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Domestic Surveillance for International Terrorists: Presidential Power and Fourth Amendment Limits

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In 2001, the President began spying on Americans again under circumstances that recalled surveillance abuses disclosed thirty years earlier by the Church Committee.[1] The current domestic spying program began soon after September 11, 2001 (9/11) and is conducted by the National Security Agency (NSA) for the purpose of detecting and thwarting threats posed by international terrorists.[2] The program, which is

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1. Elizabeth B. Bazan & Jennifer K. Elsea, Congressional Research Service, *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information* (Jan. 5, 2006), at 1-2 [hereinafter CRS Report on Warrantless Surveillance], *available at* http://www.fas.org/sgp/crs/intel/m010506.pdf; James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1. This is not the first time that a U.S. President has used electronic surveillance to spy on Americans supposedly for national security reasons. Indeed, the practice goes back at least to Franklin D. Roosevelt, as the Church Committee disclosed in the 1970s. The Church Committee's revelations led to enactment of the Foreign Intelligence Surveillance Act, which is at the center of the current controversy. *See generally* Richard Henry Seamon & William Dylan Gardner, *The Patriot Act and the Wall Between Foreign Intelligence and Law Enforcement*, 28 HARV. J.L. & PUB. POL'Y 334-36 (2005); Scott Shane, *For Some, Spying Controversy Recalls a Past Drama*, N.Y. TIMES, Feb. 6, 2006, at A18 (comparing post 9/11 domestic surveillance program to surveillance programs that came to light in the 1970s and that led to legislative reform).

2. *See* ACLU v. NSA, 438 F. Supp. 2d 754, 758 (E.D. Mich. 2006), *vacated*, 2007 WL 1952370 (6th Cir. July 6, 2007); Letter from Alberto R. Gonzales, Attorney General of the United States, to Sen. Arlen Specter (Feb. 28, 2006) [hereinafter Attorney General Letter of Feb. 28, 2006] (stating that the President authorized the "Terrorist Surveillance Program" in October 2001, before signing the USA PATRIOT Act), *available at* http://www.fas.org/irp/congress/2006_hr/022806gonzales.pdf; George W. Bush, President of the U.S.,

called the Terrorist Surveillance Program (TSP), has been thought to raise two issues in the ongoing public and academic debate. One issue is whether the TSP violates the Foreign Intelligence Surveillance Act of 1978 (FISA), or whether, instead, the FISA itself is unconstitutional to the extent it purports to restrict the President's authority to conduct the TSP.[3] This first issue arises because the TSP involves electronic surveillance (e.g., wiretapping) that is subject to FISA but has occurred without FISA compliance. The issue of whether the TSP trumps FISA, or vice versa, is a separation of powers issue. The second issue is whether the TSP violates the Fourth Amendment.[4] This Fourth Amendment issue arises because surveillance under the TSP occurs without prior judicial authorization or traditional probable cause.

Debate on the TSP correctly distinguishes the separation of powers issue from the Fourth Amendment issue; they do indeed require different analyses. Enough attention has not been given, however, to the connection between the separation of powers issue and the Fourth Amendment issue.[5] This article attempts to fill the gap.

President's Radio Address (Dec. 17, 2006), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051217.html (President states that he authorized the NSA program "[i]n the weeks following the terrorist attacks on our nation").

3. 50 U.S.C. §§ 1801-62.

4. U.S. CONST. amend. IV:

> 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.

5. The connection goes unexplored, for example, in the only published decision so far to address the constitutionality of the program. *See* ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (holding the Program unconstitutional), *vacated*, 2007 WL 1952370 (6th Cir. July 6, 2007). Likewise, none of the books or law review articles on the TSP published to date has explored the connection between the issues of whether the TSP exceeds the President's powers and whether it violates the Fourth Amendment. *See, e.g.*, RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 94-103 (2006); William C. Banks, *The Death of FISA*, 91 MINN. L. REV. 1209, 1254-60, 1278-80 (2007); Bob Barr, *Post-9/11 Electronic Surveillance Severely Undermining Freedom*, 41 VAL. U.L. REV. 1383, 1394-1402 (2007); Adam Burton, *Fixing FISA for Long War; Regulating Warrantless Surveillance in the Age of Terrorism*, 4 PIERCE L. REV. 381, 389-98 (2006); Brian R. Decker, *"The War on Information": The Foreign Intelligence Surveillance Act,* Hamdan v. Rumsfeld, *and the President's Warrantless-Wiretapping Program*, 9 U. PA. J. CONST'L L. 291, 297-356 (2006); Heidi Kitrosser, *"Macro-Transparency" as Structural Directive: A Look at the NSA Surveillance Controversy*, 91 MINN. L. REV. 1163, 1195-1206 (2007); John Cary Sims, *What NSA Is Doing . . . and Why It's Illegal*, 33 HASTINGS CONST'L L.Q. 105, 125-39 (2006); Katherine Wong, Recent Development, *The Terrorist Surveillance Program*, 43 HARV. J. ON LEGIS. 517, 518-34 (2006); John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565, 565-604 (2007). The connection between the separation of powers issue and

The article reaches two main conclusions. First, the President may defy FISA in certain circumstances by authorizing electronic surveillance that is subject to FISA but that occurs without compliance with FISA's standards and procedures (or with any other statutory authorization).[6] Furthermore, the very same circumstances that justify such surveillance "outside FISA"[7] can often cause the surveillance to satisfy the Fourth Amendment even though conducted without a warrant or traditional probable cause.[8] By the same token, when circumstances do not justify surveillance outside FISA, the government's violation of FISA presumptively violates the Fourth Amendment.[9]

The circumstances that excuse compliance with both FISA and traditional Fourth Amendment requirements are ones that constitute a genuine national security emergency. Precedent suggests that in a "genuine emergency" the President has inherent and congressionally irreducible power to respond to national security threats.[10] Although at first blush the Court's recent decision in *Hamdan v. Rumsfeld*[11] might be understood to cast doubt on the existence of such plenary presidential power, on closer examination *Hamdan* actually supports its existence. A genuine national security emergency may not only justify Presidential action that defies an Act of Congress; the emergency may create exigent circumstances, in the

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the Fourth Amendment issue does receive attention, however, in a court filing by the Center for National Security Studies and The Constitution Project. *See* Memorandum of the Constitution Project and the Center for National Security Studies in Response to U.S. Department of Justice's Defense of Warrantless Electronic Surveillance at 42-46, *In re* Warrantless Electronic Surveillance (Foreign Intell. Surv. Ct. filed Feb. 28, 2006) [hereinafter Amicus Memo, *In re* Warrantless Electronic Surveillance], *available at* http://www.cnss.org/FISC%20Memorandum%20(signed).PDF.

6. *See infra* notes 67-145 and accompanying text.

7. This article follows a convention of current public debate by using the phrase "surveillance outside FISA" to describe electronic surveillance that is subject to FISA but authorized by the President to be carried out without complying with FISA. *See, e.g.*, Amicus Memo, *In re* Warrantless Electronic Surveillance, *supra* note 5, at 14 (referring to "the President's authorization of electronic surveillance to acquire foreign intelligence information outside the FISA framework"); United States Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006), at 18 (referring to "surveillance outside the procedures set forth in FISA") [hereinafter DOJ White Paper]; *id.* at 19 n.6 (referring to communications intercepted "outside FISA procedures"); Yoo, *supra* note 5, at 572 ("Why . . . would the Bush administration operate outside FISA. . . ?").

8. *See infra* notes 146-158 and accompanying text.

9. *See infra* notes 179-215 and accompanying text.

10. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 552 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (suggesting that government could detain a citizen in a "genuine emergency," even if that detention violated an Act of Congress); *see also infra* notes 146-158 and accompanying text.

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

context of "special needs,"[12] that justify searches and seizures without the usual Fourth Amendment requirements of probable cause and prior judicial approval. Without a "genuine emergency," however, the President's defiance of FISA should be presumed to violate the Fourth Amendment because Congress designed FISA, in collaboration with the Executive branch, to implement the Fourth Amendment.

The President's power to authorize surveillance outside FISA in a genuine national security emergency does not justify the TSP's continuance beyond the weeks immediately after 9/11. Indeed, the program's very status as an ongoing, broad "program" prevents it from falling within the President's "genuine emergency" power. The genuine emergency power is limited in scope and duration when it is exercised in contravention of legislation, such as FISA, that is a generally valid regulation of the President's power to conduct domestic surveillance for national security purposes. For example, the President may well have had broad power to conduct surveillance outside FISA in the days and weeks immediately after the terrorist attacks on September 11, 2001. That power subsided, however, as time and a still-functioning civil government permitted the President to consult Congress on the appropriate scope of surveillance powers. Thus, the President's "genuine emergency" power cannot support a broad surveillance program that violates a generally valid Act of Congress. By the same token, by recently amending FISA so as to avoid a conflict between that statute and certain features of the TSP, Congress's enactment of the Protect America Act of 2007 supports the validity of those same features.[13] Congressional ratification of the President's conduct both reinforces the President's power to engage in that conduct and supports its reasonableness for Fourth Amendment purposes.

The analysis underlying this conclusion unfolds in three steps. Part I briefly describes publicly available information on the TSP and the legal controversy over it. Part II discusses the connection between the President's power to authorize electronic surveillance outside FISA and Fourth Amendment limits on that power. Principles that emerge from that discussion are applied to the TSP in Part III of the article. Part III concludes that, although in exceptional circumstances the President can authorize surveillance that violates FISA and that does not satisfy customary Fourth Amendment requirements, the TSP exceeds the

12. *See, e.g.*, Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

13. Protect America Act, Pub. L. No. 110-55, 121 Stat. 552 (Aug. 5, 2007), *available at* http://thomas.loc.gov/cgi-bin/query/D?c110:3:./temp/~c110ihTPNw::.

President's power and violates the Fourth Amendment except insofar as it has been authorized by the Protect America Act of 2007.

I. The NSA Program of Domestic Surveillance for International Terrorists

A. The Terrorist Surveillance Program (TSP) at its Inception

Soon after international terrorists attacked the United States on 9/11,[14] President George W. Bush authorized a surveillance program to investigate those attacks and prevent future ones.[15] The program is run by the NSA and involves electronic surveillance, such as wiretapping telephones and intercepting emails.[16] Many details of the program remain secret.[17] The government admits, however, that it has established and maintains a "Terrorist Surveillance Program," under which NSA monitors phone calls and email that are made (1) to or from the United States and a foreign country; (2) by, or to, someone whom the government has "reasonable grounds" to believe has ties to al Qa'eda, the terrorist network responsible for the 9/11 attacks, "or an affiliated terrorist organization."[18] The government also seemingly admits that some of this surveillance is subject to the Foreign Intelligence Surveillance Act of 1978 ("FISA") but has not

14. *See, e.g.*, Elisabeth Bumiller and David E. Sanger, *A Somber Bush Says Terrorism Cannot Prevail*, N.Y. TIMES, Sept. 12, 2001, at A1.

15. *See* Attorney General Letter of Feb. 28, 2006, *supra* note 2, at 1 (stating that the President authorized the "Terrorist Surveillance Program" about which Gonzales previously testified before Congress in October 2001, before signing the USA PATRIOT Act).

16. *See Wartime Executive Power and the NSA's Surveillance Authority: Hearing Before the Sen. Comm. On the Judiciary*, 109th Cong. 12 (2006) (testimony of Alberto R. Gonzales, Attorney General of the United States) ("[T]his program is administered by career professionals at NSA.") [hereinafter *Senate Hearing, Wartime Executive Power*], *available at* http://a257.g.akamaitech.net/7/257/2422/26juy20061500/www.access.gpo.gov/congress/senate/pdf/109hrg/27443.pdf (listed as Senate Hearing 109-500); *id.* at 20 (testimony of Attorney General Gonzales) ("[T]he NSA did not commence the kind of electronic surveillance which I am discussing here today prior to the President's authorization.").

17. *Senate Hearing, Wartime Executive Power*, *supra* note 16, at 11 (testimony of Attorney General Gonzales) ("Many operational details of our intelligence activities remain classified.").

18. *Senate Hearing, Wartime Executive Power*, *supra* note 16, at 11 (testimony of Attorney General Gonzales) (stating that "[o]nly international communications are authorized for interception"—i.e., "communications between a foreign country and this country"—and that surveillance is triggered "only when a career professional at the NSA has reasonable grounds to believe that one of the parties to a communication is a member or agent of Al Qaeda or an affiliated terrorist organization"); DOJ White Paper, *supra* note 7, at 5 ("The President has acknowledged that, to counter this [al Qaeda] threat, he has authorized the NSA to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations.").

been conducted in compliance with FISA's requirements.[19] This admission means that the TSP at its inception may have been illegal on either of two grounds (or both).[20]

First, the TSP may violate FISA. FISA prescribes "the exclusive means by which electronic surveillance [for foreign intelligence purposes] . . . may be conducted" in the United States.[21] FISA's legislative history confirms that Congress intended FISA to govern all domestic electronic surveillance for foreign intelligence purposes.[22] Congress made

19. *See* Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005) (statement of Attorney General Gonzales) [hereinafter Attorney General Press Briefing of Dec. 2005] ("[I]n terms of legal authorities, the Foreign Intelligence Surveillance Act provides—requires a court order—before engaging in this kind of surveillance that I've just discussed and the President announced on Saturday, unless . . . otherwise authorized by statute or by Congress."), *available at* http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html; *cf.* DOJ White Paper, *supra* note 7, at 17 n.5 ("To avoid revealing details about the operation of the program, it is assumed for purposes of this paper that the activities described by the President constitute 'electronic surveillance,' as defined by FISA, 50 U.S.C. § 1801(f)."); Letter from William E. Moschella, Assistant Attorney General, U.S. Dept of Justice, to Hon. F. James Sensenbrenner, Jr., Chairman, U.S. House of Rep. Judiciary Comm., encl. at 12 (Mar. 24, 2006) [hereinafter Moschella Letter of Mar. 24, 2006] (stating that DOJ Whitepaper "assumes, solely for purposes of that analysis, that the targeted interception of international communications authorized under the President's Terrorist Surveillance Program would constitute 'electronic surveillance' as defined in FISA," but Department "cannot confirm whether that is actually the case without disclosing sensitive classified information"), *available at* http://www.fas.org/irp/agency/doj/fisa/doj032406.pdf.

20. This section discusses the TSP "at its inception" because, as discussed below, the TSP's validity has recently been affected by the Protect America Act of 2007. *See infra* notes 55-59 and accompanying text.

21. 18 U.S.C. § 2511(2)(f). Section 2511(2)(f) also authorizes "electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications" to occur under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III") and under Chapter 121 of Part I of Title 18, 18 U.S.C. §§ 2701-2712. Title III authorizes wiretaps for criminal investigations, *see* 18 U.S.C. §§ 2516 & 2518(3)(a) (wiretap order requires probable cause that individual targeted for the wiretap is involved in one of enumerated offenses), and Chapter 121 concerns access to stored electronic communications, such as email messages, for the investigation of criminal offenses. *See* 18 U.S.C. § 2701(a) (generally prohibiting unauthorized access to "a wire or electronic communication while it is in electronic storage" in "a facility through which an electronic communication service is provided"); *id.* § 1803(a) & (d) (authorizing access to wire or electronic communications and customer records for an "offense under investigation" and for "an ongoing criminal investigation"). *See generally* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208 (2004) (explicating Chapter 121 and suggesting legislative revisions). The government has not claimed that either Title III or Chapter 121 supports the current NSA surveillance program, leaving FISA as the "exclusive" means of surveillance, under § 2511(2)(f). In addition to the exclusivity provision in Section 2511(2)(f), FISA provides: "A person is guilty of an offense if he intentionally engages in electronic surveillance under color of law except as authorized by statute." 50 U.S.C. § 1809(a)(1).

22. The exclusivity provision in § 2511(2)(f) of FISA replaced a provision in Title III stating that Title III did not limit the President's power to "take such measures as he deems necessary" to

FISA exclusive to stop executive abuses exposed in the 1970s through efforts such as the Church Committee investigations.[23] The Church Committee revealed that Presidents since Franklin D. Roosevelt had authorized warrantless surveillance of Americans.[24] Although Presidents claimed "inherent" power to authorize this surveillance for "national security" purposes, the surveillance often targeted people merely because of their political views.[25] By enacting FISA in 1978, Congress intended to "prohibit the President, notwithstanding any inherent powers," from

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protect national security. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351 tit. III, § 802, 82 Stat. 214 (1968), *repealed by* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 201(c), 92 Stat. 1797. Because the prior provision was designed to preserve the President's "inherent" constitutional authority, if any, to authorize surveillance that was not authorized by any statute, its repealer reinforces Congress's intent to eliminate the President's inherent power in this area, to the extent Congress was able to do so. So does Congress's enactment of § 2511(2)(f) instead of proposed provisions that, unlike § 2511(2)(f), continued to recognize possible inherent presidential power to conduct national security surveillance without statutory authorization. See S.3197, 94th Cong. § 2528, *reprinted in Hearings on S. 743, S. 1888, S. 3197 Before the Subcomm. on Criminal Laws and Procedure of the Sen. Comm. on the Judiciary*, 94th Cong. 134 (1976) (bill provision stating that legislation proposed in the bill would not "limit the constitutional power of the President to order electronic surveillance" for national security purposes); H. CONF. REP. No. 95-1270, at 35 (1978) (observing that House version provided that FISA and Title III would be "the exclusive statutory means" by which President could conduct surveillance, but Conference selected Senate version, "which omits the word 'statutory'"); Ira S. Shapiro, *The Foreign Intelligence Surveillance Act: Legislative Balancing of National Security and the Fourth Amendment*, 15 HARV. J. ON LEGIS. 119, 123 n.11 (1977) (quoting later version of S. 3197, 94th Cong. (1976), in which Senate Intelligence Committee narrowed the bill so that it referred to President's possible constitutional authority to conduct surveillance 'if the facts and circumstances giving rise to the acquisition are so unprecedented and potentially harmful to the Nation that they cannot reasonably be said to have been within the contemplation of Congress"). Other legislative history expresses Congress's intent in FISA to eliminate the President's inherent power to conduct national security surveillance. *See* S. REP. No. 95-604, pt. I, at 6 (1978) (bill enacted as FISA "recognizes no inherent power of the President in this area"); *id.* at 64 ("As to methods of acquisition which come within the definition of 'electronic surveillance' in this bill, the Congress has declared that this statute, not any claimed presidential power, controls."); H.R. REP. No. 95-1283, pt. 1, at 24 (1976) ("[E]ven if the President has the inherent authority in the absence of legislation to authorize warrantless electronic surveillance for foreign intelligence purposes, Congress has the power to regulate the conduct of such surveillance by legislating a reasonable procedure, which then becomes the exclusive means by which such surveillance may be conducted."); *see also Senate Hearing, Wartime Executive Power*, *supra* note 16, at 126 (testimony of Attorney General Gonzales) ("There is no question, if you look at the legislative history [of FISA] . . ., that Congress intended to try to limit whatever the President's inherent authority existed.").

23. *See, e.g.*, S. REP. No. 95-604, at 8 (1977) (bill that became FISA "is designed . . . . to curb the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it"); *see also* Seamon & Gardner, *supra* note 1, at 336-37 & nn.66-71 (2005) (discussing and citing relevant legislative history).

24. *See, e.g.*, S. REP. No. 95-604, at 7-8 (1977).

25. *See, e.g.*, *id.* at 8.

conducting domestic electronic surveillance for foreign intelligence purposes without complying with FISA.[26] Congress seemingly precluded any domestic surveillance outside of FISA.

Ever since the TSP came to light in late 2005, however, President Bush has claimed both statutory and constitutional power to conduct surveillance outside FISA. The statutory power, he contends, comes from post-9/11 legislation called the "Authorization for the Use of Military Force" ("AUMF").[27] He also claims "inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs."[28]

The President's reliance on the AUMF is weak.[29] The AUMF in relevant part authorizes the President to "use all necessary and appropriate

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26. *See supra* note 22 (citing legislative history of FISA indicating Congress's intent that FISA be the exclusive source of executive branch power to conduct electronic surveillance for foreign intelligence information); *see also* H.R. REP. No. 95-1283, pt. I, at (1978) ("[D]espite any inherent power of the President to authorize warrantless electronic surveillances in the absence of legislation, by this bill [and Title III] . . ., Congress will have legislated with regard to electronic surveillance in the United States, that legislation with its procedures and safeguards prohibit the President, notwithstanding any inherent powers, from violating the terms of that legislation."). Section 111 of FISA makes clear that Congress intended FISA to apply—to the exclusion of the President's inherent powers—even during wartime. Section 111 says, "[T]he President, through the Attorney General, may authorize electronic surveillance without a court order . . . to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress." 50 U.S.C. § 1811. I thank Louis Fisher for pointing out to me the significance of this provision. E-mail from Louis Fisher, Senior Specialist in Separation of powers, Congressional Research Service, Library of Congress, to Richard Henry Seamon, Professor of Law, University of Idaho College of Law (July 12, 2006 6:59 AM) [hereinafter Email from Louis Fisher] (on file with author).

27. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (Sept. 18, 2001), *reprinted in* 50 U.S.C. § 1541 note (Authorization for Use of Military Force); *see, e.g.*, Attorney General Press Briefing of Dec. 2005, *supra* note 19 ("Our position is, is that the authorization to use force, which was passed by the Congress in the days following September 11th, constitutes th[e] other authorization [to which FISA refers] . . . to engage in this kind of signals intelligence."); *Senate Hearing, Wartime Executive Power*, *supra* note 16, at 13 (testimony of Attorney General Gonzales) ("[T]he resolution authorizing the use of military force is exactly the sort of later statutory authorization contemplated by the FISA safety valve.").

28. *See Senate Hearing, Wartime Executive Power*, *supra* note 16, at 12 (testimony of Attorney General Alberto R. Gonzales) (President's "inherent authorities" under Constitution "include the power to spy on enemies like Al Qaida without prior approval from other branches of Government"); DOJ White Paper, *supra* note 7, at 1 (to the same effect).

29. *See, e.g., Senate Hearing, Wartime Executive Powers*, *supra* note 16, at 631 (prepared statement of Harold Hongju Koh, Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law, Yale Law School) (President's reliance on AUMF "does not pass the 'straight face' test"); American Bar Association, Task Force on Domestic Surveillance in the Fight Against Terrorism, Report 5 (Feb. 2006) ("There is nothing in either the language of the AUMF or its legislative history" to support NSA surveillance program) [hereinafter ABA Task Force Report on NSA Surveillance], *available at* http://www.abanet.org/op/greco/memos/aba_house302-0206.pdf; *see also* ACLU v. NSA, 438 F. Supp. 2d 754, 779-80 (E.D. Mich. 2006) (holding that NSA program is not authorized by

force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the [9/11] terrorist attacks."[30] The problem is that, in context, the term "force" cannot be reasonably construed to authorize domestic electronic surveillance. Not coincidentally, members of Congress have almost universally rejected the President's reliance on the AUMF.[31] Because the AUMF does not authorize the TSP, the President's power to authorize the TSP at its inception depended on his constitutional powers, as validly reduced by FISA.[32]

In addition to violating FISA, the TSP at its inception may have violated the Fourth Amendment.[33] The Fourth Amendment applies to some

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AUMF), *vacated*, 2007 WL 1952370 (6th Cir. July 7, 2007). *But cf.* Cass R. Sunstein, *Clear Statement Principles and National Security:* Hamdan *and Beyond*, 2006 S. CT. REV. 1, 42 (after *Hamdan*, President's reliance on AUMF for authority to conduct warrantless electronic surveillance is "significantly weakened," but "not entirely implausible"). *See generally* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2054 (2005) (offering a "framework for interpreting the AUMF in the context of the war on terrorism"). *But see* DOJ White Paper, *supra* note 7, at 10 ("The AUMF confirms and supplements the President's inherent power to use warrantless surveillance against the enemy in the current armed conflict.") (capitalization altered); Andrew C. McCarthy et al., *NSA's Warrantless Surveillance Program: Legal, Constitutional, and Necessary* 60-63 in THE FEDERALIST SOCIETY, TERRORIST SURVEILLANCE AND THE CONSTITUTION (undated) (arguing that AUMF supports NSA program), *available at* http://www.fed-soc.org/pdf/terroristsurveillance.pdf; Letter from Robert Alt, Fellow in Legal and International Affairs, John M. Ashbrook Center for Public Affairs, to Hon. James Sensenbrenner, Jr., 2 (Feb. 2006) ("[T]he scope of the President's electronic surveillance program . . . is consistent with the scope of the AUMF's authorization of the use of force."), *available at* http://www.ashbrook.org/publicat/dialogue/alt_judiciary.html.

30. AUMF § 2(a), 115 Stat. 224, *reprinted in* 50 U.S.C. § 1541 note (Authorization for Use of Military Force).

31. *See, e.g.*, *Senate Hearing, Wartime Executive Power*, *supra* note 16, at 2 (statement of Sen. Specter) (expressing doubt that AUMF authorizes the NSA program). *But cf.* Letter from Sen. Pat Roberts to Sens. Arlen Specter and Patrick J. Leahy 17 (Feb. 3, 2006) (defending surveillance program primarily based on president's inherent powers but stating: "I do not discount the legal arguments of the Department of Justice concerning the [AUMF]."), *available at* http://www.fas.org/irp/congress/2006_cr/roberts020306.pdf.

32. *See infra* notes 67-145 and accompanying text.

33. U.S. CONST. amend. IV; *see, e.g.*, William Banks, *NSA Eavesdropping and the Fourth Amendment*, JURIST-FORUM, Mar. 8, 2006 (arguing that "this domestic spying violates the Fourth Amendment"), http://jurist.law.pitt.edu/forumy/2006/03/nsa-eavesdropping-and-fourth-amendment.php; Complaint for Declaratory and Injunctive Relief at 2 ¶ 3 & 59 ¶ 193, ACLU v. NSA, Civ. No. 06-CV-10204 (E.D. Mich. filed Jan. 17, 2006) (alleging program violates Fourth Amendment), *available at* http://cdt.org/security/nsa/20060117aclu-complaint.pdf; Complaint at 2 ¶ 2 & 15 ¶ 50, Center for Constitutional Rights v. Bush, No. 06-CV-00313 (S.D.N.Y. filed Jan. 17, 2006) (similar allegations), *available at* http://www.ccr-ny.org/v2/legal/govt_misconduct/docs/NSAcomplaintFINAL11706.pdf; *cf.* Letter from Curtis A. Bradley, Richard and Marcy Horvitz Professor of Law, Duke Univ., to Sen. Bill Frist et al. 5 (Jan. 9. 2006) [hereinafter Law Professors' Letter to Congress] (stating that program raises serious Fourth

electronic surveillance, because electronic surveillance can constitute a "search" within the meaning of the Fourth Amendment.[34] Reflecting a traditional Fourth Amendment requirement, FISA ordinarily requires the government to get a court order (often called a "FISA warrant") before conducting electronic surveillance.[35] To get a FISA warrant, the government must show "probable cause" that the target of the surveillance is a foreign power or agent of a foreign power.[36] FISA's requirement for a court order based on probable cause, combined with the other FISA requirements, has led courts to reject Fourth Amendment challenges to surveillance that complies with FISA.[37] By the same token, surveillance outside FISA may violate the Fourth Amendment precisely because it occurs without a court order[38] and without meeting the other requirements of FISA, possibly including its substantive standard of "probable cause."[39]

Amendment if considered to be statutorily authorized), *available at* http://www.cdt.org/security/20060109legalexpertsanalysis.pdf.

34. *See, e.g.*, Katz v. United States, 389 U.S. 347, 353 (1967) (holding that search occurred when government attached an electronic listening device to outside of phone booth and overhead the person speaking on the phone inside the booth); *see also* Osborn v. United States, 385 U.S. 323, 326-31 (1967) (rejecting constitutional challenge to government's electronic recording of conversation when government first obtained warrant authorizing the recording); Richard H. Seamon, Kyllo v. United States *and the Partial Ascendance of Justice Scalia's Fourth Amendment*, 79 WASH. U.L.Q. 1013, 1013-14 (2001) (discussing applicability of Fourth Amendment to technological developments in surveillance).

35. 50 U.S.C. § 1805.

36. *Id.* § 1805(a)(3)(A).

37. United States v. Damrah, 124 F. App'x 976, 983 (6th Cir. 2005) ("FISA has uniformly been held to be consistent with the Fourth Amendment."); *see, e.g., In re* Sealed Case, 310 F.3d 717, 736-46 (Foreign Int. Surv. Ct. Rev. 2002) (rejecting Fourth Amendment challenge to FISA); United States v. Pelton, 835 F.2d 1067, 1075 (4th Cir. 1987) ("We now join the other courts of appeals that have reviewed FISA and held that the statute meets constitutional requirements."); United States v. Cavanagh, 807 F.2d 787, 790 (9th Cir. 1987) ("FISA satisfies the constraints the Fourth Amendment places on foreign intelligence surveillance conducted by the government."); United States v. Duggan, 743 F.2d 59, 73 (2d Cir. 1984) ("We regard the procedures fashioned in FISA as a constitutionally adequate balancing of the individual's Fourth Amendment rights against the nation's need to obtain foreign intelligence information.").

38. *See* Attorney General Press Briefing of Dec. 2005, *supra* note 19 (Attorney General Gonzales stating the United States's position that it is not legally required to get court approval for NSA surveillance program disclosed in December 2005).

39. *Compare* DOJ White Paper, *supra* note 7, at 5 (stating that surveillance under NSA program requires "a reasonable basis to believe that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda") *with* Alberto R. Gonzales, *Prepared Remarks for Attorney General Alberto R. Gonzales at the Georgetown University Law Center* (Jan. 24, 2006) ("the standard applied [for surveillance under NSA program]—'reasonable basis to believe'—is essentially the same as the traditional Fourth Amendment probable cause standard."); *and* Moschella Letter of Mar. 24, 2006, *supra* note 19, encl. at 2-3 (equating "reasonable basis" standard to "probable cause").

B. Recent Developments in the TSP

Disclosure of the TSP in late 2005 and the ensuing debate have produced (1) several lawsuits, (2) a decision by the President to submit the TSP to supervision by the Foreign Intelligence Surveillance Act, and, most recently, (3) legislation authorizing the TSP temporarily and in part. This section briefly describes each development.

Of the many lawsuits challenging the TSP,[40] two sets of suits have reached federal courts of appeals. The Sixth Circuit rejected a challenge to the TSP, holding that the plaintiffs lacked standing.[41] That fate is unlikely to defeat a TSP challenge recently argued in the Ninth Circuit, because the plaintiffs in that case have documentary evidence that their phone calls were intercepted under the TSP.[42] Even so, the Ninth Circuit may not reach the merits because the government has sought dismissal based on the state-secrets doctrine.[43] Indeed, the government seems to believe that the TSP is categorically beyond legal challenge.[44]

In January 2007, the Justice Department persuaded a judge on the Foreign Intelligence Surveillance Court (FISC) to issue orders that blessed the TSP.[45] The orders were, and remain, secret.[46] It appears, however, that

40. *See, e.g.*, Master Consolidated Complaint Against Defendants AT&T Mobility LLC et al., *In re National Security Telecommunications Records Litigation*, MDL Docket No. 06-1791 (N.D. Cal. filed Jan. 16, 2007), *available at* http://www.eff.org/legal/cases/att/#legal.

41. ACLU v. NSA, 2007 WL 1952370, at *1 (6th Cir. July 6, 2007) ("[w]e cannot find that any of the plaintiffs have standing for any of their claims.").

42. *See Secret Log at Heart of Wiretap Investigation*, CHI. TRIB., Aug. 6, 2007, at 10; Complaint, Al-Haramain Islamic Found. v. Bush, No. CV 06 274 MO (D. Ore. filed Feb. 28, 2006).

43. Adam Liptak, *U.S. Defends Surveillance to 3 Skeptical Judges*, N.Y. TIMES, Aug. 16, 2007, at A1.

44. Henry Weinstein, *How Lawyer Navigates Sea of Secrecy in Bizarre Case*, L.A. TIMES, Aug. 15, 2007, at 1 ("Asked . . . if there was any way, under the government's interpretation of the law, that someone could contest the surveillance program, a senior Justice Department official replied, 'In the current context, no.'").

45. Letter from Alberto R. Gonzales, U.S. Attorney General, to Sens. Patrick Leahy & Arlen Specter, Chairman & Ranking Minority Member, Sen. Judiciary Comm. (Jan 17, 2007), at 1, [hereinafter Letter from Alberto Gonzales to Sens. Leahy and Specter], *available at* http://www.talkingpointsmemo.com/docs/nsa-doj-surveillance/; *see also* Chris Roberts, *Transcript: Debate on the Foreign Intelligence Surveillance Act*, EL PASO TIMES, Aug. 22, 2007 [hereinafter El Paso Times Interview with DNI McConnell] (interview in which Director of National Intelligence Mike McConnell states that, on approximately January 7, 2007, "The administration had made a decision to put the terrorist surveillance program into the FISA court"), *available at* http://www.elpasotimes.com/rds_archivesearch/ci_6685679? IADID=Search-www.elpasotimes.com-www.elpasotimes.com.

46. *See* Eric Lichtblau & David Johnston, *Court to Oversee U.S. Wiretapping in Terror Cases*, N.Y. TIMES, Jan. 18, 2007, at A1 (reporting that senior Justice Department official said "the mechanics" of the January 2007 FISC orders were classified to prevent compromising

the orders do not take the form of traditional FISA warrants issued by the FISC, for Attorney General Alberto Gonzales described them as "innovative" and "complex."[47] He also told the Senate Judiciary Committee that the January 2007 FISC orders "authorize[e] the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agency of al Qaeda or an associated terrorist organization."[48] Thus, according to Gonzales, these orders caused "any electronic surveillance that was occurring as part of the Terrorist Surveillance Program" to be "conducted subject to the approval of the Foreign Intelligence Surveillance Court."[49] If these secret orders had remained unimpeached, debate over the legality of the TSP might have become largely academic, at least as a prospective matter.[50]

The January 2007 FISC orders authorizing the TSP did not, however, settle the matter. In March 2007, an FISC judge different from the one who entered the January 2007 orders questioned whether the government could rely on those orders when it intercepted communications using

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intelligence activities); *see also* Dan Eggen, *Court Will Oversee Wiretap Program; Change Does Not Settle Qualms About Privacy*, WASH. POST, Jan. 18, 2007, at A1 (noting that details of FISC supervision were unclear because "administration officials declined to describe specifically how the program will work").

47. Letter from Alberto Gonzales to Sens. Leahy and Specter, *supra* note 45, at 1; *see also* Eggen, *supra* note 46, at A1 (reporting that one official "characterized the change as 'programmatic,' rather than based on warrants targeting specific cases"); EL PASO TIMES Interview with DNI McConnell, *supra* note 45 (stating that the FISC allowed "an approval process that was at a summary level . . . . The FISA court . . . said the program is what you say it is and it's appropriate and legitimate."). Ordinarily, the FISC issues an order authorizing surveillance of a particular individual whom the government identifies as a "target" and establishes probable cause to believe is "a foreign power or an agent of a foreign power." 50 U.S.C. §§ 1804(a)(4) & 1805(a)(3)(A). *See generally* Gardner & Seamon, *supra* note 1, at 338-47.

48. Letter from Alberto Gonzales to Sens. Leahy and Specter, *supra* note 45, at 1.

49. *Id.*

50. Retrospectively, it remains important to know whether the TSP was valid before it was authorized by an FISC judge, and before it was authorized in part by the Protect America Act of 2007, because of pending lawsuits against telecommunications companies and other private defendants based on their involvement in the TSP. *See In re* Nat'l Security Agency Telecommunications Records Litigation, 2007 WL 2127345 (N.D. Cal. July 24, 2007) (denying government's motion for summary judgment in multidistrict litigation in which states seek records on federal government's use of telecommunications companies to facilitate TSP); Hepting v. AT & T Corp., 439 F. Supp. 974, (N.D. Cal. 2006) (in action by customers against AT&T for its involvement in TSP, court denies government's motion to dismiss or for summary judgment), *appeal docketed*, No. 06-17132 (9th Cir. Nov. 8, 2006); EL PASO TIMES Interview with DNI McConnell, *supra* note 45 (explaining that the private sector has assisted government in carrying out the TSP and are being sued for it; an issue "which has to be addressed is the liability protection for the private sector now is proscriptive. . . . We've got a retroactive problem.").

facilities, such as switching stations, located on U.S. soil.[51] In May 2007, this second judge flatly declared that the government could not do so, even when using U.S. facilities to intercept communications between persons located overseas.[52] The requirement to obtain traditional FISA warrants for "foreign-to-foreign" communications diminished NSA's surveillance of those communications because of the significant amount of time it takes the

51. *See* 153 CONG. REC. S10865 (daily ed. Aug. 3, 2007) (statement of Sen. Levin) ("When foreign persons communicate with foreign persons, even though . . . the communications might be routed through the United States, that is the problem that must be cured. . . . [W]e must . . . find a way with the new technology where calls may be routed through the United States, to get to those communications by foreign persons to foreign persons."); Joby Warrick & Walter Pincus, *How the Fight for Vast New Spying Powers Was Won*, WASH. POST, Aug. 12, 2007, at A1; EL PASO TIMES Interview with DNI McConnell, *supra* note 45 (stating that after one FISC judge "said the program is what you say it is and it's appropriate and it's legitimate," a "second judge looked at the same data and said . . . if it's on a wire and it's foreign in a foreign country, you have to have a warrant.").

52. Warrick & Pincus, *supra* note 51, at A1; *see also* Carol D. Leonning & Ellen Nakashima, *Ruling Limited Spying Efforts*, WASH. POST, Aug. 3, 2007, at A1 (reporting that the second FISC judge "concluded early this year that the government had overstepped its authority in attempting to broadly surveil communications between two locations overseas that are passed through routing stations in the United States. . . ."). Although the second FISC judge's ruling is secret, we can infer its rationale. FISA requires the government to obtain a traditional FISA warrant in order to conduct "electronic surveillance" for "foreign intelligence information." *See* 50 U.S.C. § 1804; *see also* 18 U.S.C. § 2511(2)(f), discussed *supra* note 21. FISA defines "[e]lectronic surveillance" to include "the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States." 50 U.S.C. § 1801(f)(2). When the government listens in on phone calls made by a person overseas, it cannot know in advance whether any particular call will be made to someone inside the United States. The possible interception of foreign emails and calls sent or made to people in the U.S., coupled with the use of facilities located inside the U.S. to make the interception, causes the surveillance to constitute "electronic surveillance" within the meaning of FISA, for which a standard FISA warrant must be obtained. *See, e.g.*, 153 CONG. REC. S10869 (daily ed. Aug. 3, 2007) (statement of Sen. Bond) (stating that he opposes a bill that would authorize warrantless interception of only foreign-to-foreign communications because, "[t]he problem is, you do not know—if you are targeting a foreigner—whether that foreigner is going to call or communicate with another foreigner"); *id.* at S10869 (statement of Sen. Chambliss) ("The problem is, when NSA has its eyes and its ears out on the wire, NSA does not know who an individual, who is in a foreign country, is calling—whether they are calling somebody foreign or whether they are calling somebody domestically."); *id.* at H9965 (statement of Rep. Wilson) ("Because [officials conducting surveillance of foreigners in foreign countries] can't tell in advance that the targeted communication is not to an American and there is no 'safe harbor' in the current law, they are forced to get warrants to avoid potentially committing a crime. As a result, increasingly, our intelligence agencies have been forced to get warrants on foreign targets in foreign countries."); *cf.* 50 U.S.C. § 1802(a)(1) (Attorney General may authorize electronic surveillance without a court order if surveillance "is solely directed at" communications transmitted "by means of communications used exclusively between or among foreign powers" and "there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party.").

government and the FISC to process applications for FISA warrants.[53] Government officials began urgently lobbying Congress for a legislation that would restore the government's ability to intercept foreign-to-foreign communications without having to obtain traditional FISA warrants.[54]

Congress responded in August 2007 by enacting the Protect America Act of 2007.[55] The Act "clarifies" that FISA's definition of "electronic surveillance" does not "encompass surveillance directed at a person reasonably believed to be located outside of the United States."[56] This clarification at the very least frees the government from having to obtain a FISA warrant to intercept foreign-to-foreign communications. Some argue that the Act goes much farther—contending that it, in fact, authorizes the

53. 153 CONG. REC. S10869 (daily ed. Aug. 3, 2007) (statement of Sen. Bond) (stating that unclassified summary of order issued by FISC said that FISA "must be amended because due to uncertainties and technological changes, they are spending so much time having to work on orders for collection involving the foreign targets."); Warrick & Pincus, *supra* note 51, at A1 (quoting an official as stating, "We needed thousands of warrants at the [FISC], but the most we could do was hundreds."); Eric Lichtblau, James Risen & Mark Mazzetti, *Reported Drop in Surveillance Spurred a Law*, N.Y. TIMES, Aug. 10, 2007, at A1 (reporting that, in closed door briefings with members of Congress, senior intelligence officials said they were collecting only 25 percent of the foreign-based communications that they had been receiving a few months earlier, and that the "ratcheting down" in government's ability to intercept foreign communications was traceable to the FISC ruling requiring warrants for some of those interceptions).

54. 153 CONG. REC. S10862 (daily ed. Aug. 3, 2007) (statement of Sen. Rockefeller) ("The DNI [Director of National Intelligence] and others have made a huge point about keeping the surveillance of foreign-to-foreign communications outside the FISA process."); *id.* (reproducing written statement by Director of National Intelligence: "[T]he Intelligence Community should not be required to obtain court orders to effectively collect foreign intelligence from foreign targets located overseas."); *id.* at H9954 (daily ed. Aug. 4, 2007) (statement of Rep. Smith ("The bill . . . clarifies well-established law that neither the Constitution nor Federal law requires a court order to gather foreign communications from foreign terrorists."); *id.* at H9956 (statement of Rep. Nadler) (Director of National Intelligence told Congress "we needed to fix the foreign-to-foreign intelligence."); Warrick & Pincus, *supra* note 51, at A1 ("What [Director of National Intelligence Michael] McConnell wanted most from Congress was to be able to intercept, without a warrant, purely foreign-to-foreign communications that pass through fiber-optic cables and switching stations on U.S. soil."); *see also* Eric Lichtblau & Mark Mazzetti, *Broader Spying Authority Advances in Congress*, N.Y. TIMES, Aug. 4, 2007, at A8 ("The White House lobbying [for changes to FISA] took on new urgency because of a still-classified ruling by the intelligence court earlier this year that placed new restrictions on monitoring without warrants purely foreign communications that are routed through the United States."); EL PASO TIMES Interview with DNI McConnell, *supra* note 45 (describing his effort to persuade Congress to require "no warrant for a foreigner overseas" being subjected to electronic surveillance).

55. Protect America Act, Pub. L. No. 110-55, 121 Stat. 552 (Aug. 5, 2007), *available as enrolled bill at* http://thomas.loc.gov/cgi-bin/query/D?c110:3:./temp/~c110ihTPNw.

56. Protect America Act § 2 (provision entitled "Clarification of Electronic Surveillance of Persons Outside the United States") (to be codified as 50 U.S.C. § 1805a).

entire TSP and then some.[57] Concern about the scope of the Act, compounded by the extraordinary speed with which it was enacted, led Congress to include a provision that causes the Act to sunset in six months.[58] Regardless of the scope and duration of the Act, as developed

57. *See* 153 CONG. REC. S10866 (daily ed. Aug. 3, 2007) (statement of Sen. Feingold) (bill enacted as Protect America Act "goes far, far beyond the public descriptions of the President's warrantless wiretapping program."); *id.* at S10867 (statement of Sen. Leahy) (bill enacted as Protect America Act "gives [the government] far greater authority than they had claimed in their secret, warrantless surveillance program."); *id.* at S10868 (statement of Sen. Murray) ("To simply legitimize the Bush administration's warrantless wiretap program . . . is the wrong message to send to our citizens."); James Risen, *Bush Signs Law to Widen Reach for Wiretapping*, N.Y. TIMES, Aug. 6, 2007, at A1 (quoting Kate Martin, director of Center for National Security Studies, as stating that the Protect America Act "more or less legalizes the N.S.A. program"); *see also* James Risen & Eric Lichtblau, *Concerns Raised on Wider Spying Under New Law*, N.Y. TIMES, Aug. 19, 2007, at A1 (reporting on suspicions of some civil rights advocates that "the legislation may grant the government the right to collect a range of information on American citizens inside the United States without warrants, as long as the administration asserts that the spying concerns the monitoring of a person believed to be overseas."). Although intended primarily to allow warrantless interception of "foreign-to-foreign" communications, the Protect America Act appears to authorize warrantless interception of communications by U.S. citizens who are located overseas. *See* 153 CONG. REC. S10864 (daily ed. Aug. 3, 2007) (statement of Sen. Levin) (bill enacted as Protect America Act "seems to me, very clearly applies to U.S. citizens overseas"); *id.* at S10866 (statement of Sen. Feingold) (bill enacted as Protect America Act "giv[es] free rein to the Government to wiretap anyone, including U.S. citizens who live overseas."); *id.* at S10868 (statement of Sen. Feinstein (under the bill enacted as Protect America Act, "A U.S. citizen in Europe is, in fact, covered," but minimization procedures prescribed in Exec. Order 12333 would apply). In addition, by authorizing surveillance "directed at" targets overseas, the Act apparently authorizes interception of phone calls and emails between people overseas and American residents. When the interception of information about a U.S. person does not constitute "foreign intelligence information," that information generally would be subject to "minimization" procedures prescribed by Executive Order that would prevent its use and disclosure. *See* 153 CONG. REC. S10868 (daily ed. Aug. 3, 2007) (statement of Sen. Feinstein) (stating that if government intercepted communications of U.S. citizen in Europe, "the minimization [procedures under Exec. Order 12,333] come into play"); *id.* at S10869 (statement of Sen. Bond) ("[I]f an American citizen is caught in a communication from an al-Qaida target or another foreign target, then that person's participation is minimized. And if it is not foreign intelligence, that is completely dumped."); EXEC. ORDER No. 12,333, pt. 2.3, 3 C.F.R. 200 (1982), *reprinted as amended in* 50 U.S.C. § 401 note, at 61-62 (2000) (governing intelligence agencies' collection of "information concerning U.S. persons"); *id.* pt. 2.5 (authorizing Attorney General to approve "for intelligence purposes" surveillance "against a United States person abroad"); National Security Agency, Central Security Service, *United States Signals Intelligence Directive 18*, § 1 (July 27, 1993) (prescribing procedures for "the minimization of U.S. person information collected, processed, retained or disseminated by the [United States SIGINT (Signals Intelligence) System]"), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB23/07-10.htm; *see also* Protect America Act, § 2, Pub. L. No. 110-55, 121 Stat. 552 (2007) (to be codified as 50 U.S.C. § 1805b(a)(5) (authorizing Director of National Intelligence and Attorney General to authorize surveillance of persons reasonably believed to be outside the United States if they determine that the acquisition is made using "minimization procedures" that meet FISA's definition of such procedures in 50 U.S.C. § 1801(h)); Department of Defense Directive 5240 1-R ("Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons") (Dec. 1982).

58. Protect America Act § 6(c).

below, its authorization of some aspects of the TSP is relevant both to whether the TSP falls within the President's power and to whether the TSP violates the Fourth Amendment.[59]

C. The Dualistic—and Incomplete—Debate over the TSP

It is typical and entirely proper for exercises of power by the federal government or its components to be subjected to a two-part analysis under the U.S. Constitution. The analysis asks, first, whether the governmental action under analysis falls within an enumerated power and, if so, whether the action violates any of the constitutional restrictions on the exercise of enumerated powers.[60] This two-part analysis recognizes that, for example, although Congress has power to regulate interstate commerce, it cannot exercise that power in a way that violates individual rights. Thus, Congress could not prohibit the interstate transportation of newspapers containing articles that criticized Congress. That prohibition would not violate any "intrinsic" limits on Congress's Commerce Clause power (because it would, after all, constitute a regulation of interstate commerce). Instead, the prohibition would violate "extrinsic" limits imposed on the Commerce Clause power by the First Amendment.

Considering this conventional dualistic analysis, it is not surprising that public and academic debate over the TSP has focused on two issues: whether the TSP falls within the President's powers and whether the TSP violates the Fourth Amendment.[61] The debate has not explored the

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59. *See infra* notes 216-223 and accompanying text.

60. *See generally, e.g.*, David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 80 ("Intrinsic limits derive from the principle of enumerated powers."); *id.* at 153 (describing Bill of Rights as containing "extrinsic limits").

61. *See, e.g.*, ACLU v. NSA, 438 F. Supp. 2d 754, 773-75, 776-82 (E.D. Mich. 2006) (holding, in separate analyses, that TSP violates Fourth Amendment and separation of powers), *vacated*, 2007 WL 1952370 (6th Cir. July 6, 2007); *Senate Hearing, Wartime Executive Power*, *supra* note 16, at 436 (testimony of Prof. Ken Gormley) (stating that NSA program violates FISA and Fourth Amendment); ABA Task Force Report on NSA Surveillance, *supra* note 29, at 10, 13 (presenting two arguments: that "Congress did not implicitly authorize the NSA domestic spying program in the AUMF, and in fact expressly prohibited it in FISA"; and that "construing the AUMF to authorize such wiretapping would raise serious questions under the Fourth Amendment"); Brian R. Decker, *"The War of Information": The Foreign Intelligence Surveillance Act,* Hamdan v. Rumsfeld, *and the President's Warrantless-Wiretapping Program*, 9 U. PA. J. CONST. L. 291, 304-43 (2006) (separately analyzing whether TSP falls within President's power and whether it violates Fourth Amendment); Lawrence Friedman & Renée Landers, *Domestic Electronic Surveillance and the Constitution*, 25 J. MARSHALL J. COMPUTER & INFO. L. 177, 178 (2006) (concluding that TSP exceeds President's authority and violates the Fourth Amendment); R. Andrew Smith, *Breaking the Stalemate: The Judiciary's Constitutional Role in Disputes Over the War Powers*, 41 VAL. U.L. REV. 1517, 1531 (2007) ("[T]he constitutional question raised by the NSA program concerns its permissibility under the Fourth

connection between these two issues. My contention, developed over the next two parts of this article, is that there is a connection: Indeed, the TSP should be presumed to violate the Fourth Amendment precisely because, and to the extent that, it violates the generally valid statutory restrictions on the President's power that are prescribed in FISA. This contention reflects Congress's power, through legislation regulating surveillance, to affect the content of the Fourth Amendment. Under my approach, the TSP violates the Fourth Amendment today—because FISA is on the books—even though the TSP may very well *not* have violated the Fourth Amendment before FISA was enacted and might very well not violate the Fourth Amendment if FISA were repealed. Congress's enactment of a statute that is within Congress's power and that is designed to implement the Fourth Amendment alters the Fourth Amendment analysis. In this sense, Congress can affect the substance of the Fourth Amendment. This reflects the power of legislation to inform judicial determination of what is "reasonable" within the meaning of the Fourth Amendment. Recognizing Congress's power to enact statutes that alter Fourth Amendment reasonableness illuminates linkage between the Fourth Amendment and separation of powers doctrine. In addition, an understanding of the linkage informs the broader debate on the roles of legislatures and courts in enforcing the Fourth Amendment.[62]

Amendment and the president's war power."); Law Professors' Letter to Congress, *supra* note 33, at 5 (arguing that program violates FISA and "would raise serious questions under the Fourth Amendment"); *see also* Complaint at 13-15, Center for Constitutional Rights v. Bush, No. 06-CV-00313 (S.D.N.Y. filed Jan. 17, 2006), *available at* http://www.ccr-ny.org/v2/legal/govt_misconduct/docs/NSAcomplaintFINAL11706.pdf (alleging that NSA program violates, among other laws, FISA, separation of powers, and First and Fourth Amendments); Complaint at 59, ACLU v. NSA, 438 F. Supp. 2d 754, 758 (E.D. Mich. 2006), *vacated*, 2007 WL 1952370 (6th Cir. July 6, 2007) (alleging violations of First Amendment rights, separation of powers, and Administrative Procedure Act ("APA"), with the APA violation arising from program's violation of FISA); Curtis Bradley et al., *On NSA Spying: A Letter to Congress*, N.Y. REV. OF BOOKS, Feb. 9, 2006, *available* at http://www.nybooks.com/articles/18650 (arguing that the TSP violates FISA).

62. *See generally* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 804 (2004) (critiquing "popular view" that courts should take a primary role in enforcing privacy threatened by technology; urging an important role for legislature); *cf.* Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747 (2005) (criticizing Professor Kerr's critique).

II. Presidential Power to Conduct Domestic Electronic Surveillance for National Security Purposes Within Fourth Amendment Constraints

The analysis of whether the TSP violates FISA differs from, but overlaps with, the analysis of whether the TSP violates the Fourth Amendment. The issue of whether the TSP violates FISA requires a separation of powers analysis that draws a line between the President's power and Congress's power.[63] The issue of whether the TSP violates the Fourth Amendment entails a reasonableness analysis that strikes a balance between governmental and individual interests.[64] Despite this difference in analyses, the separation of powers issue and the Fourth Amendment issue overlap when it comes to identifying what the President can and cannot do.

Specifically, as discussed below in Section A, FISA is unconstitutional—and the President can therefore disregard it—when doing so is required by exigent circumstances of national security.[65] Furthermore, electronic surveillance conducted under exigent national security circumstances will satisfy the Fourth Amendment—even if it does not meet the traditional Fourth Amendment requirements of prior judicial approval and probable cause—if, as will often be true, the surveillance falls within the exigent circumstances doctrine of Fourth Amendment law. As discussed in Section B below, however, when national security exigencies do not exist, the President's failure to comply with FISA exceeds his authority and presumptively violates the Fourth Amendment.[66]

The connection between the separation of powers issue and the Fourth Amendment issue reflects that both separation of powers doctrine and Fourth Amendment doctrine recognize plenary executive power when necessary to protect national security. Outside of such exceptional circumstances, however, both separation of powers and Fourth Amendment doctrine support legislative and judicial checks on the executive to prevent executive abuse of individual rights.

A. Presidential Powers in a "Genuine Emergency"

As noted above, the President seemingly admits that after 9/11 he authorized "electronic surveillance" within the meaning of FISA without following FISA's requirements.[67] As also noted above, this surveillance

63. *See infra* notes 67-145, 159-178, and accompanying text.

64. *See infra* notes 146-157, 179-215, and accompanying text.

65. *See infra* notes 67-145 and accompanying text.

66. *See infra* notes 146-157 and accompanying text.

67. *See supra* note 19 and accompanying text.

outside FISA is not authorized by the later-enacted AUMF (or any other statute).[68] Because neither the AUMF nor any other statute authorizes the surveillance, only the President's "inherent powers" can do so, and they can do so only to the extent that those inherent powers cannot validly be restricted by FISA. To say that FISA invalidly restricts the President's inherent powers reflects a conclusion that FISA violates the separation of powers doctrine.[69]

I join other commentators in believing that analysis of this separation of powers issue is guided by *Youngstown Sheet and Tube Co. v. Sawyer*.[70] In *Youngstown*, the Court invalidated President Truman's attempt to take over the nation's steel mills. Truman attempted the takeover to ensure that, despite labor unrest, the mills would continue to produce materiel for the

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68. *See supra* notes 29-32 and accompanying text.

69. *See, e.g.*, Attorney General Letter of Feb. 28, 2006, *supra* note 2, at 5 ("[I]f an interpretation of FISA that allows the President to conduct the NSA activities were not 'fairly possible,' and if FISA were read to impede the President's ability to undertake actions necessary to fulfill his constitutional obligation to protect the Nation from foreign attack in the context of a congressionally authorized armed conflict against an enemy that has already staged the most deadly foreign attack in our Nation's history, there would be serious doubt about the constitutionality of FISA as so applied."); McCarthy et al., *supra* note 29, at 33-34 (similar argument); *see also* Buckley v. Valeo, 424 U.S. 1, 126, 138-39 (1976) (holding unconstitutional, as infringing on Presidential power in violation of Appointments Clause, a federal statute that gave enforcement powers to agency whose members included officials appointed by members of Congress); Myers v. United States, 272 U.S. 52, 176 (1926) (holding unconstitutional, as improper infringement on executive power, federal statute that required Senate approval of President's removal of first-class postmaster who had been appointed by the President with the advice and consent of the Senate); *cf.* Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 466 (1989) (declining to construe federal statute to restrict President's power, via Justice Department, to solicit views of an American Bar Association on potential nominees for federal court seats, because such an interpretation "would present formidable constitutional difficulties," considering its intrusion on executive power).

70. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). *See, e.g.*, ACLU v. NSA, 2006 WL 2371463, at *21-24 (relying on *Youngstown* in analyzing NSA program), *vacated*, 2007 WL 1952370 (6th Cir. July 6, 2007); *Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Sen. Comm. on the Judiciary*, 109th Cong. (Jan. 9, 2006) (testimony of Judge Samuel Alito) (stating that "I think one might look to Justice Jackson's framework" in *Youngstown* in addressing president's power to authorize NSA program); *Senate Hearing, Wartime Executive Power*, *supra* note 16, at 33 (testimony of Attorney General Gonzales) ("[I]f Congress were to take some kind of action, and say the president no longer has the authority to engage in electronic surveillance of the enemy, then I think that would put us into the third part of Justice Jackson's three-part test" in *Youngstown*); ABA Task Force Report on NSA Surveillance, *supra* note 29, at 13 (applying the "criteria set forth in Justice Jackson's famous concurring opinion in *Youngstown*" to analyze President's authorization of NSA program); Law Professors' Letter to Congress, *supra* note 33, at 15 (relying on Justice Jackson's "influential opinion" in *Youngstown* to analyze President's power to authorize the NSA program). *But cf.* McCarthy et al., *supra* note 29, at 49-51 (Court's modern approach to separation of powers analysis is "more balanced and cautious" than Jackson's framework suggests when read in isolation).

Korean War.[71] Truman argued that "his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency [he] was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces."[72] The Court rejected that argument. It held that Truman's action was not authorized by any statute or any extra-statutory power that the President has under the Constitution.[73]

The most authoritative opinion from *Youngstown* has come to be, not the majority's opinion, but Justice Jackson's concurrence.[74] In his concurrence, Justice Jackson set out a three-part framework for analyzing the President's power.[75] The framework reflects the interdependence of the President and Congress in certain matters, including war.[76] Under the first part of the framework, the President's power is "at its maximum" when he or she acts with the express or implied authorization of Congress.[77] In this first situation, the President has "all [of the power] that he [or she] possesses in his [or her] own right plus all that Congress can delegate."[78] The second part of the framework applies when the President acts with neither congressional approval nor congressional denial of his or her authority. In this second situation, the President "can only rely upon his [or her] own independent powers."[79] The third part of the framework applies when the President takes action "incompatible with the expressed or implied will of Congress."[80] In this third situation, the President's power "is at its lowest ebb, for then he [or she] can rely only upon his [or her]

71. *Youngstown*, 343 U.S. at 585-89.

72. *Id.* at 582.

73. *Id.* at 585 ("The President's power, if any, . . . must stem either from an act of Congress or from the Constitution itself."); *id.* at 585-88 (holding that executive order did not fall within any statute or constitutional power).

74. *Id.* at 634-55 (Jackson, J., concurring); *see, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 662 (1981) (stating that, as parties in that case agreed, Justice Jackson's concurrence in *Youngstown* "brings together as much combination of analysis and common sense as there is in this area"); Patricia L. Bellia, *Executive Power in Youngstown's Shadow*, 19 CONST. COMMENT. 87, 89 n.11 (2002) (citing commentary recognizing influence of Jackson's concurrence); *see also supra* note 70 (citing sources relying on Jackson's *Youngstown* framework to analyze President's power to authorize the current NSA surveillance program).

75. *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring).

76. *Id.* at 635.

77. *Id.*

78. *Id.*

79. *Id.* at 637.

80. *Id.*

own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling Congress from acting upon the subject."[81]

Justice Jackson's framework makes it important to determine whether the TSP is authorized by—or is instead inconsistent with—the express or implied will of Congress. The President argues that the TSP was authorized at its inception by the AUMF, but this argument lacks merit.[82] Without the AUMF to support it, the TSP violates FISA and so presents Justice Jackson's third situation. Accordingly, the surveillance can fall within the President's power, despite violating FISA, only to the extent that Congress is constitutionally "disabl[ed]" from curbing the President's power.[83] The question becomes to what extent Congress can regulate the President's conduct of domestic electronic surveillance for national security purposes.

Precedent establishes that Congress has some regulatory power in this matter, but the precedent leaves the scope of that power unclear. The relevant precedent includes FISA itself, which was supported by Presidents Carter and Ford as a legitimate regulation of the President's power.[84] Unfortunately, this legislative precedent has no direct analog in Supreme Court precedent. The Supreme Court has said that Congress can regulate electronic surveillance in the United States to investigate national security threats posed by *domestic* organizations.[85] The Court has not addressed congressional regulation of surveillance of threats to national security posed by *foreign* agents and powers.[86] Though not addressing that specific

81. *Id.* at 637-38; *see also* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2774 n.23 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.") (citing Jackson's concurrence in *Youngstown*, 343 U.S. at 637).

82. *See supra* notes 29-32 and accompanying text.

83. *Youngstown*, 343 U.S. at 637-38.

84. 50 U.S.C. § 1805(a)(3)(A) (to issue order authorizing electronic surveillance, court must find that "the target of the electronic surveillance is a foreign power or an agent of a foreign power"); *see also id.* § 1801(a) & (b) (defining "foreign power" and "agent of a foreign power"); Seamon & Gardner, *supra* note 1, at 336-37 (documenting support of Ford and Carter Administrations for FISA).

85. United States v. U.S. Dist. Ct. (*Keith*), 407 U.S. 297, 324 (1972) ("prior judicial approval is required for the type of domestic security surveillance involved in this case and . . . such approval may be made in accordance with such reasonable standards as the Congress may prescribe").

86. *See Senate Hearing, Wartime Executive Power*, *supra* note 16, at 434 (testimony of Robert F. Turner) (stating that *Keith* case has been misunderstood as bearing on President's power to conduct surveillance of foreign threats to national security; *Keith* dealt only with "internal threats from domestic organizations"); *id.* (stating that *Keith* "made no suggestion that

issue, the Court has recognized that Congress has significant power over foreign relations—power that stems from, among other places, its power over foreign commerce and certain national defense matters.[87] On the other hand, the Court has recognized that the President, too, has significant power over foreign affairs, including matters of foreign intelligence, which exists independently of Congress's power.[88] Precedent does not establish to what extent the President's power is not only independent but also "plenary"—meaning not reducible by Congress.

Though not providing clear guidance, history and precedent suggest that the President has congressionally irreducible power to "repel sudden

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Congress should put any constraints on foreign intelligence gathering"); *see also* Mitchell v. Forsyth, 472 U.S. 511, 533 (1985) (distinguishing surveillance of foreign threats to national security from surveillance of domestic threats to national security). Of course, although *Keith* does not address congressional regulation of surveillance of foreign threats to national security, nor does it cast doubt on Congress' power to regulate that subject.

87. *See* Champion v. Ames, 188 U.S. 321, 351-52 (1903) ("the commerce with foreign countries . . . which Congress c[an] regulate . . . includ[es] . . . the transmission by telegraph of ideas, wishes, orders, and intelligence") (citing W. Union Tel. Co. v. Pendleton, 122 U.S. 347, 356 (1887)). In addition to Congress's power to regulate the executive branch's gathering of foreign intelligence, Congress can regulate the federal courts' admission of evidence derived from that intelligence gathering, as Congress has done in FISA. *See* 50 U.S.C. § 1806(e) (authorizing motion to suppress evidence obtained in violation of FISA); *see also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 31 (1976) (stating that Congress "has plenary [power] over the promulgation of evidentiary rules for the federal courts"). *See generally* Max Kidalov & Richard H. Seamon, *The Missing Pieces of the Debate Over Federal Property Rights Legislation*, 27 HASTINGS CONST. L.Q. 1, 60-61 (1999) (discussing Congress's power to make rules for the federal courts).

88. *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (referring to "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress"). *See also* Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 109, 111 (1948). The *Waterman S.S. Corp.* court noted:

> Congress may of course delegate very large grants of its power over foreign commerce to the President. The President also possesses in his [or her] own right certain powers conferred by the Constitution on him [or her] as Commander-in-Chief and as the Nation's organ in foreign affairs. . . . [In those roles, he or she] has available intelligence services whose reports neither are nor ought to be published to the world.

Id. In citing *Curtiss-Wright*, I do not mean to endorse its reasoning, which has received withering, cogent criticism. Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation: *An Historical Reassessment*, 83 YALE L.J. 1, 32 (1973) (concluding that "major segments" of *Curtiss-Wright* rest on history that is "shockingly inaccurate"); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 496 (1946) (finding "little room" for acceptance of *Curtiss-Wright*'s concept of President's inherent extra-constitutional powers in "political and constitutional ideas" prevailing at time of American Revolution and framing of Constitution). I am arguing that the President has some margin to act contrary to law, provided it is not very long and he or she gets statutory authority as quickly as possible. In *Curtiss-Wright*, Sutherland saw no need for statutory authority. The President had exclusive, independent, inherent, and extraconstitutional powers, not dependent at all on congressional support. *See* E-mail from Louis Fisher, *supra* note 26.

attacks" on the country.[89] In *The Prize Cases*, for example, the Court upheld President Lincoln's power to blockade southern ports in the days after the Confederacy's attack on union forces at Fort Sumter.[90] The Court made clear this power did not depend on legislative authorization, stating: "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. . . . 'He must determine what degree of force the crisis demands.'"[91] Significantly, *The Prize Cases* was a 5-to-4 decision, with the four dissenters concluding that, because Congress had not declared war, "the President had no power to set on foot a blockade."[92] The Court's decision, in substance and voting alignment, implies at most a narrow power in the President to take defensive measures in response to attacks on the country—and one that may exist *without* "special legislative authority" but that does not necessarily exist when it *contradicts* legislative authority.[93]

89. *See, e.g.*, A Report of the Committee on International Security Affairs of the Association of the Bar of the City of New York, *The Legality and Constitutionality of the President's Authority to Initiate an Invasion of Iraq*, 41 COLUM. J. TRANSNAT'L L. 15, 19 n.13 (2002) ("Messrs. Madison and Gerry jointly introduced the amendment to substitute 'declare' for 'make' [in the clause enumerating Congress' war power]. They noted the change would 'leav[e] to the Executive the power to repel sudden attacks."); M. Farrand, The Records of the Federal Convention of 1787 (rev. ed. 1937), at 318, *cited in* THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, CONGRESSIONAL RESEARCH SERVICE (1992), at 308, n.1420.); *see also* War Powers Resolution, Pub. L. No. 93-148, § 2(c), 87 Stat. 555 (1973), (codified at 50 U.S.C. § 1541(c)) ("The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to [in addition to congressional authorization] . . . (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 852-63 (1996) (reviewing LOUIS FISHER, PRESIDENTIAL WAR POWER (1995)) (describing range of scholarly views on President's war powers, including power to repel imminent attacks on the country). Presidential power expert Louis Fisher traces the claim of presidential power to act contrary to law in cases of genuine emergency to the Lockean Prerogative. *See* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 259-260 (rev. 4th ed. 1997). Until recently, Presidents exercised the power but later sought authorization from Congress. *Id.* at 260-62.

90. The Brig Amy Warwick (*The Prize Cases*), 67 U.S. (2 Black) 635 (1862).

91. *Id.* at 668, 670.

92. *Id.* at 698 (Nelson, J., dissenting, joined by Taney, C.J., and Catron and Clifford, JJ.); *see also* Holmes v. United States, 391 U.S. 936, 946-47 (1968) (Douglas, J., dissenting) (discussing *The Prize Cases*).

93. *See also* Halperin v. Kissinger, 606 F.2d 1192, 1201 (D.C. Cir. 1979) ("[W]hatever special powers the Executive may hold in national security situations must be limited to instances of immediate and grave peril to the nation. Absent such exigent circumstances, there can be no

More recently, two Justices in *Hamdi v. Rumsfeld* recognized a similar, but broader, emergency power to respond to threats to national security.[94] In *Hamdi*, Justice Souter (joined by Justice Ginsburg) dissented from a decision upholding the detention of an asserted enemy combatant who is also a U.S. citizen.[95] Justice Souter concluded that an Act of Congress barred the detention.[96] He suggested, however, that the executive branch might be able to detain a citizen, even in violation of the statute, "in a moment of genuine emergency, when the Government must act with no time for deliberation."[97] The plurality did not address this issue because it held—contrary to Justice Souter's dissent (but in basic agreement with Justice Thomas' dissent)—that the detention in that case was authorized by federal statute.[98] The *Hamdi* dissent implies that the President's power to take action "incompatible with the expressed or implied will of Congress" (the third situation identified by Justice Jackson's *Youngstown* concurrence) may include the power to take immediate action to respond to

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appeal to powers beyond those enumerated in the Constitution or provided by law."); *cf.* Little v. Barreme, 6 U.S. (2 Cranch) 170, 177-79 (1804) (captain of U.S. vessel was personally liable in damages for seizing a vessel in violation of statute, even though the seizure comported with presidential orders, because presidential orders misconstrued the statute). As Dr. Louis Fisher observed in commenting on a draft of this article, *The Prize Cases* may also be distinguishable from what is called the "global war on terrorism," of which the current NSA surveillance program is part, because President Lincoln acted in a domestic context, rather than in a context in which he was taking the country from a state of peace to a state of war with another nation. *See* E-mail from Louis Fisher, *supra* note 26 (citing *The Prize Cases*, 67 U.S. at 660 (argument of counsel for government, distinguishing foreign war from civil war)).

94. Hamdi v. Rumsfeld, 542 U.S. 507 (2004); *see also* Joseph R. Biden, Jr, & John B. Ritch III, *The War Power at a Constitutional Impasse: A 'Joint Decision' Solution*, 77 GEO. L.J. 367, 372 (1988) (proposing a "joint decision" model under which presidential power to use force in the absence of statutory authorization "derives from the concept of emergency: the need to repel an attack on the United States or its forces, to forestall an imminent attack, or to rescue United States citizens whose lives are imperiled").

95. *Hamdi*, 542 U.S. at 539-54 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment, joined by Ginsburg, J.).

96. *Id.* at 541.

97. *Id.* at 552.

98. *Id.* at 517 (O'Connor, J., announcing judgment of the Court and delivering an opinion in which Rehnquist, C.J., Kennedy and Breyer, JJ., joined) (holding that "Congress has in fact authorized Hamdi's detention"); *id.* at 579-94 (Thomas, J., dissenting) (finding that President's detention of Hamdi fell within "powers vested in the President by the Constitution and with explicit congressional approval"). Justice Thomas believed that the plurality understood the President's power under the Constitution and the AUMF too narrowly. *See id.* at 587-93. Justice Thomas also disagreed with the Court's disposition, which remanded the case for Hamdi to have "a meaningful opportunity to contest the factual basis for [his] detention" (*id.* at 509 (opinion of O'Connor, J., announcing judgment of the Court); *id.* at 553 (Souter, J., joined by Ginsburg, J., concurring in remand)). *See id.* at 579 (Thomas, J., dissenting) (concluding that "there is no reason to remand the case" because Hamdi's habeas challenge should fail).

a "genuine emergency" threatening national security.[99] Furthermore, the *Hamdi* dissent did not limit its implication of presidential power to situations involving an actual attack. Indeed, even before *Hamdi* many commentators believed that the President's power encompasses taking defensive measures necessary to thwart imminent attacks.[100]

Initially, the Court's decision in *Hamdan v. Rumsfeld* might be read to cast doubt on the existence of any plenary power in the President to defy an Act of Congress when he believes it necessary to respond to a national security threat.[101] In *Hamdan*, the Court held that the President violated an Act of Congress—namely, the Uniform Code of Military Justice (UCMJ)—when he established military tribunals to try aliens detained in the war on terrorism.[102] The Court held that the President's order establishing the tribunals violated two UCMJ provisions. First, the President's order violated Article 36 of the UCMJ. [103] Article 36, as the Court interpreted it, requires the rules for military tribunals to be the same as the rules for courts martial to the extent practicable.[104] Although the

99. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

100. *See* Biden & Ritch, *supra* note 94, at 398-99 (proposing legislation that authorizes the President, without additional statutory authority, to take various actions including "to forestall an imminent act of international terrorism known to be directed at citizens or nationals of the United States"); Stromseth, *supra* note 89, at 862-863 (expressing the view that the President has power without congressional consent to respond not only to actual attacks but also to "imminent attacks" and to "exercise the nation's fundamental right of self-defense" when a foreign force "by its own actions placed the United States in a state of war"); Jane E. Stromseth, *Collective Force and Constitutional Responsibility: War Powers in the Post-Cold War Era*, 50 U. MIAMI L. REV. 145, 159 (1995) ("In exceptional cases, the President may determine that aggression short of an attack or imminent attack against the United States poses a threat to the country's security that is serious enough to warrant dispatching American forces into combat within a time frame that precludes prior approval from Congress."); William Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 9 (1972).

> [T]he lodgment of the power to declare war exclusively in Congress forbids the sustained use of armed force abroad in the absence of a prior, affirmative, explicit authorization by Congress, subject to the one emergency exception: an interim emergency defense power in the President to employ armed force to resist invasion or to repel a sudden armed attack until Congress can be properly convened to deliberate on the question as to whether it will sustain or expand the effort by specific declaration or, by doing nothing, require the President to disengage our forces from the theater of action.

Id. cf. Martin v. Mott, 25 U.S. 19, 29 (1827) (stating of Congress' power that "the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object.").

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

102. *Id.* at 2790-98.

103. *Id.* at 2790 (discussing Art. 36 of the UCMJ, 10 U.S.C. § 836).

104. *Id.* at 2790-93.

President had determined that it would be impracticable to have the military tribunals operate under the same rules as do courts martial, the Court found that determination "insufficient."[105] Second, the Court found that the President's rules for military tribunals violated UCMJ Article 21. Article 21 requires the rules for military tribunals to comply with "the law of war."[106] The Court determined that the tribunals' rules violated the Geneva Conventions, which the government conceded are part of "the law of war."[107] In short, the Court invalidated the President's rules because they conflicted with an Act of Congress.

Some believe that *Hamdan* casts serious doubt on the legality of the TSP because that program, like the President's rules for tribunals, violates an Act of Congress: namely, the FISA.[108] The provisions of the UCMJ at issue in *Hamdan*, however, unlike the FISA provisions with which the TSP conflicts, were not challenged by the government as unconstitutionally infringing on the President's inherent powers. As Justice Thomas noted in his *Hamdan* dissent, the Court did not need to decide whether the President has inherent authority to use military tribunals to try suspected terrorists.[109] The issue before the Court was whether the President's action fell within "certain statutes, duly enacted by Congress . . . in the proper exercise of its powers as an independent branch of government."[110] Perhaps the government did not challenge the UCMJ provisions at issue in *Hamdan*

105. *Id.* at 2791.

106. *Id.* at 2794 (discussing Art. 21 of the UCMJ, 10 U.S.C. § 821).

107. *Id.*

108. *See* Decker, *supra* note 5, at 341 (arguing that, under *Hamdan*, "the President cannot rely on inherent authority to trump" FISA restrictions); David Cole, *Reviving the Nixon Doctrine: NSA Spying, the Commander-In-Chief, and Executive Power in the War on Terror*, 13 WASH. & LEE J. CIV. RTS. & SOC. JUST. 17, 29-30 (2006) (relying on *Hamdan* to argue "there is no constitutional impediment to Congress restricting the President's ability to conduct electronic surveillance within the United States and targeted at United States. persons"); Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2366 (2006) ("*Hamdan* similarly destroys the legal case in support of the NSA's sustained program of secret, unreviewed, warrantless electronic surveillance of American citizens and residents"); Editorial, *Who Watches Those Who Watch Us?*, NW. FLA. (FORT WALTON BEACH) DAILY NEWS, July 26, 2006 (quoting interview in which Marc Rotenberg, Executive Director of the Electronic Privacy Information Center, states that *Hamdan* "told the executive branch that it doesn't have unlimited power under the Constitution to do whatever it thinks is necessary, even in times of war," and arguing that the decision dampens congressional enthusiasm for legislation authorizing the NSA surveillance program); Letter from Jerrold Nadler, Member of U.S. House of Rep., to Alberto Gonzales, U.S. Attorney General, 2006 WLNR 12942104, July 26, 2006 (stating that Court's decision in *Hamdan* makes it untenable for President to rely on inherent powers to justify NSA surveillance program).

109. *Hamdan*, 126 S. Ct. at 2825 n.2 (Thomas, J., dissenting).

110. *Id.* at 2799 (Kennedy, J., concurring in part).

because they leave room for the President to act as necessary in genuine national security emergencies. UCMJ Article 36 authorizes the President, when establishing military tribunals, to depart from the rules for courts martial if it is "impracticable" to use identical rules.[111] UCMJ Article 21 obligates the President to follow the "laws of war" in the use of military tribunals, but the laws of war, in turn, authorize the use of military tribunals "in cases of 'controlling necessity.'"[112] Thus, both statutory provisions arguably reflect that as necessary in exigent circumstances, the President has authority to depart from their otherwise applicable strictures.[113]

Recognizing a congressionally irreducible "genuine emergency" power in the President is supported by the Constitution's creation of a "unitary executive."[114] The Constitution provided for only one president so that, on appropriate occasions, one person can act for the nation without

111. 10 U.S.C. § 836.

112. *See Hamdan*, 126 S. Ct. at 2774 (quoting *Ex parte Milligan*, 71 U.S. 2, 139-40 (1866), and explaining that the law of war, as described in *Milligan*, was initially codified in UCMJ Art. 15 and later in UCMJ Art. 21); *see also Hamdan*, 126 S. Ct. at 2785 (opinion of Stevens, J.) (referring to the "inability on the Executive's part here to satisfy the most basic precondition—at least in the absence of specific congressional authorization—for establishment of military commissions: military necessity").

113. In addition to *Hamdan*, a much older case that casts doubt on the existence of congressionally irreducible presidential power in wartime matters is *Little v. Barreme*. 6 U.S. (2 Cranch) 170 (1804). In *Barreme*, an Act of Congress authorized the President to instruct the commanders of U.S. vessels to seize American ships sailing *to* French ports, if the vessels were reasonably suspected of carrying on illegal trade with the French. *Id.* at 170-71. In transmitting this Act of Congress to U.S. ship commanders along with orders to implement it, the President erroneously construed the Act of Congress to authorize the seizure of suspicious ships sailing *from* (as well as to) French ports. *Id.* at 171. The Court held that the Captain of a U.S. vessel could not rely on the President's "misconstruction of the act" in a suit brought by the owners of a ship that the Captain seized while acting under the President's orders. *Id.* at 178-79. Some commentators have read *Little* to mean that Congress can limit the President's discretion in waging war. *See, e.g.*, Banks, *supra* note 5, at 1278 & n. 465; Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1236 (2006). The case does not involve a situation, however, in which the President determined that national security made it necessary to defy congressional restrictions. *Cf. Little*, 6 U.S. (2 Cranch) at 178 (President's construction of the statute was "much better calculated" than a literal reading "to give . . . effect" to the law banning intercourse between U.S. and France). Professor Cole therefore errs in writing that in *Little* the President's order was "said to be necessary to the war effort." Cole, *supra* note 108, at 27.

114. *See, e.g.*, Clinton v. Jones, 520 U.S. 681, 712-13 (1997) (Breyer, J., concurring in the judgment) (discussing unitary executive); THE FEDERALIST No. 70, at 452 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) ("Decision, activity, secrecy, and despatch [sic] will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number."); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601 (2005).

consulting others.[115] The Framers thought a unitary executive was particularly important for conducting foreign affairs. A unitary executive not only enables the country to speak to other countries with one voice,[116] it also ensures quick action when necessary to protect national security.[117] Too, it helps ensure the secrecy of sensitive foreign intelligence.[118] Thus, the Court has often referred to the President as the "sole organ" of foreign affairs.[119] The "sole organ" concept cannot, however, be stretched so far that it puts the President indefinitely above the law. Rather, it makes sense to let the President act as the "sole organ" if—but only so long as—it is necessary in a genuine national security emergency for him or her to

115. *See* 10 ANNALS OF CONG. 613 (1800) (argument of John Marshall that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.").

116. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("The President is the constitutional representative of the United States with regard to foreign nations.") (quoting 8 U.S. Senate Reports Comm. On Foreign Relations 24 (Feb. 15, 1816)).

117. *See* THE FEDERALIST No. 70, *supra* note 114, at 451-52 ("Energy in the executive . . . is essential to the protection of the community against foreign attacks . . . ." An ingredient of this energy is "unity."); *see also* LOUIS FISHER, PRESIDENTIAL WAR POWER 6 (University Press of Kansas 1995) (explaining that Framers believed President should have power to repel foreign attacks without congressional approval partly because Congress was expected to meet only about once a year).

118. *See* Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world."); *Curtiss-Wright*, 299 U.S. at 320 ("Secrecy in respect of information gathered by [President's "confidential sources of information"] may be highly necessary [in the "field of international relations"], and the premature disclosure of it productive of harmful results"); EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984 5-7, 200-01 (Randall W. Bland et al. eds. 5th ed., New York University Press 1984) (1940) (citing among President's advantages over Congress in the conduct of foreign policy the unitary nature of the Presidency, its ability to collect and maintain secrecy of relevant information, and to act quickly); *see also* Robert F. Turner, Op-Ed, *FISA vs. the Constitution*, WALL ST. J., Dec. 28, 2005, at A14 (quoting THE FEDERALIST No. 64, at 422 (John Jay), many who provide useful intelligence related to treaties "would rely on the secrecy of the President" but not on that of the Senate or House of Representatives, and therefore Constitution's framers wisely provide that President "will be able to manage the business of intelligence in such a manner as prudence may suggest").

119. Pasquantino v. United States, 544 U.S. 349, 369 (2005) ("In our system of government, the Executive is 'the sole organ of the federal government in the field of international relations . . . .'") (quoting *Curtiss-Wright*, 299 U.S. at 320); *see also* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) ("[T]he historical gloss on the 'executive Power' vested in Article II of the constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'") (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993) (President has "unique responsibility" for the conduct of "foreign and military affairs"); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767 (1972) (plurality opinion) (President has "the lead role . . . in foreign policy").

function.[120] The unitary executive concept rests on the need for prompt, univocal action that will often be informed by information that cannot be broadly shared. As that need subsides, so does the legitimacy of conduct justified by reference to the unitary executive concept.

This reliance on the unitary executive concept is deliberately narrow. It does not embrace broader claims that have been asserted under the unitary executive theory. Unitary executive extremists assert Presidential power to ignore congressional restrictions on removal of executive branch officials and congressional enactments vesting exclusive power to administer statutory programs in officials other than the President.[121] In particular, recognition of congressionally irreducible presidential power in national security emergencies does not imply that the President has a greater role than Congress in the prosecution of war.[122] The position staked out here does, however, reject the view that "there is no constitutional impediment to Congress restricting the President's ability to conduct electronic surveillance within the United States and targeted at United States persons."[123] That view would apparently preclude the President's violation of statutory surveillance restrictions even if the President reasonably concluded that violation of those restrictions was necessary to respond to a national security emergency.

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120. *Cf.* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1257-58 (2004) (arguing for recognition of a constitutional principle of necessity that can even "trump specific constitutional requirements" if necessary to "national self-preservation").

121. *See* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 713 (2003) (arguing that President can execute all laws by him- or herself and can direct all other executive officials in their execution of the law); Yoo, *supra* note 114, at 607 (arguing that all Presidents in the modern era have asserted and exercised a broad understanding of executive power); *cf.* A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1347 (1994) (disputing account of executive power that gives President absolute authority to remove executive officials vested with administrative power by Congress); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 966 (2001) (arguing that, "although the president's ability to remove agency heads gives him enormous power to influence their decisions, it does not give him the authority to dictate substantive decisions entrusted to them by law").

122. *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 174 (1996) (arguing that Congress can check President's waging of war only by use of spending power or by impeachment). *But cf.* Fisher, *supra* note 113, at 1200, 1234-40 (arguing that Constitution "vest[ed] in congress the authority to take the country from a state of peace to a state of war against another country" and disputing historical accuracy of John Yoo's view of presidential power); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1729 (1996) ("[T]he unitarian executive attributed to the Founding is 'just myth.'" (quoting Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 4 (1994)).

123. Cole, *supra* note 108, at 29-30.

This analysis leaves many questions unanswered, including: Who decides whether a national security emergency exists?; What response is appropriate to a particular emergency?; and, How does one decide whether a particular legislative provision should be read to unconstitutionally intrude upon the President's power to respond to such an emergency?[124] As a practical matter, the President often must decide those questions initially.[125] Courts, however, can often review those decisions when they are implemented by officials other than the President and when the decisions affect individual rights.[126] Indeed, sometimes the federal courts can set aside such decisions, as the Court's recent decision in *Hamdan v. Rumsfeld* shows.[127] Thus, regardless of the power the President may individually possess as a "unitary executive," he or she is judicially accountable in many settings. In addition, the President is politically accountable for his or her unilateral responses to genuine national security emergencies, at least once those decisions become public.[128]

By any standard, 9/11 constituted a genuine national security emergency.[129] Accordingly, it empowered the President to take some

124. *Cf.* Paulsen, *supra* note 120, at 1289-96 (discussing standard and identity of decision maker for proposed constitutional principle of necessity); Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 904 (1994) (arguing that Boland Amendment would be unconstitutional if construed to restrict the "generally recognized constitutional power of the President to defend and protect Americans against attack").

125. *See* Martin v. Mott, 25 U.S. 19, 31 (1827) (in determining whether to call up the state militia pursuant to statutory and constitutional authority, the President "is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts").

126. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589-92 (1952) (Court reviewed Executive Order that recited existence of an "emergency" that required takeover of the nation's steel mills); *see also* Alderman v. United States, 394 U.S. 165, 176-85 (1969) (prescribing standards and procedures by which criminal defendant could identify and seek suppression of evidence gathered through electronic surveillance for national security purposes); *cf. Martin*, 25 U.S. at 32-33 (rejecting the argument that court could try the facts underlying President's determination that emergency existed justifying the call up of the militia); Marbury v. Madison, 5 U.S. 137, 169-172 (1803) (concluding that mandamus would lie to order head of federal government department to take action compelled by law, where failure to take the action injured individual's vested legal rights).

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

128. *See Martin*, 25 U.S. at 32 (danger of President's abusing statutory and constitutional authority to call up the militia in times of emergency lay in "[t]he frequency of elections, and the watchfulness of the representatives of the nation," which "carry with them all the checks which can be useful to guard against usurpation or wanton tyranny").

129. *See* Declaration of National Emergency by Reason of Certain Terrorist Attacks, Proclamation No. 7463, 66 Fed Reg. 48,199 (Sept. 14, 2001) (presidential declaration of emergency).

immediate actions that he reasonably thought necessary, even if those actions violated federal statutes. Suppose, for example, that the passengers aboard United Airlines Flight 93 had not caused the plane to crash in Shanksville, Pennsylvania, and that it had continued its suicide mission toward the U.S. Capitol.[130] Can anyone doubt that the President could have ordered the flight shot down before it hit the Capitol, even if that order violated a federal statute?[131] Similarly, suppose the President had ordered the instant electronic monitoring of all cell phone calls to and from the plane to determine the plane's target and those responsible for the suicide mission. Would not the President have authority to order that surveillance even if it violated FISA?[132]

One basis for concluding that the President *would* have that authority is to interpret FISA (and other statutes limiting the President's power in genuine emergencies) to implicitly include exceptions for genuine emergencies. That interpretation finds support in the canon requiring courts to avoid statutory interpretations that produce "absurd results."[133] But the canon should not obscure the reason why it would be absurd to interpret FISA to prohibit the President from responding to genuine national security emergencies: It is absurd to give Congress such a prohibitory power. To the contrary, common sense and precedent support recognition of presidential power, irreducible by Congress, to make necessary, immediate responses to genuine national security emergencies.

Of course, the President's "genuine emergency" power has limits. The Japanese attack on Pearl Harbor created a "genuine emergency," but that emergency did not last for the entire war.[134] Nor did the attack on

130. *See* THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 10-14 (2004) [hereinafter THE 9/11 COMMISSION REPORT] (describing events leading to the crash of United Airlines Flight 93).

131. *See* THE 9/11 COMMISSION REPORT, *supra* note 130, at 37, 45 (discussing contingent "shootdown order" issued for Flight 93).

132. *Cf. Senate Hearing, Wartime Executive Power*, *supra* note 16, at 425 (testimony of former CIA Director R. James Woolsey) (stating that the President's "inherent authority" justifies NSA surveillance program "because the country has been invaded, albeit, of course, not occupied, and defending against invasion was at the heart of the President's Article II authority from the Founders").

133. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 429 (1998). Supporting the interpretation described in the text is a statement by then-Attorney General Griffin Bell that the bill enacted as FISA "does not take away the power of the President under the Constitution." *Foreign Intelligence Electronic Surveillance Act of 1978: Hearings on H.R.5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the H. Comm. on Intelligence*, 95th Cong. 15 (1978).

134. *See Ex parte* Milligan, 71 U.S. 2, 80 (1866). "As necessity creates the rule [allowing military tribunals to serve the function of civil courts when the latter are closed due to foreign

Pearl Harbor necessarily justify every measure that the President deemed reasonable, including the mass internment of Japanese Americans.[135] The existence of genuine emergency powers in the President—and the relaxation of Bill of Rights limits on those powers—must be limited in time and scope.[136] Otherwise, the separation of powers system cannot work effectively and Bill of Rights freedoms become fair weather friends. I propose two limits on the President's "genuine emergency" powers.

First, the President's power depends on the legislative framework within which it is exercised. The President can defy an Act of Congress in a national security emergency only if defiance of the legislation is necessary to respond to the emergency. If the President can effectively respond to the emergency while obeying the statute, the President lacks power to defy it.[137] Thus, Congress can regulate the President's power to respond to national security emergencies by enacting legislation that gives the President adequate leeway in such emergencies. By the same token, it is the inadequacy of legislation that justifies presidential defiance of the legislation in cases of genuine emergency.[138]

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invasion or civil war], so it limits its duration." *Id.* at 127 (martial law justified only by "actual and present" necessity as in a genuine invasion that closes civilian courts). *See also* Hirabayashi v. United States, 320 U.S. 81, 113 (1943) (Murphy, J., concurring) ("[T]he military arm, confronted with the peril of imminent enemy attack and acting under the authority conferred by the Congress, made an allowable judgment at the time the curfew restriction [upon Japanese Americans living in certain areas of the West Coast] was imposed. Whether such a restriction is valid today is another matter.").

135. *See Hirabayashi*, 320 U.S. at 102 (upholding Executive Order, ratified by Congress, imposing curfew on Japanese Americans in certain areas during World War II, while emphasizing that other wartime measures affecting Japanese Americans (such as internment) were not before the Court); *see also* Korematsu v. United States, 323 U.S. 214, 217-18 (1944) (upholding Executive Order excluding Japanese Americans from certain areas).

136. *Cf. Korematsu*, 323 U.S. at 234 (Murphy, J., dissenting) ("The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger.").

137. The President has claimed that the NSA surveillance program is "crucial to our national security." Letter from William E. Moschella, Assistant Attorney General, Office of Legislative Affairs, U.S. Dep't of Justice, to Sen. Pat Roberts et al. 1 (Dec. 22, 2005) ("The President stated that these activities are 'crucial to our national security.'"), *available at* http://www.fas.org/irp/agency/doj/fisa/doj122205.pdf. The President has not (publicly, at least) shown why it is necessary to ignore FISA in conducting that program.

138. *See Foreign Intelligence Surveillance Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 94th Cong. 92 (1976) (testimony of Attorney General Edward H. Levi) ("[W]hen a statute prescribes a method of domestic [surveillance] action *adequate to the President's duty to protect the national security*, the President is legally obliged to follow it.") (emphasis added); *see also Senate Hearing, Wartime Executive Power*, *supra* note 16, at 830 (prepared statement of David S. Kris,

Second, the President's emergency powers are residual when Congress has enacted generally valid legislation in the same area. Congress and the President share power in many areas, including the waging of war.[139] In matters of shared governance, the separation of powers doctrine gives Congress the power to make rules and the President power—not to *unmake* Congress's rules—but to *break* them when reasonably necessary in a genuine emergency.[140] For example, in late 2005 Congress enacted a law prohibiting members of the armed forces from torturing people detained in the war on terrorism.[141] Assume for the sake of argument that it is possible to conceive of a "genuine emergency" in which the President could reasonably decide it was necessary to defy this prohibition.[142] It is one thing to recognize presidential power to break

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Senior Vice President, Time Warner, Inc.) (separation of powers analysis of NSA program will depend partly on "the [executive branch's] need to eschew the use of FISA in obtaining" needed information); *cf.* Chambers v. NASCO, Inc., 501 U.S. 32, 58-60 (1991) (Scalia, J., dissenting) (stating that federal courts have inherent and congressionally "indefeasible" power to "do what courts have traditionally done in order to accomplish their assigned tasks," and, while Congress "may to some degree" prescribe the means for exercising that power, courts can ignore the prescribed congressionally prescribed means if those means are inadequate); *id.* at 65 (Kennedy, J., dissenting) (positing a similar "necessity limitation" on federal courts' exercise of congressionally irreducible inherent powers).

139. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2773 (2006) (discussing Constitution's grants of war powers to President and Congress); *Hirabayashi*, 320 U.S. at 93 ("[T]he Constitution commits to the Executive and to Congress the exercise of the war power . . . ."); *see also, e.g.*, Rumsfeld v. Forum for Academic & Inst'l Rights, Inc., 126 S. Ct. 1297, 1306 (2006) ("'[J]udicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies.") (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)).

140. *Cf.* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1023, 1096-133 (2003) (arguing for "Extra-Legal Measures" model under which "public officials . . . may act extralegally when they believe that such action is necessary for protecting the nation and the public in the face of calamity, provided that they openly and publicly acknowledge the nature of their actions"); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1388, 1392-97 (1989) (describing "liberal constitutionalism" view of emergency powers, under which "emergencies required strong executive rule, premised not on law and respect for civil liberties, but rather on discretion to take a wide range of actions to preserve the government").

141. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003, 119 Stat. 2680, 2739 (2005) ("No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.").

142. To be clear, I am indeed staking out the position that the President has power to ignore anti-torture legislation when reasonably necessary to respond to a genuine national security emergency. Although the President's power in this national emergency situation is not *congressionally* reducible, it is, of course, subject to constitutional restrictions, such as those imposed by the Fourth, Fifth, and Eighth Amendments. *See* Richard H. Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 773-77 (2006) (discussing constitutional limits on government's power to torture suspected terrorists); *see also* Paulsen, *supra* note 120, at 1280 (taking a similar position). Furthermore, even if Congress lacks power to prohibit executive branch torture in

Congress' rule in a particularly exigent situation, after making an individualized determination that it was necessary to violate the prohibition. It is quite a different matter to recognize presidential power to unmake Congress's rule by promulgating a "program" authorizing torture in broadly defined categories of situations.[143] One way to express the difference is by saying that, in the second situation, the President is impermissibly exercising legislative power, whereas in the first situation he is exercising irreducible executive power.[144] Another way to express the difference is to say that the executive power to act in "emergencies" is limited in scope and duration to that necessary when there is "no time for deliberation."[145] Those limits flow from our system of separated powers.

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certain situations, Congress might have power to exclude evidence derived from that torture in federal courts. *See, e.g.*, United States v. Williams, 504 U.S. 36, 55 (1992) (stating in dicta that Congress could require disclosure to criminal defendants of exculpatory evidence presented to the grand jury, even if Constitution did not require disclosure).

143. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.").

144. The President's power in the legislative process, as specifically prescribed in the Constitution, includes recommending legislation to Congress. Certainly the President could have done so in the six years since authorizing the NSA program. *See* Dan Eggen, *2003 Draft Legislation Covered Eavesdropping*, WASH. POST, Jan. 28, 2006, at A2 (observing that Department of Justice drafted legislation in 2003 to amend Patriot Act but, according to Justice Department officials, the draft legislation did not address the TSP).

145. Hamdi v. Rumsfeld, 542 U.S. 507, 552 (2004); *see also* Transcript of Oral Argument at 28-29, *Hamdi*, 542 U.S. 507 (2004) (No. 03-6696) (Justice Souter remarks, "[I]t may very well be that the executive has power in the early exigencies of an emergency. But that at some point in the indefinite future, the other political branch has got to act if that . . . power is to continue."); JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 5-9 (Princeton University Press 1993) (proposing that, in response to sudden attack, President can respond without congressional authorization if he seeks such authorization simultaneously); William C. Bradford, *"The Duty to Defend Them:" A Natural Law Justification for the Bush Doctrine of Preventive War*, 79 NOTRE DAME L. REV. 1365, 1448 (2004) ("[I]n the event of an invasion or other imminent harm against U.S. citizens or property, inherent presidential powers of self-defense—for the exercise of which the President need neither seek nor receive congressional authorization—are triggered, even if the President remains obligated to make a subsequent request for congressional authorization for his course of action."); John W. Dean, *George W. Bush as the New Richard M. Nixon: Both Wiretapped Illegally, and Impeachably; Both Claimed That a President May Violate Congress' Laws to Protect National Security*, FINDLAW, Dec. 30, 2005, http://writ.news.findlaw.com/dean/20051230.html (stating that NSA surveillance program might have been justified "as a temporary measure" or in response to "a particularly serious threat of attack," but program is not justified considering all of the time that President has had, and not used, "to seek legal authority for his action" from Congress); *cf.* Mitchell v. Harmony, 54 U.S. 115, 134 (1851) (for military to have power to take private property for military use, "the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for.").

B. Fourth Amendment Constraints on Presidential Powers in a "Genuine Emergency"

The hypothetical surveillance order described above, covering all cell phone calls to and from the doomed Flight 93, falls not only within the intrinsic limits of the President's powers under Article II but also within the extrinsic limits imposed by the Fourth Amendment. Ordinarily, the Fourth Amendment requires the government to get a warrant before electronically intercepting phone calls or reading their mail (presumably including their e-mail).[146] In addition, the Fourth Amendment ordinarily requires a particularized showing that the monitoring of each phone user is likely to reveal evidence of crime.[147] The traditional Fourth Amendment requirements of a warrant and an individualized showing of probable cause for a search do not, however, apply to our Flight 93 scenario. The exigent circumstances doctrine of Fourth Amendment law justifies immediate, warrantless surveillance of all cell phone users on board the flight.[148] Moreover, although the exigent circumstances doctrine normally requires a particularized showing of probable cause of criminal activity,[149] that showing is unnecessary when "special needs, beyond the normal need for law enforcement," make the probable cause requirement impracticable.[150]

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146. *See Berger v. New York*, 388 U.S. 41, 45-54 (1967) (holding that electronic interception of phone calls was a Fourth Amendment "search"); *Ex parte* Jackson, 96 U.S. 727, 733 (1877) (holding that opening mail involves a Fourth Amendment "search"); *cf.* United States v. Forrester, 512 F.3d 500, 509-12 (9th Cir. 2008) (holding that computer surveillance detecting email addresses was not a Fourth Amendment "search"); *see also* Orin S. Kerr, *Internet Surveillance After the USA PATRIOT Act: The Big Brother That Isn't*, 97 Nw. L. Rev. 607, 628-29 (2003).

147. *See id.*

148. *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 298 (1967) (holding that police's warrantless entry into home and search for bank robber did not violate the Fourth Amendment because "the exigencies of the situation made that course imperative") (internal quotations omitted); *see also* Georgia v. Randolph, 126 S. Ct. 1515, 1524 n.6 (2006) (stating in dicta that exigent circumstances would justify police's entry into a house, over the objection of a co-tenant, when necessary to preserve evidence or in other circumstances); Zweibon v. Mitchell, 516 F.2d 594, 649-50 (D.C. Cir. 1975) (en banc) (plurality opinion of Wright, J., joined by Chief Judges Bazelon and Circuit Judges Leventhal and Spottswood W. Robinson, III) (finding that exigent circumstances doctrine would allow warrantless electronic surveillance when delay would cause "disastrous harm to the national security").

149. *See, e.g.*, *Hayden*, 387 U.S. at 307.

150. *See* Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment)). As the text indicates, the exigent circumstances doctrine and the "special needs" doctrine sometimes overlap. The overlap occurs when exigent circumstances, such as those associated with national security emergencies, trigger a "special need" for searches and seizures beyond that associated with ordinary law enforcement. Two recent Supreme Court cases confirm the overlap. In *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000), the Supreme Court relied on the exigent circumstances doctrine in stating that

The Flight 93 scenario thus illustrates the linkage between the President's

"the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route." The Court explained that each of these situations would involve an "emergency" that would cause the "primary purpose" of such a roadblock no longer to be merely "ordinary crime control." *Id.*; *see also id.* (stating that the "exigencies created by" the terrorist scenario "are far removed from the circumstances under which authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction"). In support of that dicta, the Court cited the decision of the court of appeals in *Edmond*, which had endorsed roadblocks for similar purposes but relied, not on the exigent circumstances doctrine, but on the "special needs" doctrine of Fourth Amendment law. *Id.*; *see also* Edmond v. Goldsmith, 183 F.3d 659, 662-63 (7th Cir. 1999) (cited in *Edmond*, 531 U.S. at 44). We see similar blending of the exigent circumstances doctrine and the special needs doctrine in dissenting opinions in Illinois v. Caballes, 543 U.S. 405 (2005). The majority in *Caballes* held that the use of a narcotics-detection dog during a traffic stop did not constitute a "search" or "seizure" subject to the Fourth Amendment. *Id.* at 407-10. In dissent, Justice Souter said that he "would treat the dog sniff" as a search subject to the Fourth Amendment. *Id.* at 417 (Souter, J., dissenting). Justice Souter noted, however—in discussing the government's "authority to detect explosives and dangerous chemical or biological weapons that might be carried by a terrorist who prompts no individualized suspicion"—that "[u]nreasonable sniff searches for marijuana are not necessarily unreasonable sniff searches for destructive or deadly material if suicide bombs are a societal risk." *Id.* at n.7. Justice Souter did not identify what Fourth Amendment doctrine supported the reasonableness of sniff searches for suicide bombs. Fellow dissenter Justice Ginsburg, however, identified the special needs doctrine as supporting both the suicide-bomb scenario described by Justice Souter and the terrorist scenario described by the majority (and justified using the exigent circumstances doctrine) in *Edmond*. *See Caballes*, 543 U.S. at 424-25 (Ginsburg, J., dissenting); *see also* Kia P. v. McIntyre, 235 F.3d 749, 762-63 (2d Cir. 2000) (holding that state's seizure of a child in order to prevent suspected abuse or neglect could be justified under either the special needs or the exigent circumstances doctrine). Without a genuine national security exigency, even routine protection of national security may justify some types of special needs searches, including ones that occur at the border. *See* United States v. Flores-Montano, 541 U.S. 149, 152 (2004) (warrantless, suspicionless border searches supported by "the longstanding right of the sovereign to protect itself") (quoting United States v. Ramsey, 431 U.S. 606, 616 (1977)); United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) (border searches supported by "Congress' power to protect the Nation"); Carroll v. United States, 267 U.S. 132, 154 (1925) ("Travellers [sic] may be so stopped in crossing an international boundary because of national self protection . . . ."). Without extended discussion, I would only note that, in my view, neither the special needs doctrine nor the border search doctrine, standing alone, support the TSP as a whole. The special needs doctrine does not work because of the scope and intrusiveness of the surveillance program; if it passes muster under special needs analysis, just about anything goes—the Fourth Amendment would be gutted. Essentially the same analysis precludes reliance on the border search doctrine. The TSP monitors phone calls and emails between foreign countries and places throughout the United States. Because the surveillance blankets this country, if it is treated as occurring at the border or its "functional equivalent," the border search doctrine would decimate the Fourth Amendment. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973) (stating that border searches "may in certain circumstances take place not only at the border itself, but at its functional equivalents as well," such as "a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City"); *see also* United States v. Ortiz, 422 U.S. 891, 892 (1975) (government did not attempt to treat search occurring at fixed checkpoint more than sixty miles from the border as occurring at the "functional equivalent" of the border).

congressionally irreducible, intrinsic power under Article II to respond to genuine national security emergencies and extrinsic limits on that power imposed by the Fourth Amendment. In a "genuine emergency," the President can take immediate action reasonably necessary to protect national security—even if the action violates statutory restrictions—and, if the President's action entails a search or seizure (as does Presidentially authorized electronic surveillance), exigent circumstances in the "special needs" context of national security will often excuse ordinary Fourth Amendment requirements. In short, the President's power reasonably to respond to a genuine national security emergency not only is irreducible by Congress but also satisfies the Fourth Amendment—even if the response entails warrantless, suspicionless searches and seizures—as long as that response is reasonably justified by the emergency.[151]

The connection between separation of powers limits and Fourth Amendment limits on the President's power in the Flight 93 scenario is not happenstance. Rather, it reflects a connection between the separation of powers doctrine and Fourth Amendment doctrine.[152] Our system of separated powers provides a unitary executive to encourage prompt and focused exercises of executive power, especially in foreign affairs.[153] Yet to prevent abuses of executive power, separation of powers requires the President to obey limits imposed in statutes enacted by Congress (while acting within its powers) and in judgments entered by the federal courts (while acting within their powers). The Fourth Amendment, like the

151. As Chris Slobogin has pointed out, the term "suspicionless" is often used imprecisely to refer to situations that are, in fact, suspicious but that may not involve suspicion associated with any particular individual. *See* Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 57, 81-85 (1991).

152. *See* United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 317 (1972) (the Fourth Amendment principle that generally requires advance judicial approval of searches "accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers"); *see also* Katz v. United States, 389 U.S. 347, 359-60 (1967) (Douglas, J. concurring) ("In matters where [the President or the Attorney General] believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be. Under the separation of powers . . . , the Executive Branch is not supposed to be neutral and disinterested . . . . I cannot agree that where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate."); Raymond Shih Ray Ku, *The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325, 1342 (2002) ("[T]he Fourth Amendment and the doctrine of separation of powers share the same goal and are intended to serve the same function"—namely, "to preclude the exercise of arbitrary power."); *cf.* Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J.L. & PUB. POL'Y 711, 737 (2000) (arguing that "[t]he exclusionary rule can be justified on the basis of separation of powers principles").

153. *See supra* notes 114-118 and accompanying text

separation of powers doctrine, is designed to prevent abuses of power by any of the three branches. Thus, both the separation of powers doctrine and the Fourth Amendment are power-limiting constitutional elements neither of which speak in absolutes. In a genuine national security emergency, the President needs some room to act unilaterally—even in defiance of congressional restrictions—and without the usual Fourth Amendment constraints. Recognition of this unilateral emergency power reflects that neither the separation of powers doctrine nor the Fourth Amendment operates as a "suicide pact."[154]

As is true of presidential power to ignore generally valid statutes, presidential power to act free of ordinary Fourth Amendment constraints has limits. Specifically, a search that is justified at its inception by exigent circumstances violates the Fourth Amendment if conducted in a way that is not reasonably related to the circumstances that justified it in the first place.[155] And so, police officers who enter a house without a warrant to help a shooting victim cannot stay in the house to search for evidence of crime after they have rendered the help.[156] Likewise, a wide-scale surveillance program that violates an existing statute but that is justified by a national emergency such as 9/11 becomes unjustified as days and weeks pass without further attacks and give the executive branch an opportunity to have Congress consider whether to amend the statute to allow the TSP.[157]

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154. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159-60 (1963). On this same "Constitution is not a suicide pact" principle, one can imagine other instances—besides the exigent circumstances situation—in which the President might have plenary power to act free of statutory limitations and, at the same time, free of ordinary constitutional constraints. I thank David Kris for this point. *See* E-mail from David S. Kris, Senior Vice-President & Deputy General Counsel and Chief Ethics and Compliance Officer, Time Warner, Inc., to Richard Henry Seamon, Professor of Law, University of Idaho College of Law (July 12, 2006, 8:49 AM) (on file with author); *see also* Paulsen, *supra* note 120, at 1257 (proposing an "overriding principle of constitutional and national self-preservation that operates as a meta-rule of construction" and "that may even, in cases of extraordinary necessity, trump specific constitutional requirements").

155. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325 (1985) 341-42; Mincey v. Arizona, 437 U.S. 385, 393 (1978) ([A] warrantless search must be strictly circumscribed by the exigencies which justify its initiation . . . .") (internal quotations omitted).

156. *See Mincey*, 437 U.S. at 392-93 (approving lower court cases holding that "the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid," but these holdings did not justify four-day search of murder scene that occurred in the case before the Court).

157. In commenting on a draft of this article, Louis Fisher asked the fair question of how long after 9/11 the President's power to defy FISA lasted. E-mail from Louis Fisher, *supra* note 26. Lincoln acted in April 1861 and did not address Congress until it returned several months later. He notes that, when President Lincoln waited until several months after Congress returned from recess to seek legislation authorizing Lincoln's emergency actions (including suspension of the writ of habeas corpus) in April 1861. *Id.*; *see also* FISHER, *supra* note 89, at 260-61. I agree with the standard that Dr. Fisher proposes: When Congress is in session, the President must go to

C. Summary

I want to summarize by emphasizing the limited nature of my claim. I claim that precedent suggests that the President has congressionally irreducible power to respond reasonably to genuine national security emergencies. Precedent is suggestive but not conclusive on the existence of this plenary power. Equally important, the precedent suggests the President's "genuine emergency" powers, if any, are limited in scope and duration when Congress has legislated on a matter as to which it and the President share power. In their interstitial nature, the President's powers resemble, and indeed often parallel, the government's power in "exigent circumstances" involving "special needs" beyond those of ordinary law enforcement to conduct searches and seizures free from the traditional Fourth Amendment requirements of a warrant and individualized probable cause.[158] The parallel reflects the pragmatic balance between strong executive power and safeguards against executive abuses that underlie both separation of powers doctrine and Fourth Amendment doctrine.

III. Analysis of the TSP as an Exercise of the President's Genuine National Security Emergency Powers

A. Whether the TSP at Inception Fell Within the President's Power Despite Violating FISA

As discussed above, precedent suggests that the President has congressionally irreducible power to take immediate action reasonably necessary to respond to a genuine national security emergency; that power is limited, however, by the legislative framework within which it is exercised and by its exigent nature. The TSP exceeds those limits (except to the extent it has been authorized by the Protect America Act of 2007).[159]

Let us assume that in the days and weeks after the 9/11 attacks the President could have established a "program" of domestic, electronic

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Congress as soon as possible. In the case of 9/11, that date came less than one week after 9/11, for that is how quickly the Administration was able to draft and present to Congress the bill later enacted as the Patriot Act. *See* THE 9/11 COMMISSION REPORT, *supra* note 130, at 328; *see also Administration's Draft Anti-Terrorism Act of 2001: Hearing Before the H. Comm. on the Judiciary*, 107th Cong. 67-90 (2001) (reproducing Administration's proposed bill).

158. Thus, I am not making the same argument that a lower court understood the government to be making in defense of the NSA program; I do not argue that the President "has been granted the inherent power to violate not only the laws of the Congress but [also] the . . . Fourth Amendment." ACLU v. NSA, 438 F. Supp. 2d 754, 780 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007).

159. *See infra* notes 216-223 and accompanying text.

surveillance outside FISA. The President's power to maintain such a program, which violated a facially valid statute, subsided as weeks passed without further attacks and provided "time for deliberation"[160] within a system of civilian government that continued to function.[161] Indeed, deliberations on appropriate responses to 9/11 *did* occur within and among the executive branch and Congress. The result was the enactment of the PATRIOT Act, which expanded surveillance power by, among other changes, amendments to FISA.[162] It is hard for the President to argue it was reasonably necessary to establish a far-ranging surveillance "program" in defiance of FISA when the President did not first attempt to change FISA to avoid the need to violate that statute.[163]

True, FISA has shortcomings. The shortcomings reflect changes in surveillance technology and in international terrorism. Those shortcomings could very well justify surveillance outside FISA—even today—if the President reasonably determines that, in a particular instance, it is reasonably necessary to depart from FISA. Specifically, FISA has at least three shortcomings that could create "genuine emergencies" justifying event-specific departures from FISA.

First, it can take too long to get a FISA surveillance order.[164] True, the Attorney General can authorize "emergency orders" approving FISA

160. Hamdi v. Rumsfeld, 542 U.S. 507, 552 (2004).

161. *Ex parte* Milligan, 71 U.S. 2, 127 (1866) (stating that military tribunals could "furnish a substitute for the civil authority" if "in foreign invasion or civil war, the [civil] courts are actually closed, and it is impossible to administer criminal justice according to law"); *cf.* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2799 (2006) (opinion of Breyer, J., concurring) (rejecting dissent's argument that Court's decision invalidating Presidential order establishing military tribunals threatened national security: "Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger.").

162. United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, §§ 206-208, 214, 215, 218, 225, 115 Stat. 272, 282-83, 286-88, 291, 295-96 (2001) (codified in scattered sections of 50 U.S.C.).

163. *See supra* note 157 and accompanying text (arguing that President had power to act only while there was no time for deliberation). One argument that the President has made is that the terrorists might have been alerted if the President had consulted with Congress about the NSA surveillance program. This argument is difficult to analyze because so little relevant information is publicly available. I do not wish to reject the argument out of hand, however.

164. The DOJ White Paper, *supra* note 7, at 18, summarizes the typical FISA process:

> As a general matter, the statute requires that the Attorney General approve an application for an order from a special court composed of Article III judges and created by FISA—the Foreign Intelligence Surveillance Court ("FISC"). *See* 50 U.S.C. §§ 1803- 1804. The application must demonstrate, among other things, that there is probable cause to believe that the target is a foreign power or an agent of a foreign power. *See id.* § 1805(a)(3)(A). It must also contain a certification from the Assistant

surveillance without prior court approval.[165] But this statutory emergency authority has drawbacks. The Attorney General must personally determine the existence of both an emergency and a factual basis for the issuance of an order.[166] Until he or she does so, emergency surveillance cannot occur.[167] NSA, however, may need to start surveillance the instant that NSA determines the surveillance is justified, without awaiting Attorney General authorization.[168] Furthermore, the Attorney General is only one

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to the President for National Security Affairs or an officer of the United States appointed by the President with the advice and consent of the Senate and having responsibilities in the area of national security or defense that the information sought is foreign intelligence information and cannot reasonably be obtained by normal investigative means. *See id.* § 1804(a)(7). FISA further requires the Government to state the means that it proposes to use to obtain the information and the basis for its belief that the facilities at which the surveillance will be directed are being used or are about to be used by a foreign power or an agent of a foreign power. *See id.* § 1804(a)(4), (a)(8).

165. 50 U.S.C. § 1805(f) (2006) ("Emergency orders") provides in relevant part:

> Notwithstanding any other provision of this subchapter, when the Attorney General reasonably determines that—
>
> (1) an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained; and
>
> (2) the factual basis for issuance of an order under this subchapter to approve such surveillance exists;
>
> he may authorize the emergency employment of electronic surveillance if a judge having jurisdiction under section 1803 of this title is informed by the Attorney General or his designee at the time of such authorization that the decision has been made to employ emergency electronic surveillance and if an application in accordance with this subchapter is made to that judge as soon as practicable, but not more than 72 hours after the Attorney General authorizes such surveillance. If the Attorney General authorizes such emergency employment of electronic surveillance, he shall require that the minimization procedures required by this subchapter for the issuance of a judicial order be followed. In the absence of a judicial order approving such electronic surveillance, the surveillance shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of 72 hours from the time of authorization by the Attorney General, whichever is earliest.

166. § 1805(f)(1), (2) (2006); Moschella Letter of Mar. 24, 2006, *supra* note 19, encl. at 12 (stating that Attorney General must "personally" determine that factual basis for emergency FISA surveillance exists).

167. *See* Moschella Letter of Mar. 24, 2006, *supra* note 19, encl. at 39 ("[A]s a practical matter, it is necessary for NSA intelligence officers, NSA lawyers, Justice Department lawyers, and the Attorney General to review a matter before even emergency surveillance would begin.").

168. *See* Alberto R. Gonzales, U.S. Attorney General, U.S. Dep't of Justice, Prepared Remarks at the Georgetown University Law Center (Jan. 24, 2006), *available at* http://www.usdoj.gov/archive/ag/speeches/2006/ag_speech_0601241.html:

> [T]he optimal way to achieve the necessary speed and agility is to leave the decisions about particular intercepts to the judgment of professional intelligence officers, based on the best available intelligence information. They can make that call quickly. If, however, those same intelligence officers had to navigate through the FISA process for each of these intercepts, that would necessarily introduce a significant factor of DELAY, and there would be critical holes in our early warning system.

person, and he or she may be called upon personally and very quickly to make dozens or hundreds of "emergency" determinations. The Attorney General could become a bottleneck. Finally, the government must advise the FISA court of each emergency order and apply within seventy-two hours for a surveillance order from the court to ratify the attorney general's emergency order.[169] This supposedly expedited application process, required for every emergency order, could keep dozens of government lawyers employed on a continual fire drill without coming close to achieving the instantaneous authorization that is sometimes required for national security surveillance.

Second, the standards for getting FISA surveillance orders can be too high. NSA monitors phone calls and emails into and out of the United States involving people whom NSA has a "reasonable basis" for believing are associated with al Qaeda.[170] The government may not have probable cause to believe that these people are "agents of foreign power" who can be targeted under FISA.[171] Indeed, the person in the United States whose phone calls or emails are monitored may be entirely innocent, if it is the person *outside* the U.S. who is associated with al Qaeda and who triggers NSA surveillance.[172] To cite another example, perhaps the person in the U.S. who is being monitored *is* associated with al Qaeda but the association

169. 50 U.S.C. § 1805(f) (2006).

170. *See* DOJ White Paper, *supra* note 7, at 5 ("[T]he Attorney General [has] elaborated and explained that in order to intercept a communication, there must be 'a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda.'" (citing Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, *available at* http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html (Dec. 19, 2005) (statement of Attorney General Gonzales))).

171. 50 U.S.C. § 1801(b) (2006) (defining "agent of a foreign power"); *see also id.* § 1805(a)(3) (2006) (requiring judge to find "probable cause" that target of proposed FISA surveillance "is a foreign power or an agent of a foreign power"); Yoo, *supra* note 5, at 575-77 (explaining that FISA's "probable cause" standard is too high in certain situations).

172. *Senate Hearing, Wartime Executive Power*, *supra* note 16, at 459 (testimony of former CIA Director James Woolsey) ("Suppose al Qaeda calls someone in the United States and it is a false flag operation and they pretend to be Hezbollah, to get him to do something. Is that probable cause to believe he is an agent of al Qaeda? I don't think so."); Douglas Waller, *A Better Way to Eavesdrop?*, TIME, Feb. 2, 2006 (quoting "administration official" as stating that "you have this amorphous group of people around the world who are all calling people in the U.S. You may not know who they're calling in the U.S., but you know the person overseas making the call is a bad guy . . . . But FISA doesn't fit that situation."); Richard A. Posner, *Wire Trap*, NEW REPUBLIC, Feb. 6, 2006, at 15 (NSA program is apparently designed to fill gap left by FISA "by conducting warrantless interceptions of communications in which one party is in the United States . . . and the other party is abroad and suspected of being a terrorist.").

does not make that person a foreign agent.[173] Even so, the government may have good reason to monitor the communication.[174]

Third, FISA orders could be too narrow. FISA authorizes surveillance of one target at a time.[175] The government, however, sometimes needs to conduct wholesale surveillance—for example, by monitoring phone calls to all persons in the United States from particular individuals outside the U.S and by filtering communications to detect certain words and patterns of words.[176] Wholesale surveillance may very well violate FISA but be

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173. *See* Seamon & Gardner, *supra* note 1, at 345 (footnotes omitted):

> [FISA] classifies a U.S. person as a foreign agent based on their "knowing" involvement, "for or on behalf of a foreign power," in (1) "'clandestine intelligence gathering activities' [that] involve or may involve violations of Federal criminal law'; (2) "other clandestine intelligence activities," "pursuant to the direction of an intelligence service or network of a foreign power," "which . . . involve or are about to involve a violation of the criminal statutes of the United States"; (3) "sabotage or international terrorism [as defined elsewhere in the FISA] . . . or activities that are in preparation therefore"; (4) entering or remaining in the United States "under a false or fraudulent identity"; or (5) aiding or abetting, or conspiring to engage in, any of the first three categories of activities listed in this sentence. Thus, to find probable cause that a U.S. person is an "agent of a foreign power," the judge usually must find evidence of conduct that is a crime or likely to be a crime.

Id. See *also* McCarthy et al., *supra* note 29, at 90 (referring to the "relatively narrow portion of the overall al Qaeda-related communications" covered by FISA); POSNER, *supra* note 5, at 16 ("[T]he problem with fisa is that the surveillance it authorizes is unusable to discover who is a terrorist, as distinct from eavesdropping on known terrorists . . . . Even to conduct fisa-compliant surveillance of non-U.S. persons, you have to know beforehand whether they are agents of a terrorist group, when what you really want to know is who those agents are.").

174. *See* Sims, *supra* note 5, at 129 (concluding that "the warrantless surveillance program violates the applicable statutes" because it targets U.S. persons in the U.S. for interceptions without having probable cause that they are agents of a foreign power).

175. *Senate Hearing, Wartime Executive Power*, *supra* note 16, at 425 (testimony of former CIA Director James Woolsey) ("The one-spy-at-a-time surveillance systems of the Cold War, including FISA, through courts, are not designed to deal with fast-moving battlefield electronic mapping, in which an al Qaeda or a Hezbollah computer might be captured which contains a large number of e-mail addresses and phone numbers, which would have to be checked out very promptly. An Attorney General, on a 72-hour basis, or a FISA court, simply cannot go through the steps that are set out . . . in time to deal with this type of a problem.").

176. *See* Orin S. Kerr, *Updating the Foreign Intelligence Surveillance Act*, 75 U. CHI. L. REV. (forthcoming 2008) (discussing need for FISA to be updated to reflect that modern electronic surveillance focuses on searching targeting certain data, as distinguished from targeting individuals), *available at* http://ssrn.com/abstract=1000398 (abstract); POSNER, *supra* note 5, at 16 (surveillance would run up against FISA if government domestically monitored all international phone calls to a phone number in the United States that was discovered once to have been called by a terrorist suspect abroad, or if government, more broadly, used computers domestically to scan all electronic communications for suspicious messages); Daniel J. Solove, *Data Mining and the Security-Liberty Debate*, 75 U. CHI. L. REV. (forthcoming 2008) (discussing data mining), *available at* http://ssrn.com/abstract=990030 (abstract); K. A. Taipale, *Whispering Wires and Warrantless Wiretaps: Data Mining and Foreign Intelligence Surveillance*, N.Y.U. REV. L. & SECURITY, NO. VII SUPL. BULL. ON L. & SEC., at 4-6 (Spring 2006) (discussing need

reasonably necessary in a genuine national security emergency, such as when the government has strong evidence that someone outside the U.S. is planning terrorist attacks on a U.S. target with accomplices inside the U.S.[177]

In sum, the President may have power to authorize surveillance "outside FISA" in situations presenting a "genuine emergency." That power, however, exists only when national security exigencies make it reasonably necessary to ignore FISA. Even so, the power justifies surveillance outside FISA even today, to the extent FISA's shortcomings create exigent circumstances precluding resort to the FISA process. This residual power does not support the current NSA surveillance "program," which authorizes wholesale departure from FISA.[178]

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for automated, programmatic surveillance of electronic communications' contents and traffic patterns), *available at* http://whisperingwires.info/; Yoo, *supra* note 5, at 577-78 (discussing data mining).

177. The government can also avoid FISA by conducting electronic surveillance that falls outside FISA's definition of "electronic surveillance." The definition does not, for example, cover surveillance of a "United States person" if the surveillance is conducted outside the United States or if it does not "intentionally target[] that United States person." 50 U.S.C. § 1801(f) (2006). Thus, the government would not be subject to FISA if it targeted persons who are located abroad—even U.S. persons—if the surveillance occurs abroad. If conducted inside the United States, however, the surveillance would be subject to FISA. *See* 50 U.S.C. § 1801(f)(2) (2006) (defining "electronic surveillance" to include, with an exception not pertinent here, "the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States"); *see also* David B. Rivkin & Robert Levy, *NSA Debate: Federalist Society: Rivkin v. Levy*, FREE REPUBLIC, Jan. 23, 2006, http://www.freerepublic.com/focus/f-news/1563282/posts (remark by David Rivkin).

178. I am arguing for a much narrower scope of plenary power than Professor Sims attributes to the present Administration. *See* Sims, *supra* note 5, at 136 (understanding present Administration to be advancing an "unformed constitutional theory" that would give the President a "blank check"). Another commentator appears to find no room for "exclusive" presidential power when its exercise "*directly contradicts*" the FISA. Decker, *supra* note 5, at 345. This commentator reasons that, "[s]ince Congress retains constitutional powers to declare war, make rules regarding enemy capture, and the like, the President cannot rely on inherent authority to trump" FISA's statutory limitations on surveillance. *Id.* at 341. That reasoning seems to preclude the possibility that a statute that generally falls within Congress's power can, in some applications, unconstitutionally infringe upon the President's extra-statutory powers under Article II. In contrast, Justice Jackson's concurring opinion in *Youngstown* implicitly recognizes such a possibility. *See* Harold J. Krent, *The Lamentable Notion of Indefeasible Presidential Powers: A Reply to Professor Prakash*, 91 CORNELL L. REV. 1383, 1390 (2006). The Court has provided no more than limited guidance on the issue. My position, however, is that situations can arise—and a genuine national security presents one such situation—in which generally valid legislation, such as FISA, could unconstitutionally intrude upon the President's Article II power.

B. Whether the TSP Violates the Fourth Amendment Because Surveillance Under the TSP Occurs Without a Warrant or Traditional Probable Cause

Before Congress enacted FISA in 1978, several lower federal courts upheld warrantless electronic surveillance conducted for national security purposes.[179] Those courts interpreted the Fourth Amendment to create an exception to the warrant requirement for searches conducted for foreign intelligence purposes.[180] The government has relied on these cases to argue that the TSP does not violate the Fourth Amendment even though it occurs without a warrant or probable cause to believe the surveillance will reveal evidence of crime.[181] Opponents of the TSP counter that these cases are inapposite because they concern surveillance conducted before FISA was enacted.[182] Thus, the opponents believe that FISA's enactment affects Fourth Amendment analysis. Neither opponents nor supporters of the TSP, however, elaborate on how FISA affects Fourth Amendment analysis. This portion of the article examines that issue. I believe that FISA influences any Fourth Amendment analysis of the NSA program and should carry particular weight in analysis conducted by the courts.

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179. *In re* Sealed Case, 310 F.3d 717, 742 (FISA Ct. Rev. 2002) ("[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information."); *see* United States v. Truong Dinh Hung, 629 F.2d 908, 913 (4th Cir. 1980) ("[T]he Executive Branch need not always obtain a warrant for foreign intelligence surveillance."); United States v. Butenko, 494 F.2d 593, 605-06 (3rd Cir. 1974) (en banc) ("[A] warrant prior to a search is not an absolute prerequisite in the foreign intelligence field when the President has authorized surveillance"); United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973) ("[T]he President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence."). *But cf.* Zweibon v. Mitchell, 516 F.2d 594, 613-14 (D.C. Cir. 1975) (plurality opinion of Wright, J.) (stating in dicta, "[A]n analysis of the policies implicated by foreign security surveillance indicates that, absent exigent circumstances, all warrantless surveillance is unreasonable and therefore unconstitutional . . . ."); *see also id.* at 651 ("[O]ur analysis would suggest that, absent exigent circumstances, *no* wiretapping in the area of foreign affairs should be exempt from prior judicial scrutiny, irrespective of the justification for the surveillance or the importance of the information sought.").

180. *See, e.g.*, *Truong*, 629 F.2d at 913 ("For several reasons, the needs of the executive are so compelling in the area of foreign intelligence . . . that a uniform warrant requirement would . . . unduly frustrate the President in carrying out his foreign affairs responsibilities.") (internal quotations omitted).

181. *See, e.g.*, DOJ White Paper, *supra* note 7, at 8 ("[E]very federal appellate court to rule on the question has concluded that, even in peacetime, the President has inherent constitutional authority, consistent with the Fourth Amendment, to conduct searches for foreign intelligence purposes without securing a judicial warrant.").

182. *See, e.g.*, ABA Task Force Report on NSA Surveillance, *supra* note 29, at 13 (observing, in response to government's reliance on pre-FISA case law, that "FISA was enacted precisely because, prior to FISA, prior presidents had repeatedly abused" their power).

First, FISA changes the legal landscape within which the Fourth Amendment reasonableness of the TSP will be judged.[183] Prior to FISA, the alternative to conducting electronic surveillance for national security purposes without a warrant was to seek a warrant for a physical search using the warrant application process used by prosecutors to search for evidence of crime.[184] That process caused problems because it was designed for physical searches, not electronic surveillance, and for criminal investigations, not for national security surveillance.[185] With the ordinary criminal warrant process as an alternative, warrantless national security surveillance might have been reasonable. Warrantless surveillance is not necessarily reasonable when the alternative to it is the FISA process that Congress engineered with electronic surveillance and national security in mind. Thus, experience under FISA could establish that the TSP is unreasonable, and therefore violates the Fourth Amendment, even though the same program might have been reasonable prior to FISA. In short, determining whether warrantless NSA surveillance is reasonable requires a consideration of the alternatives. FISA has created an alternative that, experience shows, facilitates the process of getting judicial approval for national security surveillance. Thus, the existence of FISA and experience under FISA bear on the reasonableness of proceeding without resort to that process in somewhat the same way as rules authorizing telephonic warrants bear on the reasonableness of police proceeding without a warrant.[186]

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183. *See, e.g.*, Samson v. California, No. 04-9728, 2006 WL 1666974, at *3 (June 19, 2006) ("[U]nder our general Fourth Amendment approach, we examin[e] the totality of the circumstances to determine whether a search is reasonable within the meaning of the Fourth Amendment.") (internal quotations omitted).

184. *See generally, e.g.*, FED. R. CRIM. P. 41 (governing process for federal law enforcement officers and government attorneys to get search warrants).

185. *See Truong*, 629 F.2d at 913-15 (decision involving pre-FISA surveillance holding that "because of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance"); Amicus Memo, *In re* Warrantless Electronic Surveillance, *supra* note 5, at 41-42 (arguing that the concerns identified in *Truong* are largely alleviated by FISA, including its creation of a specialized court with procedures for expedited consideration of applications for surveillance orders).

186. *See* Steagald v. United States, 451 U.S. 204, 222 (1981) (observing that the inconvenience of obtaining a warrant to arrest a suspect in a third party's home is "simply not that significant" because of, among other reasons, availability of telephonic warrants); *cf.* Minnesota v. Dickerson, 508 U.S. 366, 382 (1993) (Scalia, J., concurring) ("[E]ven if a 'frisk' prior to arrest would have been considered impermissible in 1791 [when the Fourteenth Amendment was adopted], . . . perhaps it is only since that time that concealed weapons capable of harming the interrogator quickly and from beyond arm's reach have become common—which might alter the judgment of what is 'reasonable' under the original standard.").

So, too, the existence of FISA bears on Fourth Amendment analysis in essentially the same way as it bears on separation of powers analysis. To the extent that FISA provides a process adequate for conducting surveillance in a genuine national security emergency, the government's failure to use that process is unreasonable. To the same extent, the failure to use that process cannot be justified by the President's congressionally irreducible power to violate a statute when reasonably necessary to respond to a genuine national security emergency.[187]

FISA would thus be relevant to *any* Fourth Amendment analysis of the TSP. For three additional reasons, it deserves particular weight in *judicial* analysis of the TSP.

First, FISA generally falls within Congress's power to regulate domestic surveillance for foreign intelligence information. That power comes from the Commerce Clause, to the extent that the surveillance involves interception of information that travels through channels of interstate or foreign commerce such as telephone lines.[188] Additional power flows from congressional powers associated with war and foreign affairs as amplified by the Necessary and Proper Clause.[189] Indeed, the executive branch has never questioned that FISA generally falls within Congress's power, except to the extent that it infringes on the President's congressionally irreducible power under the Constitution.[190]

187. *See supra* notes 137-138 and accompanying text.

188. *See* U.S. CONST. art. I, § 8, cl. 3; Nardone v. United States, 302 U.S. 379, 381-85 (1937) (construing federal statute to bar federal agents from divulging communications intercepted by telephone taps; supposing that Congress enacted the statute to enforce "the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution"); *see also supra* note 87 and accompanying text (discussing Congress's power to regulate executive's gathering of foreign intelligence).

189. *See* U.S. CONST. art. I, § 8, cl. 10-16, 18.

190. *See* Seamon & Gardner, *supra* note 1, at 337 n.70 (citing legislative history); *see also* United States v. U.S. Dist. Court (Keith), 407 U.S. 297, 338 n.2 (1972) ("[T]he United States does not claim that Congress is powerless to require warrants for surveillances that the President otherwise would not be barred by the Fourth Amendment from undertaking without a warrant."). In commenting on a draft of this article, Judge Posner observed that—unlike Section 5 of the Fourteenth Amendment, which empowers Congress to pass laws applicable to the states enforcing substantive constitutional provisions, "[t]here is no corresponding authorization for Congress to pass laws enforcing . . . the Fourth Amendment" against the federal government. E-mail from Judge Richard Posner, to Richard Henry Seamon, Professor of Law, University of Idaho College of Law (July 9, 2006, 11:20:21) (on file with author). In my view Congress does have power—under the Necessary and Proper Clause—legislatively to prescribe its judgments on Fourth Amendment reasonableness when Congress is regulating federal officials' enforcement (execution) of laws that Congress enacted under other enumerated powers. *See* U.S. CONST. art. I, § 8, cl. 18 (empowering Congress to enact laws necessary and proper "for carrying into Execution" not only other legislative powers but, in addition, "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

Second, FISA not only falls within Congress's power but also represents Congress's careful, well-informed attempt to enforce the Fourth Amendment.[191] Congress considered foreign intelligence surveillance for six years and held as many hearings before enacting FISA.[192] Congress devoted much of that time to crafting legislation that balanced national security needs against Fourth Amendment concerns.[193] FISA may not be perfect—especially after thirty years of changes in technology and foreign threats—and it may not reflect the only way to strike the balance commanded by the Fourth Amendment, but it certainly does represent

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When Congress in the FISA authorized federal agents to conduct foreign intelligence surveillance, Congress was entitled to limit this authority—granted by Congress itself—in a way that, in Congress's judgment, corresponded to Fourth Amendment limits. *Cf.* Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715, 728-38 (1998) (making a similar point with respect to Congress's power to enforce Free Exercise Clause against federal government's actions); Krent, *supra* note 178, at 1386-87 (arguing that Congress can use Necessary and Proper Clause to control execution of the laws that it enacts). Granted, Congress's ability to limit the scope of its own grants of power to federal law enforcement agents differs from Congress's ability to limit the scope of the President's exercise of his or her constitutional powers through executive branch agents. Precisely because of that difference, I argue in this article that FISA violates the separation of powers doctrine if FISA is construed to prevent the President from taking action necessary in response to a genuine national security emergency. Congress cannot infringe on the President's inherent, congressionally irreducible power to respond to genuine national security emergencies even when Congress seeks to enforce what it regards as restrictions compelled by the Fourth Amendment. A power in Congress to enforce the Fourth Amendment outside the plenary presidential power is a power to enforce, not a power to define, the substance of the Fourth Amendment. But Congress's exercise of this enforcement power should affect judicial analysis of Fourth Amendment reasonableness, at least when Congress so carefully considers Fourth Amendment concerns as did the Congress that enacted FISA. The resulting legislation supplies important evidence on both the governmental interests and the privacy interests that underlie reasonableness analysis. This conclusion finds support in the case law cited *infra* in note 195.

191. *See, e.g.*, S. REP. No. 95-701, at 13 (1978) (bill enacted as FISA "embodies a legislative judgment [about the] . . . procedural safeguards . . . necessary to insure that electronic surveillance . . . conforms to the fundamental principles of the Fourth Amendment"); S. REP. No. 95-604, at 7-8 (1977) (bill responded to finding by Church Committee that prior executive branch surveillance supposedly conducted for national security purposes "seriously infringed the Fourth Amendment Rights of both the targets and those with whom the targets communicated") (quoting Senate Comm. To Study Governmental Operations with Respect to Intelligence Activities, Final Report on Intelligence Activities and the Rights of Americans, S. REP. No. 94-755, book III, at 332 (1976) (Church Committee Report)).

192. *See* S. REP. No. 95-604, at 7 (observing that hearings on bill enacted as FISA "were the sixth set of hearings on warrantless wire-tapping in as many years.").

193. H.R. REP. No. 95-1283, pt. I, at 22 (1978) ("In drafting this bill, the committee has carefully weighed the need [for foreign intelligence electronic surveillance] against the privacy and civil liberties interests.").

Congress's judgment of how the balance should be struck, and Congress made that judgment carefully and based on full information.[194]

Third, courts should respect legislation, such as FISA, that generally falls within Congress's powers and is carefully designed to protect Fourth Amendment rights against executive surveillance.[195] By respecting such legislation, courts encourage legislative enforcement efforts. Those efforts deserve judicial support because they can produce legislative rules that facilitate judicial enforcement.[196] FISA does this, for example, by generally requiring advance judicial approval for FISA surveillance.[197] Some statutes deserve judicial skepticism because they expand executive

194. *Cf.* POSNER, *supra* note 5, at 35-40 (2006) (arguing for "a light judicial hand in national security matters, at least when the president and Congress concur on a national security measure"); Ku, *supra* note 152, at 1360 ("Laws prohibiting certain forms or means of information gathering . . . should limit executive power and define at least minimum levels of privacy and security protected by the Fourth Amendment.").

195. *Cf.* United States v. Watson, 423 U.S. 411, 415-17 (1976) (giving weight to federal statutes authorizing warrantless felony arrests in determining their reasonableness under the Fourth Amendment); Almeida-Sanchez v. United States, 413 U.S. 266, 290 (1973) (White, J., dissenting) ("The Court has been particularly sensitive to the [Fourth] Amendment's broad standard of 'reasonableness' where . . . authorizing statutes permitted the challenged searches."). *See also* United States v. U. S. Dist. Court (*Keith*), 407 U.S. 297, 323-24 (1972) (discussing Congress's power to regulate surveillance for national security); Dalia v. United States, 441 U.S. 238, 250 n.9 (1979) (noting that Title III "serves a substantial public interest" by giving government surveillance powers while carefully prescribing those powers to protect privacy interests); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (appearing to invite Congress to create remedies to enforce Fourth Amendment rights to displace court created remedy); Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970) (considering traditionally close supervision of liquor industry, "Congress has broad authority to fashion standards of reasonableness for searches and seizures" in that industry); Davis v. United States, 328 U.S. 582, 605-06 (1946) (Frankfurter, J., dissenting) (detailing history of federal statutes evidencing Congress's "watchfulness against the dangers of police abuses" in exercise of search and seizure powers); Olmstead v. United States, 277 U.S. 438, 465-66 (1928) (stating that, although the Fourth Amendment did not apply to the wiretapping involved there, "Congress may of course protect the secrecy of telephone messages"); Kerr, *supra* note 62, at 805-06 (arguing that legislatures, rather than courts, should "provide the primary rules governing law enforcement investigations involving new technologies").

196. *See* Anthony G. Amsterdam, *Perspectives On the Fourth Amendment*, 58 MINN. L. REV. 349, 416-29 (1974) (articulating and defending a rule under which, "[u]nless a search or seizure is conducted pursuant to and in conformity with either legislation or police departmental rules and regulations, it is an unreasonable search and seizure prohibited by the fourth amendment"); *see also* Peter P. Swire, Katz *Is Dead. Long Live* Katz, 102 MICH. L. REV. 904, 930 (2004) (referring to "the catalog of instances where the Supreme Court worked collaboratively with Congress to create surveillance rules"); Kerr, *supra* note 62, at 867-88 (arguing that "legislatures often are better situated than courts to protect privacy in new technologies"). *But cf.* Solove, *supra* note 62, at 761 (arguing that legislative rules are not superior to Fourth Amendment protections articulated by courts).

197. 50 U.S.C. §§ 1802, 1804 (2007).

power with little attention to individual rights.[198] FISA does not fall within that description; it restricts executive power to enforce Fourth Amendment safeguards.[199]

Legislative rules enforcing the Fourth Amendment can facilitate judicial enforcement not only by requiring prior judicial authorization for executive surveillance, but also by prescribing substantive standards for the surveillance. Indeed, FISA prescribes an exhaustively considered standard for surveillance.[200] Legislatively prescribed standards for surveillance can benefit from the legislature's ability to gather information relevant to balancing government interests in surveillance against individual privacy interests.[201] Furthermore, legislatures may be able to make more clear standards than the courts. Clear rules, in turn, help officials obey the law and give the public notice of what privacy intrusions are authorized.[202] In addition, the public may better accept surveillance rules made by their elective representatives than rules made by unelected federal judges.[203] Legislative rules can be revised if they become unacceptable to the

198. *See generally* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice: Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1089 (1993) (arguing that "legislators undervalue the rights of the accused . . . [because] a far larger number of persons, of much greater political influence, rationally adopt the perspective of a potential crime victim rather than the perspective of a suspect or defendant").

199. *See* Seamon & Gardner, *supra* note 1, at 337, 337 n.70 (citing legislative history showing executive branch's awareness that FISA restricted executive power).

200. *See id.* at 427-35 (discussing legislative history of FISA's surveillance standard).

201. Ku, *supra* note 152, at 1375 (legislatures are "better able to develop a factual record with respect to the nuances and details of new [surveillance] technologies and their costs and benefits").

202. *Cf.* New York v. Burger, 482 U.S. 691, 703 (1987) (statutory program providing for warrantless administrative searches "must perform the two basic functions of a warrant: it must advise the [person subject to the search] that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers"); Amsterdam, *supra* note 197, at 418 (arguing that police-made rules would be clearer than judge-made rules); *but cf.* United States v. Grubbs, No. 04-1414, slip op. at 8, 126 S. Ct. 1494, 1501 (Mar. 21, 2006) (rejecting the argument that victim of search is entitled to a copy of warrant before search begins in order to ensure searching officers stay within scope of warrant).

203. *Senate Hearing, Wartime Executive Power*, *supra* note 16, at 815 (prepared statement of Morton H. Halperin, Senior Fellow, Center for American Progress) (notice to U.S. citizens of "the rules under which they may be subject to surveillance by their government in the name of national security" are necessary "to secure the necessary support of the American people for the appropriate steps needed to reduce the risk of terrorist attacks"), *available at* http://judiciary.senate.gov/testimony.cfm?id=1825&wit_id=5189.

public.[204] Moreover, legislation can create remedies that courts alone cannot—such as statutory restrictions on the use of information derived from surveillance[205] and sanctions for violations of those restrictions, including criminal sanctions.[206] For those reasons, courts have good reason to give significant weight to legislation that enforces Fourth Amendment limits on surveillance.[207]

Conversely, allowing the President to ignore statutory restrictions on surveillance encourages executive lawlessness. Courts should discourage such behavior by preferring Fourth Amendment interpretations that encourage the executive branch to collaborate with the legislature to frame such rules, rather than defy them. After all, how is the public to feel when an Act of Congress supposedly provides the "exclusive" authority for a specified type of surveillance, yet it learns that a program exists "outside" that authority and has been going on for years?[208] Such a situation is likely to undermine public confidence that the nation's leaders obey the rule of law. It undermines faith in the legislative branch's willingness and ability to check executive abuse, and in the President's willingness to abide by legislative restrictions.[209]

To implement respect for legislation, such as FISA, that is carefully designed to enforce the Fourth Amendment, courts should presume that

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204. *See id.* (notice to public of rules for surveillance is necessary so that, if the public "believe[s] the law requires reconsideration, they can seek change by lobbying the President and the Congress and by exercising their right to vote").

205. *See* 50 U.S.C. § 1806 (2007) (regulating the use of information obtained in FISA surveillance); *see also* Ferguson v. City of Charleston, 532 U.S. 67, 78 (2001) (dissemination to third parties of results of government-conducted drug tests caused drug testing program for pregnant women to involve a "far more substantial" invasion of privacy than prior cases in which dissemination of drug test results was more restricted).

206. *See, e.g.*, 50 U.S.C. § 1809 (2007) (FISA provision prescribing criminal penalties); *cf.* Amsterdam, *supra* note 197, at 428-29 (arguing that police-made rules could include administrative sanctions).

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

208. *See supra* notes 19-25 and accompanying text. At least before FISA, Title III notified the public that the President might have power to conduct surveillance outside statutory constraints. *See supra* note 22 (describing provision in Title III disclaiming that it limited President's power to protect national security).

209. *Cf.* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2799 (2006) (Kennedy, J., concurring in part) ("Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.").

surveillance "outside FISA" violates the Fourth Amendment. After all, FISA reflects Congress's judgment, formed with extensive input from the executive branch, of what the Fourth Amendment requires. Treating FISA violations as presumptive Fourth Amendment violations simply reflects that, when surveillance violates a statute that Congress and the Executive Branch designed to enforce the Fourth Amendment, the surveillance is likely to violate the Fourth Amendment. Thus, this presumption of unconstitutionality works like the presumption that the warrantless search of a home violates the Fourth Amendment.[210] The latter presumption reflects that warrantless searches of homes are likely to violate the Fourth Amendment.[211] In addition to this probabilistic basis for the presumption against warrantless searches of home, that presumption encourages police to obtain warrants, just as the presumptive unconstitutionality of surveillance outside FISA encourages compliance with FISA.[212] In short, both presumptions are rooted in common sense and further the Fourth Amendment's function of preventing abuses of power.

Of course, the presumptive unconstitutionality of surveillance outside FISA may be overcome. First and foremost, the presumption is overcome by proof that the surveillance was justified by a genuine national security emergency.[213] Furthermore, FISA has some requirements that are not related to enforcing the Fourth Amendment.[214] The government should be able to

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210. *See* Groh v. Ramirez, 540 U.S. 551, 564 (2004) (stating the presumption against constitutionality of warrantless searches of the home).

211. Kyllo v. United States, 533 U.S. 27, 31 (2001) ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.").

212. *See* Illinois v. Gates, 462 U.S. 213, 236 (1983) (warrant preference discourages police from acting without warrant). In contrast to the presumption of unconstitutionality that I am arguing should attend surveillance outside FISA, the Fifth Circuit has held, in the context of a search by Customs officials, that a "warrantless seizure or search in the complete absence of authority—a lawless governmental intrusion—is unconstitutional per se." United States v. Williams, 617 F.2d 1063, 1074 (5th Cir. 1980) (en banc). The D.C. Circuit has criticized that holding. *See* United States v. Gonzalez, 875 F.2d 875, 877-78 (D.C. Cir. 1989); *see also* Barwood, Inc. v. District of Columbia, 202 F.3d 290, 294 (D.C. Cir. 2000) (rejecting argument that arrests under ultra vires state law would automatically violate Fourth Amendment).

213. *See supra* notes 146-157 and accompanying text. The government might also rely on exigencies not directly related to a national security emergency or on Fourth Amendment doctrines, besides the exigent circumstances doctrine, that allow warrantless searches. As a practical matter, however, these alternatives are not likely to arise often. Furthermore, as discussed above, neither the special needs doctrine nor the border search doctrine supports the NSA surveillance program as a whole. *See supra* note 150.

214. For example, FISA prescribes the contents of court orders authorizing surveillance. 50 U.S.C. § 1805(c) (2007). The prescribed contents include a judicial direction that officials "compensate, at the prevailing rate," anyone who helps officials accomplish the surveillance—including the landlord who uses her passkey to open the apartment in which a telephone tap is to

show that surveillance that violates FISA nonetheless satisfies the Fourth Amendment because the violation is only technical or unrelated to Fourth Amendment concerns. If the government cannot make this showing, however, the courts should find surveillance outside FISA also to be outside of the Fourth Amendment. By presuming the unconstitutionality of surveillance outside FISA, courts can bring the TSP to heel by limiting surveillance largely to instances where it is reasonably necessary to respond to genuine national security emergencies.[215]

C. Effect of the Protect America Act of 2007

As discussed above, the Protect America Act of 2007 "clarifies" that FISA's definition of "electronic surveillance" excludes "surveillance directed at a person reasonably believed to be located outside of the United States."[216] The primary purpose is to free the government from having to get a traditional FISA warrant to intercept communications between people overseas.[217] Under the analysis proposed here, this provision supports both the President's power to intercept foreign-to-foreign communications through warrantless surveillance inside the United States, and the reasonableness of such interception for Fourth Amendment purposes.

The Protect America Act does not grant surveillance power to the President; instead, it implicitly recognizes that the President has such power independently of any statutory grant. It does so by lifting FISA's restrictions on the President's exercise of surveillance authority when directing electronic surveillance at people outside the U.S. In light of the

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be placed. *Id.* § 1805(c)(2)(D). A surveillance order that omits this direction technically violates FISA, as does a surveillance operation in which a landlord assists without receiving compensation. Yet neither of these technical violations should lead to a conclusion that the surveillance violates the Fourth Amendment.

215. As noted above, *supra* note 87, courts can presumably review surveillance under the NSA program when the government seeks to use evidence derived from such surveillance in criminal prosecutions. *Cf.* United States v. Dumeisi, 424 F.3d 566, 578-79 (7th Cir. 2005) (reviewing district court's ruling on defendant's motion to suppress evidence derived from FISA surveillance). Judicial review may also be available in civil litigation challenging the program, though this remains to be determined. *See supra* notes 40-44 and accompanying text.

216. Protect America Act of 2007 § 2 (adding provision entitled "Clarification of Electronic Surveillance of Persons Outside the United States") (to be codified at 50 U.S.C. § 1805A).

217. *See, e.g.*, 153 CONG. REC. S10867 (daily ed. Aug. 3, 2007) (statement of Sen. Leahy) ("The problem our intelligence agencies are having is with targeting communications overseas. We want them to be able to intercept calls between two people overseas with a minimum of difficulty."); H9964 (daily ed. Aug. 4, 2007) (statement of Rep. Udall) ("The point of [provision clarifying FISA's definition of "electronic surveillance"] is to resolve doubts about the status of communications between foreign persons located overseas that pass through routing stations here in the United States." *See also supra* notes 51-57 and accompanying text.

absence of any statutory source for that power, the provision implies that the President's surveillance power comes directly from the Constitution.[218]

Beyond supporting the President's power to conduct the surveillance, the Protect America Act supports the reasonableness of the surveillance for Fourth Amendment purposes—at least when conducted in accordance with the procedures for which the Act provides. Congress enacted the Protect America Act with the plain intention of allowing electronic surveillance of foreign-to-foreign communication,[219] and despite arguments that exempting that surveillance from FISA would violate the Fourth Amendment.[220] Congress determined that the surveillance could be reasonable for Fourth Amendment purposes even when conducted without FISA warrants using facilities inside the United States.[221] True, Congress may have recognized

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218. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (President's power is "at its maximum" when he or she acts with the express or implied authorization of Congress).

219. *See, e.g.*, 153 CONG. REC. H9955 (daily ed. Aug. 4, 2007) (statement of Rep. Lofgren) (opposing bill that was enacted as Protect America Act but stating, "[a]ll of us agree that foreign-to-foreign communications need to be available for surveillance.").

220. *See, e.g., id.* (statement of Rep. Tierney) (Senate's passage of bill "has done not just violence to the fourth amendment and violence to our civil liberties; it has eviscerated them."); H9957 (statement of Rep. Jackson-Lee) (bill enacted as Protect America Act "eviscerates the Fourth Amendment"); *cf.* H9959 (statement of Rep. Rogers) ("There is nothing in this bill that circumvents a United States citizen's right to the fourth amendment protections."); H9962 (statement of Rep. Ellison) (Senate bill "has forgotten about" the Fourth Amendment); H9964 (statement of Rep. Hirono) (stating that bill enacted as Protect America Act "codifies violating the Fourth amendment"); *id.* (statement of Rep. Christensen) (bill enacted as Protect America Act "trashes the 4th amendment").

221. *See, e.g.*, H9954 (statement of Rep. Smith) ("[N]either the Constitution nor Federal law requires a court order to gather foreign communications from foreign terrorists."); H9965 (statement of Rep. Wilson) (under FISA, prior to Protect America Act, "The foreign intelligence surveillance court is increasingly spending time approving warrants on people who have no privacy rights under our Constitution in the first place."). This determination is consistent with the original FISA, which did not apply to electronic surveillance directed at persons outside the United States. *See* 50 U.S.C. § 1801(f) (2007) (defining "electronic surveillance"); *id.* at 51 (bill "does not afford protections to U.S. persons who are abroad"); H.R. REP. No. 95-1283, pt. 1, at 27 (1978) (house report on bill enacted as the FISA, stating: "The Committee has explored the feasibility of broadening this legislation to apply overseas, but has concluded that certain problems and unique characteristics involved in overseas surveillance preclude the simple extension of this bill to overseas surveillances."); *see also* 153 CONG. REC. H9958 (daily ed. Aug. 4, 2007) (statement of Rep. Lungren) ("[I]n 1978, when we passed the original version of FISA, we exempted from its consideration our capture of foreign conversations involving someone in a foreign country."); H9961 (statement of Rep. Wilson) ("FISA was never intended to acquire warrants for foreigners in foreign countries just because the point of access was in the United States."); 153 CONG. REC. S10869 (daily ed. Aug. 3, 2007) (statement of Sen. Bond) (under bill enacted as Protect America Act, "you cannot target an American citizen or a U.S. person, including people here on green cards and here in the country, without getting a court order. That is what the FISA Court was set up to do—just to protect people in the United States."); *El Paso Times* Interview with DNI McConnell, *supra* note 45 (stating that under the FISA, as enacted in

that surveillance "directed at" people overseas could lead to surveillance directed at U.S. persons in the United States, at which point Congress intended FISA to be triggered.[222] This intention simply reflects that the Protect America Act does not bless the TSP in its entirety. To the extent that the Act does exempt certain features of the TSP from FISA, however, the Act also supports the conclusion that the TSP satisfies the Fourth Amendment despite its failure to occur pursuant to FISA warrants.[223]

Conclusion

It is widely understood that the Constitution separated powers to protect liberty. Among those liberties is the right of the people, under the Fourth Amendment, to be free from unreasonable searches and seizures. Among the three branches of the federal government, the Executive is perhaps the most likely to infringe upon Fourth Amendment rights. It is executive officials, after all, who go out into the field, and who tap into the worldwide electronic matrix, to learn people's secrets—in order to protect national security. By issuing warrants and ex post review of searches and seizures, the judicial branch helps prevent and remedy exercises of executive power that infringe on Fourth Amendment rights. Congress, as the legislative branch, also has an important role, under our system of separated powers, in safeguarding liberties, including those protected by the Fourth Amendment.

1978, "there was no warrant required for a foreign target in a foreign land. And so we are trying to get back to what was the intention of '78."); Arthur S. Lowry, *Who's Listening: Proposals for Amending the Foreign Intelligence Surveillance Act*, 70 VA. L. REV. 297, 334 (1984) ("[C]urrently the President may authorize, with no judicial review, unrestricted surveillance of United States persons if the target of the surveillance is outside the country.").

222. *See* 153 CONG. REC. S10859 (daily ed. Aug. 3, 2007) (statement of Sen. Bond) (under bill enacted as Protect America Act, "the Government . . . can listen in on communications from foreign sources, foreign intelligence, of somebody located overseas. If they find a suspect in the United States—and we call that a U.S. person—then any collection has to go before the FISA Court . . . before any collection can start against that target."); 153 CONG. REC. H9958 (daily ed. Aug. 4, 2007) (statement of Rep. Lungren) (stating that if surveillance of person overseas lead to information that U.S. resident "is someone who is involved in terrorism, . . . then we get a warrant."); H9961 (statement of Rep. Wilson) ("The bill before us would continue to require warrants on people in the United States . . . . It would stop requiring warrants on people reasonably believed to be outside of the United States."); H9964 (statement of Rep. Udall) ("The bill [enacted as the Protect America Act] does require a warrant from the special FISA court for surveillance of a U.S. resident who is the chief target of the surveillance."); H9965 (statement of Rep. Wilson) ("If the target of a collection is a person in the United States, the government must get a warrant to intercept the content of that communication, as required by current law.").

223. Although the Protect America Act is temporary, that does not diminish its value in informing Fourth Amendment analysis. Presumably, Congress did not intend even temporarily to allow surveillance that violated the Fourth Amendment.

Congress took that role seriously when it enacted the Foreign Intelligence Surveillance Act of 1978. FISA represents a generally valid regulation of the President's power to conduct surveillance for national security purposes. This article has argued that, as such, FISA prescribes procedures for national security surveillance, the violation of which presumptively violates the Fourth Amendment. By giving effect to that presumption, courts recognize and reinforce the synergistic connection between the separation of powers doctrine and the Fourth Amendment. Executive branch violations of generally valid regulations designed to enforce the Fourth Amendment, such as FISA, only presumptively violate the Fourth Amendment. The presumption is overcome when the President takes reasonable measures to respond to a genuine national security emergency, as faced the United States on 9/11.

Whatever its merits and demerits, the Protect America Act of 2007 shows that Congress continues to take seriously its role of safeguarding Fourth Amendment liberties from risks posed by national security surveillance. One can hope that, as the sunset of the Protect America Act approaches, Congress will continue to craft legislation that provides a presumptive framework of Fourth Amendment reasonableness. Especially in this age of instantaneous, international electronic communications, courts cannot do it alone.