquiry to President Bush’s domestic electronic surveillance program. We conclude that, while the President’s establishment of a secret surveillance program deviated from settled constitutional expectations, purportedly in response to the terrorist threat, such deviation was not in fact justified by exigent circumstances. Accordingly, the President should have looked to Congress for the authority to pursue such action.

I. INTRODUCTION

It’s a popular notion—repeated in political speeches, op-ed pages, and the blogosphere—that the events of September 11 “changed everything.” A version of this notion has been used to justify the United States invasion of Iraq, the detention and interrogation of enemy combatants, and, on our shores, the Bush administration’s domestic electronic surveillance activities.1 In the context of discussions about the wisdom and legality of these actions, the belief that the United States should approach national security issues differently in the wake of the terrorist attacks on the World Trade Center and the Pentagon has been invoked along with Supreme Court Justice Robert Jackson’s oft-repeated admonition that we temper the logic of constitutional decision-making with practical wisdom, abandoning legal niceties in the face of danger lest we convert “the constitutional Bill of Rights into a suicide pact.”2

To assert, to the contrary, that September 11 did not necessarily change how the United States should approach defense of the nation vis-à-vis terrorism, or that, after

2 Terminiello v. Chicago, 337 U.S. 1, 36 (1949) (Jackson, J., dissenting).
September 11, the Constitution is no more likely than before to become a suicide pact, is a difficult sell. There is something reassuring in the thought that the terrorist threat to national security requires a new approach—namely, the consolidation of defensive authority in the executive branch—and, further, that this new paradigm is legally justified by the exigent circumstances created by the September 11 attacks. In this article, we’re nonetheless going to make the argument that history and practice have demonstrated the traditional constitutional allocation of national security powers is sufficient to meet the national security challenges of the twenty-first century.

To be clear, we are not saying that terrorism is not a threat to the citizens of the United States, or that the threat of terrorism should not be met with appropriate seriousness and determination on the part of American political leaders. But we are saying that the constitutional structures and doctrines that functioned well before September 11 have not become liabilities since then. In particular, the relative powers the Constitution allocates between the Congress and the President in matters of national security have, in the light of experience, served the nation well and are likely to continue to do so, for the careful balance the framers struck between legislative and executive authority has the virtue of adaptability to a changing—and dangerous—world. Further, experience has demonstrated that the Constitution’s default lawmaking scheme, which favors bicameral legislative enactment, presentment, and all the democratic deliberation


4 We recognize that “national security” concerns more than just military preparedness—as Oren Gross and Fionnula Ní Aoláin have argued, the term embraces “almost all areas of human endeavor.” OREN GROSS AND FIONNULA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWER IN THEORY AND PRACTICE 215 (2006).
this process entails, can, and in appropriate circumstances should, be temporarily set aside in favor of the kind of swift national response that only the executive branch can provide.\textsuperscript{5}

In a real sense, the constitutional balance comes down, at a specific point, to how the true exigencies of the current situation—the threat of terrorist attacks on American interests, both in the United States and abroad—should be understood against a background of institutional powers separated so as to maximize representative democratic decision-making and accountability. The question we address here is how best to define, in a sufficiently flexible manner, the standards that should be applied to determine when exigent circumstances warranting a temporary departure from settled constitutional norms actually exist. Much of the argument about changed circumstances and what amounts to an ongoing emergency derives from a notion of exigency that does not reflect the best understanding of what the Constitution requires, or the reality of the way in which national security emergencies arise and responsive decisions are made. At a minimum, we hope this article will stand as a corrective to the argument that the threat of terrorism presents exigent circumstances that permit the exercise of enhanced executive authority for the foreseeable future.\textsuperscript{6}

\textsuperscript{5} We cast our lot with President Abraham Lincoln, who knew something about exigent circumstances, when he questioned whether, in such circumstances, “all the laws but one [should] … go unexecuted, and the Government itself go to pieces, lest that one be violated?” Abraham Lincoln, \textit{Message to Congress in Special Session} (July 4, 1861), in 4 \textit{The Collected Works of Abraham Lincoln} 421, 429-30 (Roy P. Basler ed., 1953).

\textsuperscript{6} The threat of terrorism presents what the U.S. Supreme Court has called “special circumstances.” Zadvydas v. Davis, 533 U.S. 678, 696 (2001). We argue here that these special circumstances are not always exigent.
We frame our argument as a response to sallies from the everything-is-different camp by Judge Richard Posner, Professors John Yoo, and Professor John C. Eastman. We focus in particular upon the defense these commentators have made of the Bush administration’s domestic electronic surveillance program, and the claim that the president has the inherent authority to establish such a program. Part II of this Article addresses the arguments Posner, Yoo and Eastman have made in support of a broad understanding of the executive’s authority in matters of national security vis-à-vis the terrorist threat; these arguments are at bottom founded upon the notion that, since September 11, the United States is at war with terrorists and al Qaeda in particular, and that this exigency ought to permit the President unusual latitude in national security decision-making.

In Part III, we dispute this view of exigent circumstances. Relying upon an analysis of our constitutional experience as reflected in United States Supreme Court precedent, we explicate the framework for the ordinary distribution of authority between Congress and the President—the default lawmaking scheme—in national security matters, and the principle that, in the midst of exigent circumstances, that framework may be set aside temporarily. In addition to describing constitutional practice, we explore the normative justifications for the exercise of exigent circumstances authority by the executive, and why that authority should have appropriate limits.

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9 See John C. Eastman, Listening to the Enemy: The President’s Power to Conduct Surveillance of Enemy Communications During Time of War, 13 ILSAJ. of Int’l & Comp. L. 1 (2006).
Next, in Part IV, we turn for guidance in understanding the metes and bounds of that exigent circumstances authority to Supreme Court cases developing the parameters of the exigent circumstances exception to the warrant requirement in the context of the Fourth Amendment. Those cases establish a sufficiently flexible understanding of exigency that may be adapted to the separation of powers between Congress and the president in respect to national security. In this Part, we also look at some of the potential criticisms of the framework we have developed and whether those criticisms are sufficient to undermine the effort.

In Part V, we apply the lessons derived from our inquiry in Parts III and IV to President Bush’s domestic electronic surveillance program. We conclude that, while the President sought to justify the establishment of a secret surveillance program as a response to the terrorist threat, that program’s creation deviated from settled constitutional expectations, exceeding the compass of appropriate response to exigent circumstances. The President should have looked to Congress for the authority to pursue such action.

II. THE ARGUMENT FOR EXIGENT CIRCUMSTANCES AUTHORITY

A perceived problem with much legal scholarship is its distance from the cares and concerns of what is often referred to as the “real world.” Much ink has been spilt discussing the relative worth of law review articles and current trends in legal scholarship that emphasize the abstract and the normative over the practical. And yet the law

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school professoriate perseveres with its abundantly footnoted articles and hopes that its research and writing will find an audience and influence discourse.

Of course, there are members of the academy who are influential indeed. Richard Posner, a lecturer at the University of Chicago School of Law, sits on the United States Court of Appeals for the Seventh Circuit. Professor John Yoo, professor of law at the University of California at Berkeley, served in the Office of Legal Counsel at the Justice Department, the office from which much of the legal justifications for the Bush administration’s various moves regarding terrorism sprang. And Professor John Eastman, of Chapman University School of Law, advised Republican Representative James Sensenbrenner, a former Chair of the House Judiciary Committee, and testified before the U.S. House of Representatives Permanent Select Committee on Intelligence, regarding the legality of the administration’s domestic electronic surveillance program.

Each of these scholars has defended the Bush administration’s domestic electronic surveillance program. The New York Times revealed the existence of that program in December 2005. The Times reported that, “[m]onths after the Sept. 11 attacks, President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without court-approved warrants ordinarily required for domestic spying.” The NSA’s effort has been characterized as possibly “the largest domestic spying operation since the 1960s, larger than anything conducted by the FBI or CIA inside the United States since the Vietnam

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12 See Joseph Margulies, A Prison Beyond Law, VIRGINIA QUARTERLY REVIEW, Fall 2004, at 37, 47.
13 See Eastman, supra note __, at *.
War.” According to one report, the NSA has included tens of thousands of Americans within the auspices of the domestic electronic surveillance program.

Following the revelation of the domestic electronic surveillance program and the ensuing public clamor, the Bush administration in the spring of 2007 agreed to oversight of the program by a judicial body known as the Foreign Intelligence Surveillance Court, which ultimately concluded that, in certain instances further judicial approval of monitoring activities would be required. In August 2007, Congress began the process of formally authorizing the domestic electronic surveillance program, with some variations that appeared to expand the government’s ability to monitor phone calls and e-mails on American soil absent meaningful judicial oversight.

Notwithstanding this legislative authorization, we, like Professor Eastman, view the revelation of the original, secret surveillance program as an opportunity “to give serious consideration to the Founders’ constitutional design” regarding the respective powers of the President to authorize such a program and of the Congress to regulate the President’s actions in this and like matters. The Justice Department at the time argued that the President has “well-recognized inherent constitutional authority as commander-in-chief

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16 See Seymour M. Hersh, National Security Dept. Listening In, THE NEW YORKER, May 29, 2006, at 24, 25. One commentator has suggested that, in respect to surveillance capacity, “it is prudent to assume that almost any electronic communication that is sent through the air can be acquired by NSA if it is deemed to be worth the effort.” John Cary Sims, What the NSA Is Doing … and Why It’s Illegal, 33 HASTINGS CONST. L.Q. 105, 114 (2006).
17 See Letter from Attorney General Alberto Gonzales to the Honorable Patrick Leahy and the Honorable Arlen Specter at 1 (Jan. 17, 2007) (on file with authors) (stating that electronic surveillance would henceforth “be conducted subject to the approval of the Foreign Intelligence Surveillance Court).
20 See Eastman, supra note __, at 2.
and sole organ for the Nation in foreign affairs.”

Judge Posner supports this position, for in his pragmatic view the fight against terrorism constitutes a “national emergency.” For him, “times of emergency” exist “when the safety of the nation is believed to be unusually endangered,” such as the danger posed by “the rise of global terrorism and the intertwined menace of weapons of mass destruction,” of which we became acutely aware on September 11. While Posner maintains that “there is no handle in the constitutional text for the unilateral assumption of dictatorial power by the president,” he does believe the nation is now at war, a circumstance that allows the president to “impose more restrictions” than he could in a time of peace, because “a commander in chief’s responsibilities are different and broader in war.”

Posner thus equates emergency with war, at least in respect to the terrorist threat to national security. If follows that the president may call upon his different and broader authority in wartime to impose measures that might have the incidental effect of restricting individual rights and liberties. The soundness of a particular measure Posner would assess according to an economic analysis; and so, in respect to the administration’s domestic electronic surveillance program, the question is whether “a particular security measure harms liberty more or less than it promotes safety.” He concludes that, on balance, domestic electronic surveillance is warranted: “[i]n an era of global terrorism

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21 U.S. Department of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President at 1 (Jan. 19, 2006) (“DOJ Report”).
22 See Posner, supra note __, at 12.
23 Id. at 53.
24 Id.
25 Id. at 39.
26 Id. at 70.
27 Posner would limit the president’s wartime authority to the threat posed by terrorism that threatens national security, and would not extend it to, for example, “‘ecoterrorism’ and ‘animal rights terrorism,’” Id. at 63.
28 Id. at 32.
and proliferation of weapons of mass destruction, the government has a compelling need to gather, pool, sift, and search vast quantities of information,” regardless whether much of that information is “personal” to the vast majority of individuals whom the government has under surveillance.29

Professor Yoo also believes that the United States is at war with terrorists. He looks to an originalist understanding of the Constitution’s separation of powers to support the Bush administration’s efforts to meet the threat posed by terrorism, concentrating “less on judicial precedent and more on constitutional text, structure and history.”30 The Constitution vests the executive power in the President,31 and in Yoo’s view, national security is executive in nature because that is how it was understood at the time of the framing;32 “when the Framers ratified the Constitution,” he argues, “they would have understood that Article II, Section I continued the Anglo-American tradition of locating the foreign affairs power generally in the executive branch.”33 On this understanding, and coupled with the president’s authority as Commander in Chief,34 the executive has the inherent authority to act to prevent attacks against the United States,35 and that authority necessarily includes “the ability to engage in electronic surveillance that gathers intelligence on the activities of the enemy.”36

For his part, Professor Eastman asserts that the United States is, after September 11, a “theater of war.” In these circumstances, “the full panoply of presidential powers in time

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29 Id. at 141.
30 Yoo, The Powers of War and Peace, supra note __, at 8.
32 See Yoo, The Powers of War and Peace, supra note __, at 18-19; Yoo, The Terrorist Surveillance Program, supra note __, at 570.
33 Yoo, The Powers of War and Peace, supra note __, at 19.
34 See Yoo, The Terrorist Surveillance Program, supra note __ at 569.
35 Id. at 570.
36 Id. at 572; see also id. at 591 (power to use force “impliedly includes the power to use surveillance and intelligence to find targets”).
of war comes into play—his power as Commander-in-Chief; his power as the nation’s
top executive; and his inherent power as the organ of U.S. sovereignty on the world
stage.” Like Yoo, Eastman believes these presidential powers flow directly from
Article II of the Constitution, and he argues:

Under the Constitution, confirmed by two centuries of historical practice
and ratified by Supreme Court precedent, the President clearly has the
authority to conduct surveillance of enemy communications in time of war
and of the communications to and from those he reasonably believes are
affiliated with our enemies. Moreover, it should go without saying that
such activities are a fundamental incident of war, particularly in a war
such as this where the battle for intelligence is not only the front line but
in many respects the most significant front in the war.

Posner, Yoo, and Eastman may differ in their methodologies—economic analysis,
originalism, and reliance upon history and precedent, respectively—but each essentially
concludes that, in the exigent circumstances created by the attacks on September 11, the
president enjoys the inherent constitutional authority to employ a variety of means
typically associated with the executive’s constitutional war powers to secure the nation,
including the pursuit of a domestic electronic surveillance program. Yet the existence
and perpetual availability of the executive’s exigent circumstances authority—for none of
these commentators suggests that the president should suffer a temporal restraint upon the
exercise of this authority—raise important and unanswered constitutional questions.
Even assuming the availability of exigent circumstances authority that might justify the
assertion of extraordinary power by the president, it remains that precedent, experience,
and background constitutional values suggest the notion of executive exigent
circumstances authority must be appropriately limited lest core principles of

37 Eastman, supra note __, at 5.
38 See id.
39 Id. at 9.
representative democracy be subverted. It is to these constitutional issues that we now turn.

III. EXIGENT CIRCUMSTANCES AND EXECUTIVE AUTHORITY

Posner, Yoo, and Eastman each maintain that, at least at this writing, the United States is in the midst of an emergency that amounts to war—in other words, that, given the current circumstances, the president has the inherent authority to pursue domestic electronic surveillance and like programs in the name of protecting the nation’s security. In this Part, we seek to determine how the constitutional relationship between Congress and the president should be understood in respect to matters of national security in exigent circumstances. Our concerns are whether and to what extent the executive has the power to address emergencies at his discretion.

We begin by establishing a framework for our analysis, looking to the constitutional text and accepted practice under the Constitution as reflected in precedent and historical experience both to describe the executive’s exigent circumstances authority and to explore the normative justification for that authority. We next seek to define the factors that indicate the existence of exigent circumstances and that may serve to limit the scope of the executive’s exigent circumstances authority, relying for guidance upon the decisions of the U.S. Supreme Court explicating the exigent circumstances exception to the Fourth Amendment’s warrant requirement.

A. The Framework

We start with Justice Robert Jackson’s concurring opinion in the 1952 case, Youngstown Sheet and Tube Co. v. Sawyer, which has been recognized as establishing the basic framework for understanding the constitutional relationship between Congress

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343 U.S. 579 (1952).
and the president in respect to national security.\textsuperscript{41} In \textit{Youngstown}, the U.S. Supreme Court addressed the question whether President Harry S. Truman “was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation’s steel mills.”\textsuperscript{42} The government maintained that such action was necessary to avert any lag in steel production during the Korean conflict.\textsuperscript{43} The Court disagreed. Justice Hugo Black, writing for the Court, stated that the president’s order did not fall within the literal authority accorded the executive by the Constitution and, therefore, could not be upheld.\textsuperscript{44}

In his concurring opinion, Justice Jackson suggested that the constitution envisions a regulatory scheme more fluid than that contemplated by Justice Black’s analysis, and that the sphere of authority over matters related to foreign affairs and national security could be divided into three areas.\textsuperscript{45} First, when the president acts pursuant to Congressional authorization, he possesses not just the powers accorded him by the Constitution as Commander-in-Chief, but also the powers Congress in its wisdom believes he should exercise.\textsuperscript{46} Second, when the president acts without Congressional authorization, he relies only upon those powers conferred upon him by the Constitution, though there may be matters over which the Congress and the president share overlapping authority, or about which the distribution of authority is less than clear; this is the “zone of twilight”

\textsuperscript{41} See \textit{Dames & Moore v. Regan}, 453 U.S. 654, 661 (1981) (suggesting that Justice Jackson’s concurring opinion “brings together as much combination of analysis and common sense as there is in this area”); \textit{see id.} at 669 (finding “Justice Jackson’s classification of executive actions into three general categories analytically useful”).
\textsuperscript{42} \textit{Youngstown}, 343 U.S. at 582.
\textsuperscript{43} \textit{See id.}
\textsuperscript{44} \textit{See id.} at 587-589.
\textsuperscript{45} \textit{See id.} at 635-638 (Jackson, J., concurring).
\textsuperscript{46} \textit{See id.} at 635-637 (Jackson, J., concurring).
between legislative and executive national security authority. Finally, when the president takes measures incompatible with “the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”

In the case of the domestic electronic surveillance program, as it existed prior to August 2007, the Justice Department maintained that the president has the inherent constitutional authority to pursue this kind of intelligence acquisition, even absent Congressional authorization—and, indeed, that any act of Congress that interferes with president’s ability to conduct electronic surveillance of suspected terrorists would be unconstitutional. In evaluating this argument, we’ll assume that Congress did not sanction the administration’s creation of a domestic electronic surveillance program in the 2001 authorization to use military force against al Qaeda forces in Afghanistan. Given a lack of congressional authorization at the time, we must ask whether the president’s program fell either within Justice Jackson’s “the zone of twilight,” or whether it was, in fact, incompatible with “the expressed or implied will of Congress.”

As it happens, Congress enacted legislation regarding domestic surveillance activities almost thirty years ago. Passage of the Foreign Intelligence Surveillance Act (“FISA”)

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47 See id. at 637 (Jackson, J., concurring).
48 Id. at 637-638 (Jackson, J., concurring).
49 See DOJ Report, supra note __, at 6-10, 28-36.
50 The Bush administration and numerous commentators, including Yoo and Eastman, have argued that no Congressional action was necessary to justify the president’s domestic electronic surveillance program, but that the Authorization to Use Military Force of September 14, 2001 (“AUMF”), Pub. L. No 107-40, 115 Stat. 224 (2001), provided such authorization. We address this argument below. See infra note __-__ and accompanying text.
51 Youngstown, 343 U.S. at 637 (Jackson, J., concurring).
52 The Bush administration did not dispute that Congress had the authority to enact the FISA. See Sims, supra note __, at 135 (quoting testimony of Attorney General Alberto Gonzales before the Senate Judiciary Committee Hearing Feb. 6, 2006 (afternoon session)).
in 1978\textsuperscript{53} followed a U.S. Supreme Court decision suggesting that intelligence-gathering activities are not subject to the same strict constitutional standards as criminal investigations.\textsuperscript{54} As amended by the USA PATRIOT Act,\textsuperscript{55} the FISA regime serves to protect the interests of citizens and non-citizens who might be the objects of the government’s surveillance efforts. FISA’s regulations primarily concern surveillance “targeting [a] United States person who is in the United States,” and surveillance acquisitions that “occur[] in the United States,”\textsuperscript{56} and provide for modest \textit{ex ante} and \textit{ex post}\textsuperscript{57} judicial oversight of such surveillance by a Foreign Intelligence Surveillance Court.\textsuperscript{58} As of 2003, the court had received thousands of requests for FISA electronic surveillance orders and denied only a handful.\textsuperscript{59}

As noted above, the president had agreed by the Spring of 2007 to oversight of the domestic electronic surveillance program by the Foreign Intelligence Surveillance Court, and Congress ultimately authorized the program’s monitoring activities.\textsuperscript{60} But back in 2005, when Americans learned of the program and the fact that the NSA had been monitoring of many thousands of American’s calls,\textsuperscript{61} it was arguably contrary to Congressional instruction in this area, as the FISA itself indicates that Congress did not intend the president to exercise unfettered discretion in respect to domestic surveillance

\textsuperscript{53}50 U.S.C. § 1801-1811.

\textsuperscript{54}See United States v. United States District Court, 407 U.S. 297, 322-323 (1972) (recognizing that “domestic security surveillance may involve different policy and practical considerations from the surveillance of ‘ordinary crime’” and inviting Congressional involvement in the creation of appropriate standards).


\textsuperscript{56}50 U.S.C. §§ 1801(f)(1)-(2).

\textsuperscript{57}See id. § 1804(a). In fact, FISA permits applications for warrants up to 72 hours after surveillance has commenced in emergency situations.

\textsuperscript{58}See 50 U.S.C. § 1803(a)-(d). See Sims, supra note ___, at 118-125 (discussing operation of the FISA and the Foreign Intelligence Surveillance Court).


\textsuperscript{60}See supra notes ___-___ and accompanying text (discussing revelation and ultimate Congressional authorization of domestic electronic surveillance program).

\textsuperscript{61}See Hersh, supra note ___, at 25.
activities. Most importantly, the program ran counter to the principle upon which FISA is based—namely, that such intelligence gathering must be subject to some degree of oversight to keep the executive accountable. Contained entirely within the Executive branch, the President’s program lacked any judicial or Congressional supervision: the National Security Agency selected targets for monitoring, controlled the surveillance process, and made all subsidiary determinations respecting the privacy of the individuals under surveillance.

Utilizing Jackson’s taxonomy, the president’s program fell into the third category of authority, in which the president’s power is at its “lowest ebb,” because domestic surveillance was an area in which Congress has explicitly legislated, and the president’s program was contrary to that legislative scheme. Though Congress has since authorized the surveillance program, the question remains whether, as Justice Department lawyers and commentators like Posner, Yoo, and Eastman, have argued, the president has the constitutional authority to pursue domestic surveillance and like programs in the face of contrary direction from Congress. To resolve the issue requires that we look at the constitutional landscape in respect to national security authority.

B. The Constitutional Allocation of National Security Authority

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63 See Risen, supra note __, at 44-45.

64 Youngstwon Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

The Constitution plainly vests the executive power in the president, and names the president as the Commander in Chief “of the Army and the Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United States.” With the Senate, the president has the power to make treaties and appoint ambassadors. Congress, on the other hand, has the power to “provide for the common Defence and general Welfare of the United States,” to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,” to “raise and support Armies,” to “provide and maintain a Navy,” to “make Rules for the Government and Regulation of the land and naval Forces,” and to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”

Over the course of more than two centuries, these textual allocations of authority have been flexibly—and sometimes reluctantly—construed by the political branches so as to permit to the executive to conduct diplomacy and the diplomatic process; to respond to an attack on the United States; conduct covert operations and deploy forces for foreign policy purposes, short of war; and, when hostilities have commenced, to plan military policy and strategy. At the same time, it seems clear that Congress continues to possess

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66 U.S. Const., Art. II, Sec. 1.
67 U.S. Const. Art. II, Sec. 2.
68 U.S. Const. Art. II, Sec. 2.
69 U.S. Const. Art. I, Sec. 8, cl. 1.
70 U.S. Const. Art. I, Sec. 8, cl. 11.
71 U.S. Const. Art. I, Sec. 8, cl. 12.
72 U.S. Const. Art. I, Sec. 8, cl. 13.
74 U.S. Const. Art. I, Sec. 8, cl. 15.
75 See LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 32-33 (1990); Jane E. Stromseth, Rethinking War Powers: Congress, the President, and the United Nations, 81 GEO. L.J. 597, 597 (1993). As Yoo accurately notes, “[t]he history of foreign relations has been the story of the expansion of the executive’s power thanks to its structural abilities to wield power quickly, effectively, and in a unitary manner.” Yoo, The Powers of War and Peace, supra note __, at 22.
the power to decide whether to engage the nation in hostilities, which determination need not be accomplished by a formal declaration of war; to regulate the size and composition of the armed forces; and, of course, to appropriate the funds to wage wars and to secure the nation.\footnote{See Henkin, supra note __, at 32-33. There is a longstanding debate as to whether the power to declare war is the same as the power to make war, or simply to announce that the United States has formally joined hostilities with an enemy. See, e.g., Yoo, The Powers of War and Peace, supra note __, at 97-100 (arguing that, to the framers, a declaration of war would have been understood as merely the formal recognition of hostilities); Saikrishna Prakash, Unleashing the Dogs of War: What the Constitution Means By “Declare War,” __ CORNELL L. REV. __ (2007) (arguing that the power to declare war encompasses the authority to decide whether the nation will wage war); Michael D. Ramsey, Textualism and War Powers, 69 U. CHI. L. REV. 1543 (2002) (arguing Congress has broad power to initiate warfare). For accessible guides to the various academic positions on the issue, see Ramesy, supra note __, at 1548-69, and William M. Treanor, Fame, the Founding, and the Power to Declare War, 82 CORNELL L. REV. 695, 706-12 (1997) (canvassing academic debates about the Constitution’s allocation of war powers).

The modern understanding of congressional power in regard to national security is no small matter; though the president’s powers have become more specific and numerous through historical practice, the default rule is still that the Constitution’s deliberative lawmaking machinery must be engaged to authorize many actions that the president might undertake in the service of national security, particularly domestic actions. \textit{Youngstown} provides a case in point, as a majority of the Supreme Court concluded that the president could not undertake domestic action in support of a national security issue—the seizure of the steel plants in the midst of the Korean conflict—in the absence of Congressional authorization and when Congress had actually expressed its will regarding such actions in prior legislation.\footnote{See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643-44 (1952) (Jackson, J., concurring) (observing the lack of “indications” that the Constitution contemplates “that the title Commander-in-Chief of the Army and Navy will constitute him also Commander-in-Chief of the country, its industries and its inhabitants”).} While the modern parameters of the respective powers of Congress and the president have been the subject of much political
tension, in the main the textual allocation of national security authority continues to hold, even if it does so a relatively high level of abstraction—most would agree, in other words, that the constitution continues to embrace a distinction between the power to declare a state of war, and the power to fight a war.

As noted above, the Justice Department argued that the executive has sufficient constitutional authority to establish a domestic surveillance program absent Congressional authorization and even notwithstanding a Congressional denial of such authority. Yoo and Eastman have said much the same. Yoo contends that, “once the United States has been attacked, the President can respond with force on his own,” while Eastman maintains that, following the attacks of September 11, “the United States is a ‘theater of war.’” In light of these arguments, we can refine the question that Justice Jackson’s approach would have us ask and inquire whether the executive’s authority to repel attacks extends so far as to allow a president to pursue any action that can be linked to the initial attack, even if it invades an area in which Congress has the authority to legislate and has in fact legislated.

C. Recognizing Executive Exigent Circumstances Authority

The constitutional allocation of war powers and the judicial decisions interpreting and applying that textual allocation establish a baseline. The president is the commander of the armed forces and responsible as a consequence for all operational decisions, but

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78 See Treanor, supra note __, at 702-06 (discussing modern political debates about the Constitution’s allocation of war powers).
80 See DOJ Report, supra note __, at 1.
81 Yoo, The Terrorist Surveillance Program, supra note __, at 587.
82 Eastman, supra note __, at 5.
83 See Ramsey, supra note __, at 1619; see also LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW, § 4-6 at 657-58 (3d ed. 2000).
Congress must act in some way to authorize hostilities,\textsuperscript{84} as well as any concomitant domestic actions.\textsuperscript{85} Regardless how far the president’s national security authority has been stretched in recent years, still he lacks the power to legislate—even in wartime, as \textit{Youngstown} demonstrated.\textsuperscript{86} Nonetheless, it has long been recognized that emergencies may present themselves,\textsuperscript{87} and that in view of the possibility of such exigent circumstances, the default allocation of authority and traditional lawmaking mechanisms appropriately may be set aside in order to address the threat at hand.\textsuperscript{88}

About the existence of the executive’s exigent circumstances authority in the event of an attack on the United States or its forces, there is little disagreement.\textsuperscript{89} The debates of the constitutional convention reveal that the framers contemplated that the president

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\textsuperscript{84} See, e.g., Talbot v. Seeman, 5 U.S. (Cranch) 1, 28 (1801) (“Congress may authorize general hostilities … or partial hostilities”).

\textsuperscript{85} Congress may confer upon the President the authority to act through appropriation of funds, see Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 116 (1947), and this includes matters related to war, see DaCosta v. Laird, 448 F.2d 1368, 1369 (2d Cir.), cert. denied, 405 U.S. 979 (1971); Ramsey, supra note __, at 1612 (arguing that war has been construed broadly to include “the acts of a sovereign resolving its disputes by force”).


\textsuperscript{87} See \textit{The Federalist} No. 23, 121 (Alexander Hamilton) (Clinton Rossiter ed., rev. ed. 1999) (“It is impossible to foresee or to define the extent and variety of national emergencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.”).

\textsuperscript{88} As Professor Monaghan observed, “[t]he American constitution contains no general provisions authorizing suspension of the governmental processes when an emergency is declared.” \textit{Id.} at 33. The only references in the Constitution to emergency powers are the provisions giving Congress the power “to provide for calling forth the militia to execute the Laws of the Union, suppress insurrections and repel invasions,” Art. I, sec. 8, cl. 15, and the power to suspend the Writ of Habeas Corpus “when in Cases of Rebellion or Invasion the public safety may require it.” Art. I, sec. 9, cl. 2.

\textsuperscript{89} See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 662 (1952) (Clark, J., concurring) (observing that the Constitution grants to the president “extensive authority in times of grave and imperative national emergency”); \textit{see also} Peter Irons, \textit{War Powers: How the Imperial Presidency Hijacked the Constitution} 19-21 (2005) (framers believed legislatures would move too slowly in responding to emergency situations); Tribe, \textit{supra} note __, at 659 (president may use force to defend the United States or its forces); Louis Fisher, \textit{Presidential War Power} 11 (1995) (once United States has been attacked, president can respond accordingly); Ramsay, \textit{supra} note __, at 1622 (President has independent power “to fight a defensive war without authorization from Congress”).
would have such authority at his disposal. The Supreme Court acknowledged this understanding in the *Prize Cases*, addressing the question whether President Abraham Lincoln had the authority, following the attack on Fort Sumter in April 1861, to order southern ports blockaded. The blockade resulted in capture of several prizes and their cargoes. Though Congress had ratified the president’s actions after the fact, the court concluded that, “[i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force.” Further, the court reasoned that the circumstances of a civil war involved exigencies that the president in his discretion could determine to exist, and the courts would not second-guess such determinations.

Courts have since recognized that the notion of exigent circumstances may contemplate more than an attack on the United States or its forces. In the 1890 case *Cunningham v. Neagle*, for instance, the U.S. Supreme Court suggested that executive exigent circumstances authority extends to the protection and rescue of United States citizens. More broadly, the Massachusetts Supreme Judicial Court acknowledged the potential for exigent circumstances to disrupt ordinary constitutional processes in an 1833 opinion addressing whether specific amendments could be made to the state constitution by a process other than that specified in the constitution itself. Writing for the court, Chief Justice Lemuel Shaw stated that, in the absence of a “great emergency,” the state

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92 See id. at 636-638.
93 Id. at 668.
94 Id. at 670 (remarking that whether the circumstances present an insurrection or civil war “of such alarming proportions as well compel [the president] to accord to [hostile resistance] the character of belligerents, is a question to be decided by him” (emphasis in original)). Accord The Protector, 79 U.S. 700, 701-02 (1871).
95 135 U.S. 1 (1890).
96 See id. at 64. On the scope of the “protective power,” which we view as a species of exigent circumstances authority in the national security context, see Monaghan, supra note __, at 70-74.
97 Opinion of the Justices of the Supreme Judicial Court, 60 Mass. 573 (1833).
constitution provided for no method of amendment other than that spelled out in its provisions. Shaw understood that a “great emergency” necessarily would require some action other than the implementation of ordinary constitutional processes and would involve circumstances requiring consideration of “the general question of natural rights, and the inherent and fundamental principles upon which civil society is founded.”

In modern times, commentators have suggested that exigent circumstances may take many different forms. Professor Oren Gross has characterized “emergencies” as “sudden, urgent, and usually unforeseen events, often without the time for prior reflection and consideration.” This understanding contemplates not just what Gross refers to as “violent crises,” like the use of force against the United States in the form of an attack by a nation-state or terrorist organization, but natural disasters and similar emergencies. This understanding coincides with that contemplated by Chief Justice Shaw’s acknowledgement of the possibility that exigent circumstances of great immediacy and severity would necessitate an extraordinary constitutional response.

In view of the variety of potential exigencies that could arise, it makes a great deal of practical sense that the power to address such circumstances would lie with the nation’s chief executive, given his ability to respond with dispatch; as one commentator put it, in the event of an emergency in the nature of an attack, “there is simply no room for procedural restrictions which might hamper the republic’s ability to survive intact.” At the same time, it seems this power is necessarily contingent upon the existence of an

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98 Id. at 574.
99 Id.
101 Note, Congress, the President, and the Power to Commit Forces to Combat, 81 HARV. L. REV. 1771, 1778 (1968).
actual exigency. In other words, the president’s authority to respond unilaterally to a crisis is triggered only when the crises has actually presented itself. This power, then, is essentially circumstantial: only when, for example, an attack on the United States has occurred can the President respond with force to protect the nation and its people. As Professor Michael Ramsey has explained, in the attack context this means that the President has “the power to wage war once it is declared”—in other words, when the nation finds itself in a state of war brought about by means other than some form of congressional authorization.  

D.  The Argument for Limited Executive Exigent Circumstances Authority

By its nature, the president’s exercise of exigent circumstances authority anticipates—as Chief Justice Shaw appreciated—the subversion of ordinary lawmaking processes. That subversion occurs in the service of protecting the United States and its people, to be sure; yet exigency permits the president far greater regulatory authority than he would enjoy absent either the existence of an exigency or a congressional grant of authority. As Professor Gross has observed, with such a concentration of power in one person comes the potential for the “concomitant contraction of individual freedoms and liberties,” as well as the possibility that the elision of ordinary lawmaking processes will become entrenched, with the emergency measures transformed into the new standard by which “ordinary” is assessed. “Once brought to life,” Gross has remarked, emergency regimes “are not so easily terminable.”

102 Ramsey, supra note __, at 1631.
103 Gross, supra note __, at 1029.
104 See id. at 1071-72. Indeed, President Bush argued that the events of September 11 warranted a revised understanding of traditional individual rights doctrines. See Schwartz and Huq, supra note __, at 124.
105 Gross, supra note __, at 1073; see also Monghan, supra note __, at 35 (noting the “troublesome question” whether recognition “of any general presidential emergency power would in practice simply
This, then, is the problem. We have a need for some assurance that grave threats will be met with appropriate, responsive governmental action—at a minimum, action both swift and decisive—coupled with an equally strong desire that our constitutional democracy should endure. These basic needs provide powerful normative and emotional support for a relatively expansive understanding of the president’s exigent circumstances authority, of which the power to repel attacks is but a species. At the same time, however, there is a fear that exigent circumstances will become the norm, resulting in the ongoing subversion of the very constitutional processes we would hope to protect.

It follows that, to the extent there is a need for the president to possess contingent exigent circumstances authority, we should expect that authority should have clear and appropriate limits. The Constitution itself provides the basis for such limits. The framers geared the constitution’s structural provisions—those establishing the power relationships between and among the branches, and between the federal government and the states, that effectively check and balance the lawmaking potential of each branch or sovereign—to promote representative democracy and the rule of law, as well as governmental accountability, all to the end of preventing tyranny and the arbitrary decision-making that concentrations or power may produce. Accordingly, in marking the boundaries of executive exigent circumstances authority we should attend to the ends the framers sought to achieve: a representative democracy immune from tyranny and appropriately

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106 See Henkin, supra note __, at 37 (arguing that the Constitution must be expounded to “promote maximum attention to the will of the people and the consent of all governed,” as well as “more rather than less responsiveness, responsibility, accountability, and … broad- rather than narrow-based decision-making”).

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accountable, self-perpetuating in form unless and until altered by constitutional amendment.\textsuperscript{107}

Of course, it may be argued that, upon the president’s determination that the nation faces exigent circumstances requiring responsive action, he should have the constitutional warrant as “the sole organ” of the nation in respect to foreign relations to operate free from the system of ordinary checks and balances for so long as he in good faith determines the exigency to exist. Eastman and, to an extent, Yoo,\textsuperscript{108} rely upon the “sole organ” rationale to support their understanding of executive exigent circumstances authority. The rationale derives from \textit{United States v. Curtiss-Wright Export Corporation},\textsuperscript{109} in which the Court upheld a statute authorizing the president to prohibit the sale of arms to Bolivia if would be in the interest of the United States.\textsuperscript{110} In so concluding, the Court reasoned that the Constitution vests in the president “the power to speak or listen as a representative of the nation,”\textsuperscript{111} for he possesses “very delicate, plenary and exclusive power … as the sole organ of the federal government in the field of international relations.”\textsuperscript{112}

\begin{footnotes}
\item[107] As Deborah Pearlstein has noted, it would be odd indeed to sacrifice the values the constitutional structure promotes in the face of exigent circumstances; such an assumption “would make governmental institutions and decision-making processes essentially unpredictable, subject in the first instance to the whim of our enemies.” Deborah N. Pearlstein, \textit{The Constitution and Executive Competence in the Post-Cold War World}, \textit{COLUM. HUM. RTS. L. REV.} \textit{__} (2007) (draft at 22).
\item[108] “As ‘sole organ’ in the foreign affairs arena,” Eastman argues, “the President has inherent constitutional authority—indeed, the constitutional duty—to conduct surveillance of communications with enemies of the United States and people he reasonably believes to be working with them, in order to prevent attacks against the United States.” Eastman, \textit{supra} note \textit{__}, at 7. Given the president’s plenary authority in respect to foreign affairs, he suggests that any Congressional attempt to circumscribe his authority to undertake such activities as domestic electronic surveillance would be no more valid than an effort to circumscribe the executive authority to negotiate treaties. \textit{Id.} Yoo concurs in this assessment, citing with approval to \textit{Curtiss-Wright} despite his predominantly originalist approach. See Yoo, \textit{The Terrorist Surveillance Program, supra} note \textit{__}, at 567-68.
\item[109] 299 U.S. 304 (1936).
\item[110] \textit{See id.} at 311-314.
\item[111] \textit{Id.} at 319 (quotation omitted).
\item[112] \textit{Id.} at 320.
\end{footnotes}
On close reading, *Curtiss-Wright* offers little support for the view that the executive should enjoy unlimited discretion in exigent circumstances. As an initial matter, Congress had in fact authorized the president’s actions in respect to arms sales to Bolivia.\(^{113}\) Indeed, the decision does not suggest that the president was responding to any immediate threat to the United States or its people so much as conducting foreign relations at the instruction of Congress. Further, while Justice George Sutherland referred to the president as the “sole organ” of foreign affairs, it’s difficult to maintain that the Constitutional text or history supports any view of that statement other than that the president should be considered the nation’s agent in foreign relations, a role which may or may not implicate national security concerns; that, apparently, is what John Marshall meant when he originally used the term.\(^{114}\) Justice Sutherland likely understood this, as he quotes with approval an 1816 report of the Senate Committee on Foreign Relations describing the executive’s role as “the constitutional representative of the United States with regard to foreign nations.”\(^{115}\)

The U.S. Supreme Court’s decision in *Dames & Moore v. Regan*,\(^{116}\) concerning the authority of the president to suspend the claims of American nationals against Iran, also undermines reliance upon *Curtiss-Wright*. The *Dames & Moore* court concluded that, while Congress had authorized the president to take particular actions in respect to

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\(^{113}\) *See id.* at 312.

\(^{114}\) *See* EDWARD CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, at 178 (1957) (arguing that what Marshall had in mind “was simply the President’s role as instrument of communication with other governments”); *see also* Schwartz and Huq, *supra* note __, at 162 (noting that Marshall’s comments about the president being the “sole organ” on external relations were made in the context of “the president’s power to communicate with other nations, not a general foreign affairs power, much less a power to ignore the law”).

\(^{115}\) *Curtiss-Wright*, 299 U.S. at 319.

Iranian assets, it did not expressly authorize the suspension of claims pending in American courts. Nonetheless, “the general tenor of Congress’ legislation in this area” suggested a “congressional acquiescence in conduct of the sort engaged in by the President.” Importantly, the court did not question Congress’s continuing authority to disapprove of the president’s actions, thus confirming that, when Congress expressly or implicitly has allowed the president to exercise extraordinary powers in respect to foreign affairs, still it retains the authority to cabin his actions. And if this were so in respect to the president’s the termination of claims pending in American courts, it must also be so in respect to a presidential decision to prohibit the sale of arms to a foreign power, as in Curtiss-Wright. Even after September 11, the Court has confirmed that the constitution’s system of checks and balances suggests power must be appropriately bounded.

Given, then, that the president enjoys no exigent circumstances authority unless and until an exigency arises, whatever authority the executive does possess must be commensurate with the nature and extent of the exigency, and, as the exigency subsides, so too should the scope of his unilateral authority. If it were otherwise, the president would threaten to become, as Justice Jackson put it, “Commander in Chief of the country, its industries and its inhabitants.” If the basic features of representative democracy

117 Id. at 674.
118 Id. at 678.
119 Id. at 678-79.
120 See id. at 687.
121 See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (opinion of O’Connor, J.) (concluding that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens”).
122 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring). See also Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2800 (2006) (Kennedy, J., concurring in part) (noting that the “Constitution’s three-part system” was designed to avoid “[c]oncentration of power”); Henkin, supra note __, at 38 (when the text is silent and history ambiguous, “the principles and values of democracy must be determinative”).
embraced by our constitutional system are worth preserving in the event of exigent circumstances, it should be worth the effort to try and curtail any subversion of that system in a time of emergency, at least to the extent appropriate limits can reasonably be established.

Those limits can only be determined with some further understanding of the exigent circumstances that trigger the executive’s exigent circumstances authority. How, in other words, should executive exigent circumstances authority be defined? How should we evaluate the president’s determination of exigency, and for how long should the president have the authority to act in response to exigent circumstances without Congressional involvement? We turn now to these questions.

IV. IDENTIFYING EXIGENT CIRCUMSTANCES

In determining how the executive’s exigent circumstances authority should be defined, how his determination of exigency should be evaluated, and how long that authority should exist without Congressional involvement, we are not without significant guidance from the U.S. Supreme Court. Supreme Court cases developing the parameters of the exigent circumstances exception to the warrant requirement in the context of the Fourth Amendment can inform in our understanding of the metes and bounds of exigent circumstances in other contexts. Those cases establish a sufficiently flexible understanding of exigency that can be adapted to the separation of powers analysis between Congress and the president in respect to national security. In this section, we discuss the exigent circumstances exception in the Fourth Amendment context, and the guidance it provides to exigent circumstances in the national security context.

A. Exigency in the Fourth Amendment Context
Commentators have largely ignored the Supreme Court’s Fourth Amendment exigency standards in reaching their conclusions that the president has broad executive authority to conduct domestic electronic surveillance activities. Perhaps their failure to consider the Supreme Court cases addressing exigent circumstances stems from a view that there is little relationship between the warrant requirements of the Fourth Amendment and the president’s national security powers. Whatever the reasons, the conclusions reached by Posner, Yoo and Eastman are undermined when we fully consider the scope and limits of exigent circumstances exception to the warrant requirement. The fact is that the Court’s recognition of an exigent circumstances exception to the warrant requirement of the Fourth Amendment has much to teach us about the scope of the president’s exigent circumstances authority in the national security arena.\textsuperscript{123}

Any discussion of judicially recognized exceptions to the warrant requirement must begin with the traditional preference for government officials to obtain a warrant before conducting a search or seizure of people or property protected by the Fourth Amendment. This preference derives from the text of the Fourth Amendment,\textsuperscript{124} and from the Court’s

\textsuperscript{123} The discussion of exigent circumstances exception in this article focuses on the broad application of that concept rather than any subset, such as what has come to be known as the “automobile exception” to the warrant requirement. Additionally, we focus on exigent circumstances that may allow the government to conduct a search or seizure based on probable cause, but without a warrant. These exigent circumstances should be distinguished from the closely related but different functions of the police when they are acting in their community caretaking capacity. For more on this distinction see John F. Decker, \textit{Emergency Circumstances, Police Responses, and Fourth Amendment Restrictions}, 89 \textit{Journal of Criminal Law and Criminology} 434, 1998-1999.

\textsuperscript{124} The Fourth Amendment states: “The right of the people to be secure in their persons, houses, papers, and effects 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.”
The oft-stated rationale for the warrant preference is that

[...]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

This preference for a warrant is just that—a preference. It is not an absolute requirement. The Court has recognized a number of exceptions to the warrant requirement in circumstances in which obtaining a warrant would unnecessarily thwart legitimate law enforcement objectives, including the existence of exigent circumstances; just as the Constitution is not a suicide pact in the context of national security, the Court has recognized that the Fourth Amendment is not a “get out of jail free” card anytime law enforcement officials fail to obtain a warrant.

The exigent circumstances exception to the warrant requirement is intended to provide law enforcement a degree of flexibility to respond in situations where the benefits of obtaining a warrant are outweighed by the costs to law enforcement and to society at large caused by the delay in obtaining a warrant. This exception, like other Fourth Amendment exceptions, is tempered by the Amendment’s reasonableness requirement, which serves as the touchstone for the Court’s analysis of the exigent circumstances cases.

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125 See e.g. Johnson v. United States, 333 U.S. 10 (1948).
126 See id. at 13-14.
In the past 60 years the Court has decided a number of cases dealing with exigent circumstances. From these cases we get a fairly clear picture of the circumstances that create an exigency and the limits of the exigency exception in those circumstances. At the outset, these cases begin with the understanding that exigent circumstances justify an exception to the warrant requirement only, and not an exception to the probable cause or reasonable suspicion requirements. From these cases, moreover, a number of factors emerge which contribute to identifying and understanding exigent circumstances, including the limits the Court has placed on the scope of the exception.\textsuperscript{127}

The most important factor in determining if exigent circumstances exist is the impact of a delay caused by obtaining a warrant. Arguably, there is always the potential that some adverse consequences can occur, such as the movement or destruction of evidence before the police can obtain a warrant. In exigent circumstances, the potential for these adverse consequences is more acute and the costs to society of those consequences outweigh the privacy protections of the Fourth Amendment’s warrant requirement.

Among these adverse consequences, the Court has viewed the potential for the destruction of evidence as a primary consideration. The potential for the destruction of evidence is great, for example, when the subject of the arrest warrant may pass contraband to a confederate after retreating into her house.\textsuperscript{128} The Court has similarly recognized that firefighters need not stop by the courthouse on the way to a call, and that the exigency created by a fire may allow for the warrantless search of the premises, either

\textsuperscript{127} Few of the cases we discuss were decided by unanimous opinion. While there has been virtual universal agreement by all members of the Court as to the existence of and necessity for an exigent circumstances exception, the disagreements among the justices are most often over the factual application of the exception.

as the fire is being extinguished or soon thereafter, to determine the source and the cause of the fire, even when arson is suspected at the outset.129

On the other hand, the Court has not applied the exigent circumstances exception in situations where the risk of evidence removal or destruction is only a general concern. For example, the Court required police to obtain a warrant before entering a hotel room from which the odor of opium had been detected.130 Because the police lacked information to indicate the imminent removal or destruction of evidence, the Court invalidated the warrantless search.131 In another case, the Court invalidated the warrantless search of a barn for equipment used to make illegal alcohol,132 reasoning that, because the distilling equipment could not easily be moved, the risk that the evidence would disappear while the police obtained a warrant was minimal.133

In determining whether the exigent circumstances exception applies, the Court has frequently considered whether police were in hot pursuit of a suspect. Maryland v. Hayden,134 for example, involved an armed robbery of a cab company. Two cab drivers reported the robbery immediately and watched the suspect enter a nearby apartment; the police arrived within five minutes and entered the apartment without a warrant to look for the suspect and weapons.135 The Court held the search of the home permissible, in part

129 See Mich. v. Tyler, 436 U.S. 499, 509-10 (1978). The Court was wiling to extend that exigency beyond the initial dousing of the flames. Prompt determination of the cause is necessary to prevent a reoccurrence. It may also be necessary to preserve evidence. Based on this rationale the Court upheld the initial entry and the early morning entry some four hours after the fire was extinguished.
130 See Johnson, 333 U.S. at 12, 16.
131 See id. at 15.
133 See id. at 706.
135 Id. at 298.
because of the potential for the suspect’s escape during the delay in obtaining a warrant.\textsuperscript{136}

The Court has also considered imminent danger or harm to others in evaluating a claim of exigent circumstances. In \textit{Hayden}, the Court noted that, when the suspect entered the apartment across the street from the cab company, persons living in the apartment could have been placed in immediate danger from a fleeing armed robber.\textsuperscript{137}

The Court has also upheld the warrantless entry by the police into a home in order to stop an altercation. In \textit{Brigham City v. Stewart},\textsuperscript{138} the police had been called to the residence in response to a disturbance of the peace complaint. When the police arrived on the scene they observed some adults holding down a teenager. The teenager broke free and struck one of the adults. At this point the police entered the home without a warrant to break up the altercation,\textsuperscript{139} a warrantless entry justified by the immediate need to protect an occupant from injury.

Probably the quintessential example of exigent circumstances created by the potential danger to others is \textit{Terry v. Ohio}.\textsuperscript{140} In \textit{Terry}, a police officer observed the suspicious behavior of three individuals whom he believed might be preparing to rob a jewelry store. The officer suspected that the suspects might be armed, and when he approached them he did a quick pat down of their outer garments to determine if they in fact had weapons.\textsuperscript{141}

\textsuperscript{136} \textit{Id.} at 298-99.
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} 126 S.Ct. 1943 (2006).
\textsuperscript{139} \textit{Id.} at 1946.
\textsuperscript{140} \textit{Terry v. Ohio}, 392 U.S. 1 (1968).
\textsuperscript{141} \textit{Id.} at 7.
The Court upheld this limited warrantless search in part because of the need to protect officer safety.\textsuperscript{142}

In cases in which the Court has found that danger to others created an exigency, the risk of harm was both substantial and imminent. Conversely, when the risk of harm was more attenuated or the potential injury less serious, the Court declined to uphold warrantless searches and seizures. In \textit{McDonald v. United States},\textsuperscript{143} the police entered an apartment they suspected was being used to run a gambling operation. The police had been watching the apartment for some two months and on the day in question they thought they heard an adding machine being used. Since adding machines were common in this kind of gambling activity, the police entered the apartment complex, looked through the transom above the door, entered the apartment, and conducted a thorough search of the apartment—all without a warrant.\textsuperscript{144} The Court concluded that no exceptional circumstance justified the warrantless search, because the police had not heard shots fired or a cry for help that would have necessitated an immediate response.\textsuperscript{145}

In another case, the Court looked to the seriousness of the underlying offense to determine if the potential danger created to other people or property created an exigency. In \textit{Welsh v. Wisconsin},\textsuperscript{146} the suspect had been observed driving erratically before he drove his car off the road and into a field. Other drivers who had observed the suspect’s behavior blocked his car to prevent him from driving away and reported his conduct to the police.\textsuperscript{147} The suspect left before the police arrived. The police followed his

\textsuperscript{142} Id. at 30.
\textsuperscript{143} McDonald v. U.S. 335 U.S. 451 (1948).
\textsuperscript{144} Id. at 452-53.
\textsuperscript{145} Id. at 454-56.
\textsuperscript{147} Id. at 742.
footprints to a nearby home, the address of which matched that on the abandoned vehicle’s registration. The police entered the house without a warrant and found the suspect lying naked in his bed. The Court rejected the government’s contention that this situation created an exigent circumstance, reasoning that, because the suspect had abandoned his car, there was little risk that he posed a threat to the safety of others. In addition, the court noted that Wisconsin classified a first time DUI offense as a non-criminal violation subject to civil forfeiture proceeding and not incarceration. Because of the relatively minor nature of the conduct involved under Wisconsin law, the circumstances did not excuse the warrantless entry.

Similarly, a serious offense is not enough in itself to present a danger such that exigent circumstances exist. At one time Arizona applied a “homicide rule,” which allowed the police to conduct a warrantless search in any case that involved a homicide. In *Mincey v. Arizona*, the police entered an apartment without a warrant to arrest a suspect. During the attempted arrest several shots were fired, killing one police officer and the defendant, and wounding other occupants. Soon after medical assistance arrived, police detectives began the crime scene investigation, which lasted four days and involved a total examination of the premises and the collection of several items of evidence. The Court held that the fact that the case involved a homicide did not create exigent circumstances; by the time the detectives arrived, the threat to safety had

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148 *Id.* at 743.
149 *Id.* at 754.
150 *Id.* at 746.
152 *Id.* at 387.
153 *Id.* at 389.
dissipated and the police were required to get a warrant before searching the crime scene.\textsuperscript{154}

In all of the cases in which the Court has upheld a warrantless search or seizure under the exigent circumstances rubric, the immediacy or freshness of the information that supports the police conduct has been an important consideration. Stale information or information that alludes to an event that has taken place in the past cannot be used to show a current exigency. Likewise, the Court has been equally keen to distinguish cases of genuine exigency from situations where the law enforcement official’s failure to obtain a warrant was due to inconvenience—inconvenience alone does not create an exigency.

In determining the validity of exigent circumstances, the Court has also looked at alternatives short of a warrantless entry which might have been available to the police. In \textit{Illinois v. McArthur},\textsuperscript{155} the police accompanied a woman to her home so she could remove her personal effects from the house. The police waited outside as she retrieved her property and when she came out of the house she told the police that they should search the house for drugs because her husband had kept drugs in the home. The police then prevented the defendant husband from entering the home without a police escort while they secured a search warrant. The Court held that the two-hour detention of the defendant was a reasonable and a less intrusive means of preserving the evidence than entering the home without a warrant.\textsuperscript{156}

Once the Court determines that exigent circumstances exist, that does not end the inquiry; the Court has also placed limits on the exigent circumstances exception. These limits focus primarily on the relationship of the police conduct to the exigent

\textsuperscript{154} \textit{Id.} at 393.  
\textsuperscript{155} \textit{531 U.S. 326} (2001)  
\textsuperscript{156} \textit{Id.} at 331-33.
circumstances and the duration of the exigency. Of paramount importance is the Court’s concern that the search be closely related to the exigency itself—in other words, exigent circumstances do not give law enforcement officials a blank check that would allow them to conduct a limitless search.

*Terry* provides one of the best examples of the relationship that must exist between the government’s conduct and the exigency. In *Terry*, and later in other cases, the Court held that the acute concern for officer safety suffices to create an exigency. The Court has been clear, however, that the scope of the search should be limited to a pat down of the outer garments for weapons. The exigency does not, for example, allow the police to look inside pockets or other closed containers; nor does it allow the police to engage in tactile manipulation of items that may be in a pocket to determine if they are contraband. Because the exigency is based upon officer safety, the scope of the search begins and ends with a warrantless intrusion to assess whether the suspect has a weapon. A search that exceeds these limits may not be justified under the exigent circumstances exception.

Outside of the *Terry* line of cases lie other instances in which the Court has limited the scope of the search to the exigency. In *Hayden v. Maryland*, the Court held that the police in hot pursuit of a suspected armed robber justified the warrantless entry and search of a home for the suspect. The Court also addressed the scope of the warrantless search. When the police entered the home they spread out through the first and second floors and the cellar. In the course of searching for the suspect and possible

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158 See Dickerson, 508 U.S. at 378.
confederates, a police officer looked in a washing machine for “the man or the money”; there, he discovered and seized clothing matching that of the robbery suspect. Notwithstanding the unlikely possibility that a man would have been found hiding in the washing machine, the Court upheld the admission of the clothing into evidence. The Court reasoned that the permissible scope of the search may be as broad as reasonably necessary to prevent the dangers that the suspect at large in the house might resist or escape.\textsuperscript{160} Given the risk that weapons could be hidden in the washing machine, and that the officer who looked in the machine did not know the suspect had been apprehended, the search was reasonable.\textsuperscript{161} Had the officer known that the suspect had been apprehended and the weapons had been found before he searched the washing machine, the outcome likely would have been different.

Another limitation the Court has placed on searches under the exigent circumstances exception is a temporal relationship between the search and the exigency. In the cases involving arson investigations, for example, the Court has been careful to limit the length and scope of the warrantless search based upon the time between the fire and the search. In \textit{Michigan v. Tyler},\textsuperscript{162} the Court upheld a warrantless search of the fire-damaged property that occurred some four hours after the fire had been extinguished. But the Court invalidated the warrantless searches that occurred over the next several days because these searches were detached from the initial exigency.\textsuperscript{163} Similarly, in

\begin{footnotesize}
\begin{enumerate}
\item[160] \textit{Id.} at 299.
\item[161] \textit{Id.}
\item[162] 436 U.S. 499 (1978).
\item[163] \textit{Id.} at 511.
\end{enumerate}
\end{footnotesize}
**Michigan v. Clifford**, the Court invalidated a warrantless search of a fire-damaged home that occurred seven hours after the fire had been extinguished.\(^{164}\)

The limits the Court has placed on searches under exigent circumstances are not intended to establish a rigid set of rules. Instead, the Court has adopted a flexible approach that looks to the context of the exigency itself to determine both the scope and duration of the search under the exigency exception. The need for this flexibility is clear. A set of rigid rules could not adequately account for the wide array of factual circumstances in which an exigency may arise. Yet even though bright line rules would be difficult to craft and hamper legitimate law enforcement action, still the Court has not abandoned the effort to place some important limits on the exigency exception. Absent such limits, law enforcement officials would be given a virtual free pass to conduct wide ranging searches and seizures without the judicial check contemplated by the Fourth Amendment, and the warrant requirement would in many cases become a nullity.\(^{165}\) In other words, the Court’s jurisprudence in this area reflects a very real concern that a limitless exigent circumstances exception would risk unbridled action by the executive in the area of searches and seizures.

These concerns are not unlike the risks created by giving the executive unbounded authority in the arena of national security, once he determines that exigent circumstances exist. Just as the Constitution does not rest our right to be secure in our persons and our

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\(^{165}\) Given the numerous exceptions that currently exist to the warrant requirement, many commentators have suggested that the warrant requirement is already a nullity. We reject that assessment. The Court’s jurisprudence clearly establishes the Fourth Amendment is a check on boundless executive authority and few would contend that because courts may have difficulty defining and applying doctrinal exceptions to the warrant requirement, the executive should be able to operate unchecked. Even those justices who would argue for a separation of the warrant clause from the reasonableness clause of the Fourth Amendment contend that the reasonableness requirement places some check on limitless executive authority.
homes in the discretion of the police, limits on presidential authority are necessary lest he skirt the accountability provided by Congressional oversight when it comes to national security decisions, particularly those with a domestic component. It follows that, as in the search and seizure context, the exigency exception is compatible with the shared and flexible authority enjoyed by the president and Congress in responding to national security threats.

B. **Exigency in the National Security Context**

The parameters of the Fourth Amendment’s exigent circumstances exception may be applied to limit the executive’s exigent circumstances authority in the national security context. Though they did not expressly rely upon a Fourth Amendment analysis, various justices have framed an understanding of the president’s emergency powers in terms that essentially echo the understanding that underlies the exigent circumstances exception in Fourth Amendment cases. Justice Tom Clark, for example, stated in his *Youngstown* concurrence that, in the absence of congressional action, “[t]he President’s independent power to act depends upon the gravity of the situation confronting the nation.”\(^{166}\) This standard approximates the rule governing the exigent circumstances exception when the exigency presents a risk that injury or harm will be realized if government officials delay a search or seizure to obtain a warrant.

Two justices have suggested more specific boundaries in respect to exigent circumstances authority—boundaries that reflect the judicial considerations at play in the Fourth Amendment context. In his *Youngstown* opinion, Justice Robert Jackson, responding to the president’s argument that the executive has the “inherent” authority to exercise emergency powers, noted that the framers—who “knew what emergencies

\(^{166}\) *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 662 (1952) (Clark, J., concurring).
were”—did not expressly provide for such authority in the Constitution. Nonetheless, Jackson reasoned that “emergency powers” are not inconsistent with free government, so long as “their control is lodged elsewhere than in the Executive who exercises them.” In his view, Congress may confer upon the president such powers as it deems necessary to meet the exigency at hand.

Justice Stephen Breyer was more explicit in his concurrence in *Hamdan v. Rumsfeld*. In that case, a majority of the Court concluded that the president did not have the authority to establish military commissions to try terror suspects: Congress had not provided for such tribunals, and the commissions established by the president violated national and international guidelines. Writing separately in support of these conclusions, Justice Breyer observed that, while Congress had denied the president “authority to create military commissions of the kind at issue,” nothing prevented the president “from returning to Congress to seek the authority he believe[d] necessary.” Further, Breyer noted that when, as in the circumstances of *Hamdan*, “no emergency prevents consultation with Congress,” the ability of the federal government to respond to danger necessarily is not impaired.

The principle that emerges from the opinions of Jackson and Breyer is that the president must seek authority from Congress before acting, unless the nature of the

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167 *Id.* at 650 (Jackson, J., concurring). *See also* Home Building & Loan Ass’n v. Blaisdell, 290 U.S. 398, 426 (1934) (“The Constitution was adopted in a period of emergency. Its grant of power to the Federal Government and its limitations on the power of the States were determined in the light of emergency ….”).

168 See *Youngstown Sheet & Tube*, 343 U.S. at 652 (Jackson, J., concurring).

169 See *id.* at 652-53 (Jackson, J., concurring). Posner has argued that, as between Congress and the judiciary, “Congress knows more about national security and so may perform [the] more effective checking function.” Posner, *supra* note __, at 150.


171 See *id.* at 2772-2775.

172 See *id.* at 2786-2798.

173 *Id.* at 2799 (Breyer, J., concurring).

174 *Id.* (Breyer, J., concurring).
exigency literally prevents the members of Congress from assembling, debating, and enacting legislation granting the president appropriate authority. This is analogous to a situation involving a search or seizure, where the default preference is for the government official to obtain a warrant, unless following that procedure would result in an immediate and identifiable risk to public safety. This outside limit on exigent circumstances authority in both cases reflects a constitutional partiality for democratic deliberation—to prevent arbitrary executive action in the national security context, and to protect individual rights in the search and seizure context.175 Such deliberation in the case of a national security emergency—as Professor John Hart Ely explained in the context of the war power—ensures that action that will place the lives of American soldiers at risk should result from “the concurrence of a number of people of various points of view,” and only after the careful consideration provided by relatively slow deliberation.176 As well, “[t]he requirement of authorization by both houses of Congress … increase[s] the probability that the American people” will support Congress’s choice of action.177

C. The Argument Against Codifying Exigent Circumstances Limits

Before turning to a fuller statement of the factors indicating the existence of exigent circumstances authority in the national security context, we pause to address a concern about articulating limits on executive exigent circumstances authority. Judge Posner

175 As Justice Jackson put it, “[w]ith all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (Jackson, J., concurring). See also Hamdan, 126 S.Ct. at 2799 (Breyer, J., concurring) (Constitution places its faith in “democratic means” to respond to danger).
177 Id. In addition, as Professor William M. Treanor has noted, also in the context of the war power, presidents may have personal reasons for starting wars—to secure a place in history, to leave a lasting legacy. Treanor, supra note __, at 770. The framers, he concluded, “gave Congress the power to decide when wars should start, not because Congress has some countervailing and superior motive, but because Congress is, in contrast with the President, disinterested.” Id.
makes the argument succinctly, reasoning, that “confirming legal authority to suspend constitutional rights reduces the cost of that extreme action to the president, and we may want him to bear a heavy (though not prohibitively heavy) cost so that he will be temperate in his exercise of power.” He also suggests that, if the executive’s emergency authority is narrowly defined, “it will fail to make provision for novel emergencies …, while if it is broadly defined it will give the president too much power.”

Professor Gross also argues against codification. He notes that, “[t]he longer emergency legislation, broadly understood, remains on the statute books, the greater the likelihood that extraordinary powers made available to government under this legislation will become part of the ordinary, normal legal system.” “The farther we get from the original situation that precipitated [the] enactment [of emergency legislation],” Gross continues, “the greater are the chances that the norms and rules incorporated therein will be applied in contexts not originally intended.”

These arguments reflect two related fears. The first is that, if Congress were to codify some definition of executive exigent circumstances authority—or if a court (assuming justiciability) were to establish a benchmark for determining when such authority becomes available to a president—the president would inevitably stretch the boundaries of that definition to extend his authority in a variety of ways unconnected to the initial emergency situation. The second is that such definition would serve not to limit the president but to embolden him to view the standard for employing exigent circumstances

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178 Posner, supra note __, at 154.
179 Id.
180 Gross, supra note __, at 1090.
181 Id. at 1092.
authority—whether Congressional or judicial in origin—as a tacit endorsement of such authority and a willingness to tolerate its de rigueur exercise, thereby deterring him from seeking Congressional approval for incipient action.

These arguments are well taken and have a great deal of merit. Nonetheless, we believe some guidance for the American people and their elected representatives is necessary, for neither can effectively hold a president accountable when there is no basis for determining when he has exceeded the constitutional bounds of his authority. What we propose is not a rigid and judicially-enforceable statutory default rule, but a framework for accountability, to deter arbitrary executive actions taken under cover of a perceived emergency, particularly those that involve civilians at home—and, if such actions are taken, to ensure that the political process is available to redress those decisions.

In other words, we seek here to give some shape to the executive’s exigent circumstances authority in an effort to promote both the quality of prospective decision-making by the president and the possibility of viable contemporaneous and retrospective review by the electorate and their representatives. With this framework we aim to balance two principles central to our constitutional democracy: the need to secure its continuation through defense of the nation, and the need to hold the leaders responsible for that defense appropriately accountable. Posner is surely correct that a president will hesitate to act only to the extent he is likely to pay a price for the exercise of that authority. It seems unrealistic to us, given the American experience in the years following September 11, that this deterrent will be a sufficient safeguard against

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182 See Posner, supra note __, at 154.
executive overreaching. Indeed, it is far from clear how members of Congress or the American people might challenge a president’s understanding of emergency as either inherently faulty or alarmist when there exists no exigent circumstances standard against which to assess his assertions and actions. Absent the possibility of such a challenge, a reasonable president is likely to view the price to be paid for any given action undertaken in the name of, say, counterterrorism as relatively small.

D. When Do Exigent Circumstances Arise?

As we look at the situations in the national security context where exigencies are likely to arise, we can refer to the examples found in the Fourth Amendment cases. The most important factor to consider is the potential adverse consequences that might result if the president were not able to respond to a national security threat immediately and unilaterally. In the Fourth Amendment context, the Supreme Court has been clear that a warrant is not required if the benefits of obtaining a warrant are outweighed by the harm to public safety caused by the delay. The risks to public safety must be acute and imminent, reflecting more than just a generalized concern that evidence might be lost, or that the law enforcement efforts might somehow be thwarted in the process of obtaining a warrant.

Still, a national security exigency requiring unilateral presidential action cannot be so broad as to include every conceivable threat to American interests or the security of American citizens; the threat must be articulable and recognizable. Not every threat need

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183 “If the White House’s response to 9/11 shows anything, it is that concern about accretion of too much power in the Executive Branch is hardly trivial.” Martin S. Flaherty, The Most Dangerous Branch Abroad, 30 HARV. J. L. & PUB. POL’Y 153, 170 (2006).

184 Consider, for example, Vice President Dick Cheney’s empirically suspect “one percent doctrine,” which suggests that a suspicion of terrorist activity, without any supporting evidence, amounts to a virtual emergency. See RON SUSKIND, THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA’S PURSUIT OF ITS ENEMIES SINCE 9/11, passim (2007).
be fully developed, or on the verge of occurring, for this requirement to be met, but vague and general dangers do not create exigencies that justify unilateral action by the president. It’s worth noting that, since the formation of our republican democracy, we have lived in a dangerous world. While the actions by the terrorist on September 11 vividly demonstrated the extent of some of these dangers, threats to American interests did not begin on September 11, and not every post-September 11 threat is so imminent as to create an emergency.

There are undoubtedly situations where the government may need to act quickly—for example, the immediate of capture suspected terrorists or to thwart an imminent terrorist plot against U.S. interests. This is closely analogous to hot pursuit situations in the Fourth Amendment context. Extended consultation and deliberation are not well suited for occasions that require quick and decisive action. But this is the exception, not the rule—hot pursuit cases require a showing by law enforcement that the situation is extraordinary, and that the circumstances in fact require quick and decisive action. In the mine run of cases, application of the warrant requirement arguably sacrifices efficiency for judicial oversight, in order to protect the rights of citizens to be secure against government intrusions upon privacy rights, and to ensure that decision-makers are held appropriately accountable.

This proposition holds true for a president’s emergency action as well. Even in a global environment of trans-national terrorism, not every terrorist threat requires or justifies presidential action without the Congressional consultation and oversight contemplated by our constitutional structure. Were unilateral action justified against every threat, there would be little to distinguish a true exigency from the kinds of threats
which the framers clearly anticipated when they created a structure that requires oversight and accountability of executive actions.

National security exigencies, like their Fourth Amendment counterparts, also must take into account the seriousness of the threat and the potential harm to American interests. The fact that a situation falls within the national security arena, as opposed to the ordinary law enforcement arena, arguably shows that the potential for harm to American interests may be significant. That said, however, even national security threats pose various degrees of harm, and not every action to prevent future harm requires unilateral executive action.\footnote{As Oren Gross has noted, neither the attacks of September 11 nor terrorism generally poses a threat to the United States in the way that the Nazi advances posed a threat to the state of Europe: “[T]he threats [terrorists] pose are not existential in the sense that they do not put in real danger the very existence of the victim state.” Gross, supra note __, at 1030.} For example, efforts to gather evidence and information about terrorist cells and future terrorist activity are similar to normal law enforcement evidence gathering activities, all of which may be effectively accomplished within the strictures of the warrant requirement and like legal regimes.

Similarly, the fact that the United States has suffered terrorist attacks in the past does not create an ongoing exigent circumstance that lasts in perpetuity. In \textit{Mincey v. Arizona}, the Supreme Court rejected this very argument when it struck down Arizona’s “homicide rule” that allowed for warrantless police searches in any homicide case. The rationale of \textit{Mincey} applies equally well to national security threats: at some point after a threat comes to fruition, the immediate danger will end. When it does, the exigency no longer exists, and the need for unilateral executive action ends. Were this not the case, the president would enjoy unchecked authority to act unilaterally from first contact with the
enemy until the president alone decided the threat no longer existed, effectively delaying any real possibility of timely assessments of the efficacy of his actions.

The freshness and credibility of the information and evidence giving rise to a national security threat should also be considered in determining whether a true exigency exists. Information that is recent and specific may justify emergency executive action. As in the Fourth Amendment context, however, stale information, evidence, or intelligence alluding to events that have already taken place, or information that is of uncertain reliability would not justify either a warrantless search or the unilateral exercise of exigent circumstances authority by the executive.

Further, in considering the scope of exigent circumstances, the Supreme Court has often sought to determine the availability of less intrusive alternatives to warrantless searches, such as seizing the property or detaining a suspect briefly while a search warrant is obtained. Similar considerations are appropriate in respect to the president’s response to national security threats. Those threats might run the spectrum from true exigencies to inconsequential information, and there are likely to be many threats which should be taken seriously, but do not rise to the level of an exigency. In these cases, the president should look for alternatives to unilateral action that allow Congress to both consult and perform its oversight functions.  

In those cases in which an exigency does exist and unilateral executive action is justified, care must be taken to place appropriate limits on the scope and proportionality of the president’s actions lest the exigency exception swallow the constitutional requirements of oversight and accountability, as in the Fourth Amendment context. The

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186 Congress, too, should recognize that in some cases it could perform its deliberative functions short of full consultation and floor debate. In the past, Congress has been able to effectively perform its constitutional role by means of select committees and classified hearings.
exigency in *Terry v. Ohio* that allowed the police to conduct a warrantless search of the suspect’s outer garments for a weapon did not also allow the police to expand that search to other locations or other evidence. The specific exigency, in short, determined the scope of the search.

It is equally important to ensure that unilateral actions by the president in response to national security threats be commensurate with the scope of the exigency. Police in hot pursuit of a suspect may search a home when they believe the suspect is hiding, to locate the suspect or his confederates, and to eliminate potential threats to police safety. But the police may not engage in a warrantless search of the entire home to look for contraband or other possible evidence of the crime. So, too, when United States forces are pursuing terrorists, their actions must be limited to ensure that the exigency does not become an excuse—or a subterfuge—to engage in actions unrelated to the exigency at hand, particularly actions that potentially infringe upon the rights and interests of American citizens.

Finally, perhaps the signal limitation on the executive’s exigent circumstances authority is the most obvious: temporality. Once a threat in fact dissipates, for whatever reason, so does the president’s need to act unilaterally. At that point, the president must honor the requirements of our constitutional structure and seek Congressional authorization and the oversight that comes with such authorization. In other words, once the threat passes—once we know, in Justice Breyer’s words, that “no emergency prevents consultation with Congress”—the exigency should be deemed at an end.187

IV. **Applying the Definition of Exigent Circumstances: Domestic Electronic Surveillance**

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It remains to test the exigent circumstances guidelines developed above to a real-world exercise of executive authority that some might claim falls within the president’s emergency power. As noted above, in December 2005, the existence of a secret NSA surveillance program became known.\textsuperscript{188} Even at this writing, more than two years later, we know few of the details and specifics about this program, which operated under the exclusive control of the executive branch for almost six years. What we do know is that the program was implemented shortly after the terrorist attacks on September 11 through an executive order. According to information provided by the administration, the president authorized the NSA to conduct warrantless surveillance of domestic communications if those communications originated outside of the United States and came from sources known or suspected to be linked to al Qaeda or other terrorist organizations.\textsuperscript{189} The president disclosed that he reviewed and reauthorized the program every forty-five days.\textsuperscript{190} In addition, the administration briefed select members of both political parties in the House of Representatives and Senate on the general aspects of the program on a number of occasions. These members were forbidden from sharing this information with their staffs or other members of Congress or the public.\textsuperscript{191}

Importantly, prior to 2007 Congress had not expressly or implicitly given the president the authority to establish such a program. Professor Eastman has argued to the contrary, contending Congress authorized any action commensurate with the “war on


\textsuperscript{189} Following the revelations of the existence of this program, there have been allegations made that the NSA surveillance on some occasions did not stay within this boundary, and in fact listened in on communications of a purely domestic nature. While this may be true, for the purposes of our argument, we are addressing the president’s authority to conduct this surveillance under the program that he authorized.


terror” in adopting the AUMF a week after September 11. Eastman notes that the Supreme Court read the AUMF to give the president the authority to detain enemy combatants even though the legislation did not expressly mention such detentions, and consequently that the AUMF is “broad enough to serve as authority for the much lesser intrusion on personal liberty at issue with surveillance of international calls made to or received from our enemies.” This understanding of the AUMF has been challenged by numerous commentators who have concluded Congress did not authorize warrantless electronic surveillance, a conclusion further buttressed by the Supreme Court’s conclusion in Hamdan that the president lacked the authority under the AUMF to establish military tribunals, as well as the fact that, in the face of political and public pressure, the president in 2007 agreed to place the domestic surveillance program under the structure established by FISA.

Nor could President Bush establish such a surveillance program pursuant to the executive’s exigent circumstances authority. The first factor we consider is the impact to national security if the president had been required to consult with Congress before launching a secret surveillance program. It is possible that in the initial days and weeks after September 11, while the government was trying to assess the nature and scope of the terrorist threat, any delay created by engaging the deliberative lawmaking process outlined in the Constitution could indeed have been costly. Given the actual attacks that

192 Authorization for Use of Military Force, Pub. L. No. 107-40 § 2(a), 115 Stat. 224, 224 (Sept. 18, 2001) (authorizing the President to “use all necessary and appropriate force against those … he determines planned, authorized, committed, or aided the terrorist attacks [of September 11], or harbored such organizations or persons ….”).
193 Eastman, supra note __, at 5.
194 See, e.g., Sims, supra note __, at 130-32; see also Bloom and Dunn, supra note __, at 178-80 (concluding AUMF did not supersede FISA regime).
we experienced, and given the government’s inability to anticipate and stop those attacks before they occurred, quick unilateral action that could serve to obtain information helpful to assessing the possibility of additional attacks would seem to fit within the ambit of the exigent circumstances authority. For a time, then, the potential impact that a delay may have caused had the president been required to consult with Congress could have justified unilateral actions that included an appropriately tailored domestic electronic surveillance program.

In the Fourth Amendment context, the Court has drawn a line between unjustified adverse impacts of a delay, and circumstances in which the risks caused by a delay are less acute and of a more general concern. In the latter, the Court has favored the deliberative process of the warrant requirement over unilateral police action. In respect to the domestic electronic surveillance, it can nearly always be argued that there is some risk that the target of a surveillance effort might disappear, or a communication might be lost in the time it takes to obtain the type of judicial approval required by FISA. But such generalized concerns do not justify continued unilateral executive action in the case of the NSA’s surveillance program, after the initial exigency dissipated: as the days and weeks extended into months and years, the potential impact of any delay caused by consultation with Congress diminished accordingly.

Closely related to the possible impact caused by a delay is the situation where law enforcement is in hot pursuit of the suspect. In some of these hot pursuit situations, the Court has upheld warrantless searches and seizures. In the domestic surveillance context, a strong argument can be made that the terrorist cells responsible for the attacks on September 11 might still have been in operation and in communication with overseas
operatives in the ensuing days. Assuming the government had information that these communications were on-going and that surveillance could have led to the discovery of terrorist cells and thereby prevented other attacks, unilateral action by the executive would have been justified. Nonetheless, just as law enforcement cannot legitimately claim to be in hot pursuit at all times, at some point in the days and weeks following September 11 the surveillance trail cooled to the extent that the possibility of the immediate detection of the other possible perpetrators of the September 11 attacks or evidence of other imminent attacks became not an emergency response, but a prospective investigation.

Along with the immediacy of the harm is its potential seriousness. Courts have allowed warrantless searches in cases in which there exists a risk of serious harm to the public or law enforcement officers. Notwithstanding this consideration, the Supreme Court has been clear that the seriousness of the harm does not in itself create an exigency. Here, too the domestic electronic surveillance program falls short on a claim of exigency. While no one would seriously doubt the harm that a terrorist attack can cause, the abstract potential for harm cannot necessarily create an exigency. A domestic surveillance program free of oversight, justified primarily on the contention that terrorism is a serious threat, misses this key component of a true exigency: exigent circumstances are not just dangerous or serious circumstances; if they were, virtually any threat to American interests would warrant unilateral executive action, rendering the deliberative process in respect to national security a nullity.

Further, in respect to domestic surveillance, less intrusive means might accomplish the same objective. Notably, within a few days of the September 11 attacks, Congress
had assembled and in short order passed the AUMF; within weeks, Congress had enacted the USA PATRIOT Act. It seems clear that presidential consultation with the members of Congress in the weeks right after the September 11 attacks was in fact possible and presented an effective alternative means by which to establish a surveillance program, one that would have the benefit of the imprimatur of the democratic process.

Even assuming the circumstances in the weeks after September 11 warranted the unilateral creation of a domestic surveillance program, still that program would have to meet the requirement that it operate within the parameters of the exigency. In the Fourth Amendment context, the scope and duration of the program must relate to exigency that called it forth—otherwise the exigency would become a blank check for any actions that the president alone deemed necessary.\textsuperscript{197} Based upon the administration’s own revelations about the program, its potential scope was quite broad and included the potential to target many innocent and innocuous communications.\textsuperscript{198} Indeed, those individuals who have challenged the program in the courts have alleged that their communications either had been or could be monitored by the NSA even though they did not relate to terrorist activity.\textsuperscript{199}

The breadth of the president’s domestic electronic surveillance program as of December 2005 stands in sharp contrast to the kind of limits placed on exigent searches in other contexts. The program at the time looked more like a surveillance process designed to troll for information and uncover leads that might directly or indirectly point

\textsuperscript{197} Cf. Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (opinion of O’Connor, J.) (observing that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens”).


to possible terrorist threats. Notwithstanding the importance of such action, it resembles normal law enforcement operations which in the Fourth Amendment context could not be justified by exigent circumstances. Moreover, the potentially infinite duration of the program would run counter to the temporal limits that have been placed on the availability of the exigent circumstances exception. In short, a program that operated without any outside oversight for almost six years exceeds any reasonable understanding of the exigency created by the events of September 11.

To be sure, exigent circumstances existed on and immediately after September 11, and in light of those circumstances, the president could respond to the continuing terrorist threat without Congressional consultation. We argue here only that the nature and extent of such exigencies be assessed objectively and rationally. The approach used by the Supreme Court in the Fourth Amendment context is well suited to evaluate the president’s claims of exigency, as in the case of his domestic electronic surveillance program; rather than a rigid rule, these factors accept that, in certain circumstances, the executive enjoys the freedom of action to protect the nation. But these factors also recognize that such freedom of action must have limits, to ensure that our representative democracy does not become the ultimate victim of terrorist threats.

In the end, the establishment of the domestic electronic surveillance program sometime in later 2001 resembled not an emergency response but President Truman’s seizure of the steel mills during the Korean conflict—action beyond the president’s authority in the circumstances. This does not mean that a president could never validly take such action; it just means that, in the event, he must seek Congress’s permission to do so when it remains possible for Congress to convene and to legislate. Any other result
would upset the constitutional balance of powers by which the people may ensure the accountability of their leaders. Given the proximity of Congress to the electorate, if the people felt their representatives were impeding too severely upon the president’s national security capacity, it’s likely they would make those feelings known.

CONCLUSION

In this article, we have argued that, while the president may act unilaterally in exigent circumstances, the constitutional allocation of authority and historical practice establish the default rule that, once the exigency has dissipated, Congress must be called upon to authorize national security programs like domestic electronic surveillance. Congress, after all, is primarily responsible for all domestic affairs policymaking, as well as critical national security determinations, such as declarations of war and appropriations for the armed forces. This understanding of the executive’s exigent circumstances authority is normatively desirable, for we want to protect the nation in emergencies, yet establish limits on presidential power lest the executive skirt the accountability provided by Congressional oversight.

Though there are dangers in defining any limitations on executive exigent circumstances authority too precisely, the U.S. Supreme Court’s Fourth Amendment exigent circumstances cases provide appropriate guidance for Congress and the people to hold the president to account when he claims emergency authority. These guidelines, which find their home in the separation of powers that is a hallmark of our constitutional system, should not be regarded as creating a suicide pact in emergency situations; we should endeavor to appreciate Justice Jackson’s reminder in Youngtown that the framers
designed our constitutional system “not only to grant power, but to keep it from getting out of hand.”200

200 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring).