

# Before Privacy, Power: The Structural Constitution and the Challenge of Mass Surveillance

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## INTRODUCTION

The rich legal literature that has grown up to assess the constitutionality of bulk communications collection by the government has focused overwhelmingly—and understandably—on the challenge such programs pose to particular claims of individual right against the state. For scholars focused on the Fourth Amendment,<sup>1</sup> bulk collection threatens the constitutional protection of the “privacy, dignity, and security of persons against certain arbitrary and invasive acts” by the government,<sup>2</sup> and in particular implicates the prohibition against warrantless searches that violate an individual’s “reasonable expectation of privacy.”<sup>3</sup> Less frequently, scholars have highlighted various First Amendment interests implicated by bulk data collection—the danger that government collection may chill individual associational and expressive activities,<sup>4</sup> as well as the intellectual freedom to think and explore ideas and information without fear of state record keeping.<sup>5</sup> While varying widely in its conclusions, this work generally begins by conceptualizing the potential constitutional harm such programs pose as arising in discrete areas of the doctrinal Bill of Rights.

Yet attempting to describe what seems troubling about bulk collection in terms of individual rights alone has significant doctrinal and conceptual limits. In doctrinal terms, for instance, Fourth Amendment jurisprudence has not yet identified any constitutionally cognizable harm when the government searches information that has been shared with a third party—even in an era when vast quantities of individuals’ most intimate data is possessed in electronic form by

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1. See, e.g., David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CAL. L. REV. 1069 (2014).

2. *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 755-56 (2010) (quoting *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 613-14 (1989)).

3. See *Smith v. Maryland*, 442 U.S. 735 (1979).

4. See, e.g., Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741 (2008).

5. See, e.g., Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934 (2013). Litigants challenging various surveillance programs have also begun alleging various expressive, associational, and intellectual rights under the First Amendment. See, e.g., Complaint for Constitutional and Statutory Violations, Seeking Declaratory and Injunctive Relief at 14, *First Unitarian Church of L.A. v. NSA*, No. 3:13-CV-03287 JSW (N.D. Cal. July 16, 2013).

multiple third party service providers.<sup>6</sup> Likewise, while there is growing recognition that bulk collection may chill the exercise of freedoms of speech and association,<sup>7</sup> First Amendment doctrine remains largely undeveloped in this context, and what thinking there is reflects substantial disagreement about the effect of its protections.<sup>8</sup> To the extent the exercise of other rights may be implicated by the knowledge of bulk collection—the conduct of intimate relationships, for instance, or access to legal counsel, or to information affecting reproductive or medical decision-making—such interests are perhaps additionally protected by doctrinally weak Fifth Amendment substantive due process.<sup>9</sup> But developing the contours of any such due process notion of harm is likely to face substantial hurdles of its own, including arguments that any such idiosyncratic effects are subsumed by the more ‘specific’ rights afforded under the Fourth and First Amendments.<sup>10</sup> In any case, all such rights-based claims have faced significant litigation hurdles well before any meaningful exploration of the content of the right becomes possible. Plaintiffs have at times been unable to show that their claims of harm from surveillance programs were sufficiently non-speculative to satisfy injury-in-fact standing requirements.<sup>11</sup> Above all, the Court has generally not recognized the application of the First or Fourth Amendment to foreign nationals outside the territorial United States.<sup>12</sup> Even as data today crosses national borders easily, regularly, and often randomly, the U.S. borders have proven remarkably impermeable to the export of individual

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6. See *Smith v. Maryland*, 442 U.S. 735 (1979).

7. See, e.g., *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring) (“Awareness that the Government may be watching chills associational and expressive freedoms.”); PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT, at 161-64 (2014) [https://www.pclob.gov/library/215-Report\\_on\\_the\\_Telephone\\_Records\\_Program.pdf](https://www.pclob.gov/library/215-Report_on_the_Telephone_Records_Program.pdf) (“The NSA’s bulk collection of telephone records also directly implicates freedom of speech and association.”) [hereinafter PCLOB Report].

8. See Katherine J. Strandburg, *Membership Lists, Metadata, and Freedom of Association’s Specificity Requirement*, 10 I/S: J.L. & POL’Y FOR INFO. SOC’Y. 327, 349-53, 356-57 (2014) (contrasting government position that foreign intelligence surveillance is protected from First Amendment attack by “good faith” exception, with PCLOB view that surveillance is subject to moderate scrutiny in First Amendment analysis, and author’s view that case law supports application of strict scrutiny to associational burdens imposed by bulk surveillance).

9. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003).

10. See *Graham v. Connor*, 490 U.S. 386, 395 (1989) (holding that excessive use of force claim is properly brought under the Fourth Amendment’s “explicit textual source” of protection rather than the “more generalized notion of ‘substantive due process’”).

11. See *Clapper v. Amnesty Int’l*, 568 U.S. 398 (2013).

12. See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); see also Anna Su, *Speech Beyond Borders: Extraterritoriality and the First Amendment*, 67 VAND. L. REV. 1373, 1392 (2014). Indeed, even when an extraterritorial search is directed against an American citizen, appeals courts have concluded the warrant requirement as such does not apply; the search need only meet Fourth Amendment “reasonableness” standards. See *United States v. Bin Laden*, 126 F. Supp. 2d 264, 277 (S.D.N.Y. 2000), *aff’d sub nom.* In re Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 157 (2d Cir. 2008).

constitutional rights.<sup>13</sup>

Beyond such doctrinal limitations, it is not clear that these rights as conceived accurately capture the kind of harm one might intuitively associate with bulk collection. A right to “privacy,” for instance, understood as an interest in keeping personal information secret (a view reflected in current Fourth Amendment doctrine),<sup>14</sup> or even as a more capacious right protecting one’s personality, individuality, and dignity (as some scholars have suggested the Fourth Amendment should),<sup>15</sup> offers questionable protection against the mere government *collection* of data—the vast majority of which will never be seen much less used by any human being.<sup>16</sup> In what sense is a right to, for example, secrecy or even dignity infringed if information is collected but never used or even observed (absent the use of intervening search criteria that are or could be subject to more traditional Fourth Amendment protections)? In contrast, while it is certainly possible to conceptualize the *First* Amendment harm of collection-without-use—for example, the risk or reality that an individual will curtail expression she would otherwise pursue given knowledge of government possession<sup>17</sup>—this description of harm seems yet *under*inclusive. To the extent an individual curtails classic First Amendment activities like political participation or intellectual inquiry, the harm seems not limited to individuals alone, but rather one imposed on the polity as a whole from the lost benefit of that individual’s participation. More, to the extent individuals are or may be chilled in any form of human activity carried on electronically by the reality of government collection—from health care and religious guidance to legal advice and personal relationships—the harm seems capable of damaging more than just those expressive interests protected by the First Amendment. In these ways, among others, our habit of conceiving claims of right solely in particular doctrinal silos—expressive rights, privacy rights, process rights, and so forth—may give short shrift to describing the kind of burden imposed by a government program that implicates more than one kind of constitutionally protected interest.

Perhaps most striking, individual rights alone do not speak to the most apparent factual reality of current bulk collection programs: that the newly developed government capacity and desire to collect zettabytes of data repre-

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13. See, e.g., Jennifer Daskal, *The Un-Territoriality of Data*, 125 YALE L.J. 326 (2015) (discussing *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)); see also Timothy Zick, *The First Amendment in Trans-Border Perspective*, 52 B.C. L. REV. 941, 943 (2011) (noting that under current First Amendment doctrine, “there is no clear and unambiguous precedent holding that communications or associations that cross borders are protected in any meaningful way”).

14. See *United States v. Jones*, 565 U.S. 400 (2012) (Sotomayor, J., concurring).

15. DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 1 (2008) (discussing conceptions of privacy).

16. See Harold Laidlaw, Note, *Shouting Down the Well*, 70 N.Y.U. ANN. SURV. AM. L. 323, 349 (2015) (arguing that “in order for privacy to be breached, a human observer must be aware of the personal information whose character is sought to be kept private”).

17. *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring).

sents a vast expansion of government power.<sup>18</sup> For this reason especially, it is striking that existing scholarship on bulk collection has all but ignored a set of age-old questions about structural constitutional power that the practice seems so directly to present. The question is far from academic. Consider the President's exercise of surveillance authority as regulated by Executive Order 12333 (E.O. 12333), which governs programs involving the collection and storage of the *content* of electronic communications retrieved outside the United States.<sup>19</sup> While public attention has focused principally on bulk collection carried out pursuant to congressional authorization,<sup>20</sup> the majority of the National Security Agency's (NSA's) signals intelligence activities are conducted, according to the executive, solely pursuant to the President's authority under Article II of the Constitution, without congressional authorization or judicial supervision.<sup>21</sup> Because communications under various E.O. 12333 programs are collected abroad in "bulk" (that is, without targeting specific terms or addresses in the first instance), and because a large volume of wholly domestic electronic communications today transit through foreign communications channels en route to their domestic recipients,<sup>22</sup> a substantial quantity of Americans' ordinary domestic electronic communications is "incidentally" collected by the government under this authority.<sup>23</sup> U.S. intelligence officials have estimated that the volume of

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18. See James Bamford, *The NSA is Building the Country's Biggest Spy Center (Watch What You Say)*, WIRED (March 15, 2012), [https://www.wired.com/2012/03/ff\\_nsadatacenter/](https://www.wired.com/2012/03/ff_nsadatacenter/) (describing the facility's anticipated collection capacity).

19. Exec. Order No. 12333, United States Intelligence Activities, 3 C.F.R. 200 (1981) [hereinafter E.O. 12333], as amended by Exec. Order No. 13,284, 68 Fed. Reg. 4075 (Jan. 23, 2003) Exec. Order No. 13,355, 69 Fed. Reg. 53593 (Aug. 27, 2004); and Exec. Order No. 13,470, 73 Fed. Reg. 45325 (July 30, 2008). For a partial list of collection programs conducted pursuant to this authority, see AMOS TOH ET AL., BRENNAN CENTER FOR JUSTICE, N.Y.U. SCHOOL OF LAW, *OVERSEAS SURVEILLANCE IN AN INTERCONNECTED WORLD* 5-10 (March 16, 2016) <https://www.org/publication/overseas-surveillance-interconnected-world> [hereinafter BRENNAN CENTER REPORT].

20. Perhaps most familiar among these programs was the National Security Agency's (NSA's) collection of Americans' so-called "telephony metadata"—data including outgoing and incoming call numbers, call time and duration information. See 50 U.S.C.A. § 1861 (West 2017) (recently revised to provide for the retention of metadata by service providers, searchable by the government only on a targeted basis pursuant to FISA court order).

21. NAT'L SEC. AGENCY, LEGAL FACT SHEET: EXECUTIVE ORDER 12333 (June 19, 2013), <https://www.aclu.org/files//NSA/Legal%20Fact%20Sheet%20Executive%20Order%2012333.pdf>.

22. See, e.g., Axel Arnbak & Sharon Goldberg, *Loopholes for Circumventing the Constitution: Unrestrained Bulk Surveillance on Americans by Collecting Network Traffic Abroad*, 21 MICH. TELECOMM. & TECH. L. REV. 317 (2015).

23. See, e.g., THE WHITE HOUSE, PRESIDENTIAL POLICY DIRECTIVE 28—SIGNALS INTELLIGENCE ACTIVITIES (Jan. 17, 2014) <https://obamawhitehouse.archives.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities> ("Routine communications and communications of national security interest increasingly transit the same networks, however, and the collection of signals intelligence in bulk may consequently result in the collection of information about persons whose activities are not of foreign intelligence or counterintelligence value.") [hereinafter PPD-28]; see also John Napier Tye, *Meet Executive Order 12333: The Reagan Rule that Lets the NSA Spy on Americans*, WASH. POST (July 18, 2014), [https://www.washingtonpost.com/opinions/meet-executive-order-12333-the-reagan-rule-that-lets-the-nsa-spy-on-americans/2014/07/18/93d2ac22-0b93-11e4-b8e5-d0de80767fc2\\_story.html](https://www.washingtonpost.com/opinions/meet-executive-order-12333-the-reagan-rule-that-lets-the-nsa-spy-on-americans/2014/07/18/93d2ac22-0b93-11e4-b8e5-d0de80767fc2_story.html) ("Executive Order 12333 contains nothing to prevent the NSA from collecting and storing all such

domestic American communications captured in this way is in the millions or tens of millions.<sup>24</sup>

Does the President alone have the power to collect the content of millions or tens of millions of Americans' communications? The Supreme Court recognized in 1972 that the President must have some degree of inherent constitutional power to engage in intelligence surveillance,<sup>25</sup> and it is on this basis that the scholarly literature assumes essentially without further discussion that the President has the power to conduct the types of surveillance at issue in recent years unless Congress has said otherwise.<sup>26</sup> Yet as Part II examines in detail, the Court's 1972 recognition of executive power in this realm was framed by the very narrow scope of the circumstance presented in the case before it—namely, domestic surveillance “necessary to protect the nation” from attack, in which particular *individuals* would be targeted for surveillance.<sup>27</sup> Beyond this, the courts have not come close to addressing whether the scope of this authority extends to collecting transmissions along an entire channel of communications, to include “incidental” collection of an unidentifiably large quantity of Americans' domestic communications. Indeed, as this Article shows, the classic constitutional case for executive power in this context—based on traditional interpretive methods from text, case law, functional necessity, historical practice, and congressional acquiescence—falls short of supporting the claim that Article II authorizes E.O. 12333-type bulk collection without either front-end congressional authorization or back-end judicial review.

In the absence of persuasive interpretive evidence elsewhere, arguments for expansive executive power in this realm necessarily hinge on structural claims—that is, on a method of constitutional reasoning that helps explain the meaning

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communications — content as well as metadata — provided that such collection occurs outside the United States in the course of a lawful foreign intelligence investigation. No warrant or court approval is required, and such collection never need be reported to Congress.”); Barton Gellman & Ashkan Soltani, *NSA Collects Millions of E-mail Address Books Globally*, WASH. POST (Oct. 14, 2013), [http://www.washingtonpost.com/world/national-security/nsa-collects-millions-of-e-mail-address-books-globally/2013/10/14/8e58b5be-34f9-11e3-80c6-7e6dd8d22d8f\\_story.html](http://www.washingtonpost.com/world/national-security/nsa-collects-millions-of-e-mail-address-books-globally/2013/10/14/8e58b5be-34f9-11e3-80c6-7e6dd8d22d8f_story.html) (“Although the collection takes place overseas, two senior U.S. intelligence officials acknowledged that it sweeps in the contacts of many Americans. They declined to offer an estimate but did not dispute that the number is likely to be in the millions or tens of millions.”); Alvaro Bedoya, *Executive Order 12333 and the Golden Number*, JUST SECURITY (Oct. 9, 2014), <http://justsecurity.org/16157/executive-order-12333-golden-number/>.

24. Gellman & Soltani, *supra* note 23.

25. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 310 (1972) (“[T]he President of the United States has the fundamental duty, under Art. II, s 1, of the Constitution, to ‘preserve, protect and defend the Constitution of the United States.’ Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means. In the discharge of this duty, the President—through the Attorney General—may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government.”).

26. *See, e.g.*, William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1 (2000).

27. 407 U.S. at 310.

of particular government powers by asking both *how* the power-granting clauses were arranged, and *why* they were drafted and assembled as they were, to accomplish what substantive purpose or end.<sup>28</sup> In part, structural reasoning invites us to characterize what the power-granting clauses do—for example, they list or enumerate particular powers—and infer from that characterization a logical interpretive presumption about the meaning of any particular power—for example, whatever “the executive power” means, it must mean something specific and limited, something less than all the power in the world, else why bother making a list of powers granted in the first place. More, structural reasoning unearths the substantive reasons why the framers would want to allocate power in this way. For example, as the Court still regularly reminds us, the Constitution enumerates and separates powers at least in part for the purpose of preserving a political society free from government tyranny.<sup>29</sup> Attached in this sense to the nature of government, rather than to the identity of individuals, structural limits, unlike the protections of the Bill of Rights, have repeatedly been understood to traverse territorial boundaries, constraining the federal government wherever and against whomever it acts.<sup>30</sup> The structural theory underlying current claims of executive foreign surveillance authority necessarily turns both of these canonical arguments on their head—embracing instead the view that executive power exercised outside the United States is substantially unbounded by the implications of enumeration that apply to the other branches, and the assumption that one structural purpose (most commonly, the structural purpose of having a constitutional government that is functionally effective) may be attended to in interpretive analyses all independent of the equally evident purpose of preserving a free political society. Put differently, the structural argument on which current views of executive surveillance power hinge is one positing that the executive has all conceivable foreign intelligence power unless and until another branch says otherwise.<sup>31</sup>

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28. See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); see also, e.g., Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 997 (2006); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1523–26 (1991).

29. See, e.g., *Bond v. United States*, 564 U.S. 211, 222 (2012) (“Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.”) (internal citation omitted). The centrality of the structural purpose of protecting societal liberty is addressed in Part III below.

30. See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–78 (1804).

31. U.S. Dep’t of Justice, Office of Legal Counsel, Memorandum for the Attorney General, The President’s Compliance with the ‘Timely Notification’ Requirement of Section 501(b) of the National Security Act, 10 Op. O.L.C. 161 (Dec. 17, 1986), [hereinafter 1986 OLC Memorandum] (positing that the President’s power must include “all the discretion traditionally available to any sovereign in its external relations, except insofar as the Constitution places that discretion in another branch of the government”); see also, e.g., Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 236 (2001) (“unallocated foreign affairs powers [are] presidential executive powers”).

This Article argues that to the extent such views were ever viable, they cannot be sustained in this context. Beyond the Court's increasingly categorical rejections of effectively unbounded executive power in external relations, the notion of the structurally unbound executive is grounded in an understanding of sovereign state conduct in external affairs that bears little relation to the kind of power asserted in E.O. 12333 collection. More, while functional necessity is certainly an important structural purpose, it cannot be assessed independent of the parallel structural goal of preserving a free society. Indeed, the constitutional interest in that structural purpose—above and beyond constitutional protection for particular individual rights—better illuminates the constitutional import of bulk data collection. Where rights claims tend to insist on conceptualizing the harm suffered as a result of government practice in terms of siloed violations of a singular constitutional clause, structural cases have from the outset recognized that questions of government power depend “on a fair construction of the whole instrument.”<sup>32</sup> In this respect, structural cases invite consideration of what kind of government we intended to create in broad terms, what kind of government is consistent with the free society the Constitution envisions. They anticipate considering not just singular harms or interests of particular individuals, but allocations of power that might cause multiple kinds of harms damaging to republican government writ large. Put differently, they leave room for the reality that ours is a Constitution that presumes, even if there had never been a Bill of Rights, certain features of free society are structurally required for the government the Constitution sets forth to function.<sup>33</sup> Properly understood, structural reasoning thus requires reframing traditional inquiries into the scope of executive foreign intelligence power—not to the point of collapse, but at least to the point of better accounting for structural limits. At a minimum, where an asserted power burdens the structural purpose of ensuring a free political society, the Constitution demands particularly exacting evidence of historical practice, legislative approval or acquiescence, inside the United States or out, to support its executive exercise.

In the end, the application question this Article poses—does the President have the power to collect vast swaths of Americans' communications solely on the authority of Article II of the Constitution—is meant to evoke a skeptical response. The case that he does is far from certain, and much in the constitutional design should lead us to doubt that the power of any singular branch acting alone extends that far. At the same time, there should be little doubt that the question of bulk data collection is complicated. The President does have at least some inherent foreign intelligence authority, and global communications represent an unmatched trove of information, including information that has the

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32. *McCulloch v. Maryland*, 17 U.S. 316 (4 Wheat.), 406-07 (1819).

33. See BLACK, *supra* note 28.

potential to help protect far more individuals than it harms.<sup>34</sup> What is certain is that there can be no meaningful debate about bulk collection without seeing both merits and harms in full view. Just as advances in surveillance technology have led many to argue it is time to reconsider some of the decades-old premises on which Fourth Amendment doctrine is based, these same advances should likewise lead us to revisit the scope of executive power to engage in foreign intelligence surveillance. Above all, this examination aims to make apparent that the Constitution has more to say about bulk collection than is contained in the Bill of Rights alone.

### I. BULK COLLECTION AND THE LIMITS OF INDIVIDUAL RIGHTS

While government programs employing bulk data collection vary in size and focus,<sup>35</sup> E.O. 12333 is the primary regulation for programs involving the interception of large quantities of data acquired overseas “without the use of discriminants,” such as a name, email address, or set of terms.<sup>36</sup> “Bulk collection,” as used here, is the opposite of targeted collection, that is, an intelligence collection program that “tries to reduce, insofar as possible, items about parties with no past, present, or future intelligence value” by “narrowly select[ing] relevant items to store.”<sup>37</sup> It is this conceptual difference that leads civil libertarians to conclude bulk collection is so challenging to established constitutional norms. The quintessentially constitutional search under the Fourth Amendment, for instance, is one conducted pursuant to a warrant “*particularly describing* the place to be searched, and the persons or things to be seized,”<sup>38</sup> a model that has as its touchstone a requirement of individualized suspicion. While the acquisition of data collected in bulk may be governed by any number of back-end restrictions on its storage and use, it is the generalized collection in the first instance that troubles many with civil libertarian concerns.<sup>39</sup>

To understand the nature of these concerns, this Part briefly canvasses what is publicly known about the regulation of bulk collection programs under E.O. 12333. It then begins to identify why conceiving of the harm potentially done by bulk collection solely in terms of doctrinal claims of right may not capture the nature of the burden bulk collection may impose.

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34. See, e.g., Charles W. Schmidt, *Trending Now: Using Social Media to Predict and Track Disease Outbreaks*, 120 ENVTL. HEALTH PERSP. A30 (2012), <https://ehp.niehs.nih.gov/120-a30/>.

35. See BRENNAN CENTER REPORT, *supra* note 19, at 5-10.

36. See, e.g., PPD-28, *supra* note 23 (“References to signals intelligence collected in ‘bulk’ mean the authorized collection of large quantities of signals intelligence data which, due to technical or operational considerations, is acquired without the use of discriminants (e.g., specific identifiers, selection terms, etc.).”).

37. COMM. ON RESPONDING TO SECTION 5(D) OF PRESIDENTIAL POLICY DIRECTIVE 28, NAT’L ACAD. OF SCIENCES, ENG’G AND MED., BULK COLLECTION OF SIGNALS INTELLIGENCE: TECHNICAL OPTIONS 33 (2015), <https://www.nap.//19414/chapter/4#33> (defining bulk and targeted searches).

38. U.S. CONST. amend. IV (emphasis added).

39. See discussion *infra* Section I.B.



A. *Bulk Collection Programmatic and E.O. 12333*

Bulk communications collection is by now broadly familiar to Americans, perhaps most famously through the NSA's now discontinued collection under Section 215 of the Patriot Act of Americans' telephony metadata. Amending the existing Foreign Intelligence Surveillance Act (FISA), which has authorized and regulated various forms of foreign intelligence surveillance in the United States and overseas since 1978,<sup>40</sup> Section 215 allowed the FBI to apply to the Foreign Intelligence Surveillance Court (FISC), an executive branch court staffed by Article III judges, for an order requiring the production of "any tangible things (including books, records, papers, documents, and other items)" to obtain foreign intelligence information (not about a U.S. person) or to protect against international terrorism,<sup>41</sup> so long as the FBI could demonstrate "reasonable grounds to believe that the tangible things are *relevant* to an authorized [foreign intelligence] investigation."<sup>42</sup> In 2013, leaked documents revealed that the U.S. government had relied on Section 215 to gain FISC approval to require multiple major telecommunications providers to produce *all* U.S. telephony metadata records as "relevant" things.<sup>43</sup> Subsequent court challenges to the Section 215 bulk metadata program produced varied results,<sup>44</sup> and the courts' engagement was soon eclipsed by Congress' action in the wake of the public outcry following the leaks to clarify that Section 215 did not authorize bulk collection of all domestic telephony metadata.<sup>45</sup>

Yet Section 215 is hardly the only legal authority supporting bulk data collection operations by the U.S. government. Most relevant here, a vast swath

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40. 50 U.S.C. §§ 1801-1885c (2012).

41. 50 U.S.C. § 1861(a)(1) (2012).

42. *Id.* § 1861(b)(2)(B) (emphasis added).

43. *See* ACLU v. Clapper, 785 F.3d 787, 795-96 (2d Cir. 2015) (describing a leaked FISC order requiring Verizon to produce "on an ongoing daily basis . . . all call detail records or 'telephony metadata' created by Verizon for communications (i) between the United States and abroad; or (ii) wholly within the United States, including telephone calls").

44. The ACLU challenged the legality of the Section 215 program on statutory and First and Fourth Amendment grounds, seeking to enjoin the program. Complaint for Declaratory and Injunctive Relief at 10, ACLU v. Clapper, 959 F. Supp. 2d 724, (S.D.N.Y. 2013), *aff'd in part, vacated in part, remanded*, 785 F.3d 787 (2d Cir. 2015) (No. 1:13CV03994). The Second Circuit ruled that Section 215 did not authorize the program, so the court thus declined to reach the constitutional claims although it did acknowledge the potential "seriousness of the constitutional concerns." Clapper, 785 F.3d at 824. A D.C. district court later ruled that plaintiffs had established a likelihood of succeeding on the merits of their Fourth Amendment claim, but stayed its preliminary injunction pending appeal. Klayman v. Obama, 142 F. Supp. 3d 172, 198 (D.D.C. 2015), *vacated*, 800 F.3d 559 (D.C. Cir. 2015).

45. The USA Freedom Act provided for 180-day transition period after the bill's enactment during which bulk metadata collection would be permitted to continue. USA Freedom Act of 2015, Pub. L. 114-23, § 109(a), 129 Stat. 268, 276 (2015); *see also* Press Release, Office of the Dir. of Nat'l Intelligence, Joint Statement by the DOJ and the ODNI on the Declassification of the Renewal of Collection Under Section 215 of the USA Patriot Act (Feb. 28, 2015), <https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2015/item/1245-joint-statement-by-the-odni-and-the-doj-on-the-declassification-of-the-renewal-of-collection-under-section-215-of-the-usa-patriot-act-50-u-s-c-sec-1861-as-amended-by-the-usa-freedom-act> (discussing FISC order enabling the program to continue in effect). The transition period ended on November 29, 2015. *Id.*

of U.S. intelligence activities are carried out pursuant to the President's power under Article II, not authorized by FISA or other congressional regulation, and not supervised by the FISC. Those activities—from covert operations to foreign intelligence investigations—are governed in the first instance by the intelligence community's organizing instrument, E.O. 12333.<sup>46</sup> First promulgated in 1981 and amended several times since,<sup>47</sup> E.O. 12333 establishes the rules by which U.S. foreign intelligence agencies collect and use communications data. Pursuant to these rules, the NSA conducts a set of programs that acquire the *content* of telecommunications and internet data directly from sources including fiber-optic cables and top-level communications infrastructure nodes overseas.<sup>48</sup> Among 12333 programs, for example, is one that collects all traffic between Google and Yahoo! servers located on foreign territory, reportedly comprising up to 180 million user records (including Americans') per month.<sup>49</sup>

While E.O. 12333 imposes no limits on the President's power to collect the content of communications by or about foreigners, it does contain a set of provisions regulating the collection and use of information by or about U.S. persons. In particular, E.O. 12333 provides that any government collection, retention, or dissemination of information "obtained in the course of a lawful foreign intelligence, counterintelligence, international drug or international terrorism investigation," be carried out pursuant to a set of procedures promulgated by the head of the relevant intelligence community agency, and approved by the Attorney General.<sup>50</sup> Current Attorney General-approved procedures for the NSA are contained in the recently declassified U.S. Signals Intelligence

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46. E.O. 12333, *supra* note 19.

47. See Exec. Order No. 13,284, 68 Fed. Reg. 4075 (2003); Exec. Order No. 13,355, 69 Fed. Reg. 53593 (2004), and Exec. Order No. 13,470, 73 Fed. Reg. 45325 (2008).

48. BRENNAN CENTER REPORT, *supra* note 19, at 5-10 (citing, among other sources, reports discussing underlying Snowden documents).

49. See Barton Gellman & Ashkan Soltani, *NSA Infiltrates Links To Yahoo, Google Data Centers Worldwide, Snowden Documents Say*, WASH. POST (Oct. 30, 2013) [https://www.washingtonpost.com/world/national-security/nsa-infiltrates-links-to-yahoo-google-data-centers-worldwide-snowden-documents-say/2013/10/30/e51de-11e3-8b74-d89d714ca4dd\\_story.html](https://www.washingtonpost.com/world/national-security/nsa-infiltrates-links-to-yahoo-google-data-centers-worldwide-snowden-documents-say/2013/10/30/e51de-11e3-8b74-d89d714ca4dd_story.html). Companies like Google hold duplicate data on multiple servers for backup and synchronization. The servers are located in different countries to help guard against data loss in case of outages or errors in one of the locations. See, e.g., Google Data Centers, Google.com, <https://www.google.com/about/datacenters/inside/data-security/> (last visited Aug. 21, 2017). Because these servers regularly send data to one another within a single network, the NSA is able to collect the traffic sent between them when it passes outside the United States. See Gellman & Soltani, *supra* note 49.

50. E.O. 12333, *supra* note 19, at § 2.3 (listing the kinds of information, in addition to that collected in the course of a foreign intelligence investigation, also collectible under 12333). U.S. persons is defined: "United States person means a United States citizen, an alien known by the intelligence element concerned to be a permanent resident alien, an unincorporated association substantially composed of United States citizens or permanent resident aliens, or a corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments." *Id.* at § 3.5(k); see also E.O. 13,470, 73 Fed. Reg. 45325 (2008) (amending the definition and adding the word "element" in replace of "agent"). Those procedures are required to "protect constitutional and other legal rights and limit use of such information to lawful governmental purposes." E.O. 12333 § 2.4.

Directive SP0018 (the Directive).<sup>51</sup> The Directive establishes that the “policy” of the U.S. Signals Intelligence System “is to target or collect only foreign communications,” that is, communications involving at least one party outside of the United States.<sup>52</sup> Communications “which are known to be” to or from U.S. persons may not be “intentionally intercepted, or selected through the use of a selection term [such as a phone number or email address].”<sup>53</sup> At the same time, communications *about* a U.S. person may be intercepted or selected on the sole approval of the Attorney General (again in the absence of FISC approval) if the target is an agent of a foreign power, and “[t]he purpose of the collection is to acquire significant foreign intelligence information.”<sup>54</sup>

Notwithstanding these seemingly restrictive guidelines, the government collects a significant number of communications to, from, and about U.S. persons under E.O. 12333 programs. Although the Directive prohibits “intentionally” targeting communications to or from individuals already “known” to be U.S. persons, bulk collection programs by definition do not distinguish at the collection stage between U.S. persons and those who are not. Moreover, a large volume of wholly domestic communications today regularly transit through foreign communications channels en route to their domestic recipients.<sup>55</sup> E.O. 12333 rules thus contemplate that bulk collection of ‘foreign’ intelligence will in the first instance “incidentally” include the content of millions of Americans’ electronic communications.<sup>56</sup>

U.S. intelligence officials have defended such programs on the grounds that, as with Section 215, E.O. 12333 collection is subject to back-end use restrictions, requiring additional procedures before any digitally captured communications can be accessed or assessed.<sup>57</sup> Indeed, while there is no judicial supervision at any stage of E.O. 12333 collection or use, the Directive requires that

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51. NAT’L SECURITY AGENCY, UNITED STATES SIGNAL INTELLIGENCE DIRECTIVE SP0018: LEGAL COMPLIANCE AND U.S. PERSONS MINIMIZATION PROCEDURES (Jan. 25, 2011) at § 9.8, <http://www.dni.gov/files/documents/1118/%20USSID%20SP0018.pdf> (defining “foreign communications” as also including communications between foreign powers and officials of foreign powers) [hereinafter SP0018].

52. *Id.* at § 3.1.

53. *Id.* at § 4.1.

54. *Id.* at § 4.1.b.

55. See Arnbak & Goldberg, *supra* note 22, at 323 (describing how standard internet routing protocols can “naturally cause traffic originating in a U.S. network to be routed abroad, even when it is destined for an endpoint located on U.S. soil,” and explaining how these protocols can be “deliberately manipulated to force traffic originating in American networks to be routed abroad”).

56. See, e.g., PPD-28, *supra* note 23 (“Routine communications and communications of national security interest increasingly transit the same networks, however, and the collection of signals intelligence in bulk may consequently result in the collection of information about persons whose activities are not of foreign intelligence or counterintelligence value.”); Gellman & Soltani, *supra* note 23; Bedoya, *supra* note 23.

57. Robert S. Litt, General Counsel, Office of the Director of Nat’l Intelligence, Remarks at the Brookings Institution, “Privacy, Technology and National Security: An Overview of Intelligence Collection” (July 19, 2013) (transcript available at [https://www.brookings.edu/wp-content/uploads/2013/07/20130719\\_intelligence\\_security\\_privacy\\_transcript.pdf](https://www.brookings.edu/wp-content/uploads/2013/07/20130719_intelligence_security_privacy_transcript.pdf)) [hereinafter Litt, Remarks at the Brookings Institution].

communications “solely between persons in the United States” that are incidentally collected “be promptly destroyed unless the Attorney General determines that the contents indicate a threat of death or serious bodily harm to any person.”<sup>58</sup> The rule is somewhat more exacting for communications incidentally intercepted that are “solely between U.S. persons”; those communications “will be destroyed upon recognition, if technically possible,” except that the destruction requirement may be waived by the relevant agency director for certain communications, including any containing “significant foreign intelligence, or evidence of a crime or threat of death or serious bodily harm to any person.”<sup>59</sup>

Yet note that both of these restrictions carry significant limitations: destruction is required only *after* it has been established that the communications involve solely U.S. persons, or persons solely in the United States, and then only *after* it has been determined that the content of the communications reveals no threat of death or bodily harm, or even simply “no significant foreign intelligence.” How the U.S. government determines the identity or location of parties to a communication is not publicly known. But because it can be difficult to determine that a party to a communication is, for example, a U.S. person, from metadata alone,<sup>60</sup> it is likely that even restrictions requiring destruction “upon recognition” in practice means that an agent of the government reads and assesses the communication—and indeed may use it if it contains evidence of a threat, crime, or anything of significant foreign intelligence value—before determining that the rules require it to be destroyed.

### B. Bulk Collection Meets Constitutional Rights and Their Limits

Civil libertarians have by now assembled a lengthy list of complaints about the limits of existing constitutional protections for rights against government surveillance—from onerous requirements for establishing standing to sue,<sup>61</sup> to increasingly arbitrary lines constraining the territorial scope of constitutional protection for data that is borderless by nature,<sup>62</sup> to presumptions about ceded expectations of privacy with information shared with a third-party service

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58. SP0018, *supra* note 51, at § 5.4a.

59. *Id.* at §§ 5.4b, 5.4d.

60. See, e.g., Frank Gardner, *How the Dark Web Spurs a Spying ‘Arms Race,’* BBC NEWS (Mar. 19, 2015), <http://www.bbc.com/news/technology-31948818> (describing readily available tools for masking IP addresses and other means of hiding user identity in electronic communications).

61. See Sudha Setty, *Surveillance, Secrecy and the Search for Meaningful Accountability*, 51 STAN. J. INT’L L. 69, 85-86 (2015) (criticizing *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013) (holding that plaintiffs “cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending”)); see also *Wikimedia Foundation v. National Security Agency*, 143 F.Supp.3d 344, 355-362 (D. Md. 2015), *aff’d in part, vacated in part, remanded*, 857 F.3d 193 (4th Cir. 2017) (denying plaintiffs’ standing to challenge NSA UPSTREAM surveillance program).

62. See, e.g., Daskal, *supra* note 13, at 333 (discussing *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and arguing that the “intermingling and mobility of data means that territorial and identity-based distinctions at the heart of the Fourth Amendment . . . no longer serve the interests they are designed to protect”); see also Zick, *supra* note 13, at 943 (noting that under current First

provider.<sup>63</sup> Those few scholars who have focused on various First Amendment interests implicated by federal surveillance—for example, the danger that government collection may chill individual associational and expressive activities—have come to similarly critical conclusions.<sup>64</sup> And while Fifth Amendment substantive due process has at times been the doctrinal hook for protection of a form of decisional privacy, a particular freedom in health, family and other intimate relationships to act without undue interference from the government (typically in a context in which the information is centrally known to third parties),<sup>65</sup> substantive due process may well be criticized as a fragile, poorly elaborated basis for protecting such weighty claims of right.<sup>66</sup> More, such claimants are likely to face arguments (however misguided) that any such idiosyncratic harms are subsumed by the more ‘specific’ rights afforded by the more familiar doctrinal claims.<sup>67</sup>

Seeing such doctrinal constraints as problems, of course, presumes one sees any actual ‘rights’ harm in bulk collection in the first place. Yet it is entirely possible to contend that no such harm exists, at least in traditional Bill of Rights

Amendment doctrine, “there is no clear and unambiguous precedent holding that communications or associations that cross borders are protected in any meaningful way”).

63. For just a few of the scholarly criticisms of the third party doctrine in cases like *Smith v. Maryland*, 442 U.S. 735 (1979), see, for example, CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 151-64 (2007); Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr’s Misguided Call for Judicial Deference*, 74 *FORDHAM L. REV.* 747, 753 (2005) (“The third party doctrine presents one of the most serious threats to privacy in the digital age.”); Bryan H. Choi, *For Whom the Data Tolls: A Reunited Theory of Fourth and Fifth Amendment Jurisprudence*, 37 *CARDOZO L. REV.* 185 (2015); Matthew D. Lawless, *The Third Party Doctrine Redux: Internet Search Records and the Case for a “Crazy Quilt” of Fourth Amendment Protection*, 2007 *UCLA J.L. & TECH.* 1, 3-4 (arguing that the doctrine should be revisited as applied to internet searches). The reasonable expectation of privacy standard on which *Smith* is in part based has been equally lamented. See, e.g., Sherry F. Colb, *What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 *STAN. L. REV.* 119, 121 (2002); see also, e.g., Timothy Casey, *Electronic Surveillance and the Right to be Secure*, 41 *U.C. DAVIS L. REV.* 977, 1026 (2008) (blaming “reasonable expectation of privacy” test for confusion plaguing Fourth Amendment doctrine).

64. See, e.g., Strandburg, *supra* note 4; accord Peter Swire, *Social Networks, Privacy, and Freedom of Association*, 90 *N.C. L. REV.* 1371, 1387 (2012) (noting that “freedom of association law is relatively undeveloped”); Neil M. Richards, *The Dangers of Surveillance*, 126 *HARV. L. REV.* 1934 (2013) (“[A]llegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.” (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972))).

65. See, e.g., *NASA v. Nelson*, 562 U.S. 134, 144 (2011) (assuming separate constitutional right to “informational privacy” including both an “interest in avoiding disclosure of personal matters” and an interest in “making certain kinds of important decisions free from government interference”) (internal quotations omitted).

66. See, e.g., Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 *MINN. L. REV.* 281 (2015) (discussing historical and contemporary critiques of substantive due process).

67. See *Graham v. Connor*, 490 U.S. 386, 395 (1989) (holding that excessive use of force claim is properly brought under the Fourth Amendment’s “explicit textual source” of protection rather than the “more generalized notion of ‘substantive due process’”). To the extent a substantive due process claim raises a different, additional *kind* of harm—not just a more generalized version of the rights protected by the First or Fourth Amendment—the *Graham v. Connor* argument should not prevail. For a critique of *Graham v. Connor* more generally, see Bambauer & Massaro, *supra* note 66.

terms. The Fourth Amendment right to privacy, for instance, is often narrowly construed as an interest in keeping personal information secret.<sup>68</sup> But it is far from clear how a right to privacy-as-secrecy is implicated if, as in at least some E.O. 12333 programs, data is electronically collected but otherwise never observed.<sup>69</sup> Even a more capacious right to privacy—one conceived, for example, as a right protecting personality, individuality, and dignity<sup>70</sup>—is not obviously implicated by the mere government *collection* of data, broadly dissociated from individual identity in the first instance, and the vast majority of which, in its individuated form, no human ever sees.

In contrast, while it is certainly possible to conceptualize a First Amendment-related harm to collection-without-use—an individual curtailing some expression or association she would otherwise pursue absent government possession—this description seems in key respects *underinclusive*. The empirical literature examining whether and to what extent the threat or knowledge of surveillance may influence individual behavior is increasingly deep, and has long reported that such knowledge can exert a “powerful influence over behavior, beliefs, and feelings, whether or not that threat is realized.”<sup>71</sup> Among more recent findings, Wikipedia traffic to articles on privacy-sensitive topics revealed a statistically significant decrease after the widespread publicity surrounding the Snowden revelations of the scope of government surveillance in June 2013—a change in traffic on words from “terrorism” to “Iran” that now appears to be long lasting.<sup>72</sup> If a student or a researcher curtails the kind of intellectual investigation this finding suggests, that individual is clearly harmed. But the harm of such an effect seems hardly limited to the individual alone if, for example, the study that might otherwise have been conducted and produced new thoughts, ideas or even actions; or when, as post-Snowden research also finds, journalists

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68. *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring).

69. See Laidlaw, *supra* note 16, at 349 (arguing that “in order for privacy to be breached, a human observer must be aware of the personal information whose character is sought to be kept private”). But see Kevin S. Bankston & Amie Stepanovich, *When Robot Eyes Are Watching You: The Law and Policy of Automated Communication Surveillance*, 23 (U. Miami Sch. of Law, Early Workshop Draft, 2014) [http://robots.law.miami.edu/2014/wp-content/uploads/2014/\\_Stepanovich\\_We\\_Robot.pdf](http://robots.law.miami.edu/2014/wp-content/uploads/2014/_Stepanovich_We_Robot.pdf) (arguing that “there is no distinction between exposure of information to a human and exposure of information to automated equipment controlled by humans”).

70. See DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY 1* (2008) (discussing conceptions of privacy).

71. Gregory L. White & Philip G. Zimbardo, *The Effects of Threat of Surveillance and Actual Surveillance on Expressed Opinions Toward Marijuana*, 111 J. SOC. PSYCHOL. 49, 59 (1980).

72. Jonathon W. Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 BERKELEY TECH. L. J. 117, 175 (2016); accord Alex Marthews & Catherine Tucker, *Government Surveillance and Internet Search Behavior* (February 17, 2017), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2412564](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412564) (reporting results of a study of user data from 11 countries on the search volume of select keywords from before and after Snowden surveillance revelations, and finding that users were less likely to search using search terms that they believed might get them in trouble with the U.S. government). The Penney study selected “privacy-sensitive” terms from a list of keywords the U.S. Department of Homeland Security uses to monitor social media; among the terms were Al Qaeda, Iran, nuclear, fundamentalism, and terrorism.

self-censor for fear of surveillance.<sup>73</sup> It is not only the inventor or journalist injured but the free society at large that might otherwise benefit from their insights.<sup>74</sup>

One need not agree that E.O. 12333 bulk collection *violates*, for example, existing Fourth Amendment doctrine, to acknowledge that bulk collection as practiced and rights doctrine as applied are, in at least some of these ways, misaligned. In part, such a putative misalignment of rights and harms may be seen as a function of the nature of a Bill of Rights itself. Existing doctrine tends to organize individual rights claims into particular silos—expressive rights, privacy rights, process rights, and so forth—even though lived experience often arguably defies such restricted categorization. Does evidence that a bulk collection intelligence program chills Americans’ electronic communications with religious advisers about reproductive decisions implicate an expressive right or a privacy right? A religious right? An associational right? The answer is of course, at least potentially, all of the above, likely in overlapping, even cumulative ways. Yet as constitutional litigation has evolved, the Court most commonly considers infringement on rights at best separately in sequence,<sup>75</sup> foreclosing consideration of, for example, cumulative effects.<sup>76</sup> At other times the Court selects only one harm—the most “specific”—to adjudicate in a given case, ignoring other potential claims even when the considered claim fails.<sup>77</sup> And when the Court has attempted to craft a doctrinal or quasi-doctrinal way to

73. See PEN AMERICAN CENTER, CHILLING EFFECTS: NSA SURVEILLANCE DRIVES U.S. WRITERS TO SELF-CENSOR 3-4 (2013), [http://www.pen.org/sites/default/files/Chilling%20Effects\\_PEN%20American.pdf](http://www.pen.org/sites/default/files/Chilling%20Effects_PEN%20American.pdf) [hereinafter PEN AMERICAN CENTER, CHILLING EFFECTS] (discussing a survey that shows journalists’ self-censorship online as a result of Snowden’s revelations of NSA surveillance). Bulk collection in this sense presents in part precisely the kind of generalized grievance that is both genuinely harmful and classically nonjusticiable. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

74. See, e.g., *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Those who won our independence believed that the . . . freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine . . .”).

75. Compare, e.g., *Boyd v. United States*, 116 U.S. 616, 638 (1886) (compelling criminal or forfeiture defendant to produce evidentiary items violates both Fourth and Fifth Amendments), with, e.g., *Fisher v. United States*, 425 U.S. 391, 409 (1976) (explaining “[t]o the extent . . . that the rule against compelling production of private papers rested on the proposition that seizures of or subpoenas for ‘mere evidence’ . . . violated the Fourth Amendment and therefore also transgressed the Fifth, the foundations for the rule have been washed away”) (internal citations omitted).

76. Cf. *Ireland v. United Kingdom*, App. No. 5310/71, 25 Eur. Ct. H.R. (ser. A) at 53-57 (1978) (recognizing that any one practice may not be “torture” but may rise to that level if effects are considered cumulatively).

77. See, e.g., *Graham v. Connor*, 490 U.S. 386, 392-94 (1989). In the surveillance context, courts have at times recognized that both First and Fourth Amendment harms may be present, see, e.g., *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 313 (1972) (Powell, J.) (“National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of ‘ordinary’ crime.”), but have still tended to evaluate claims under only one doctrinal framework, see, e.g., *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (“Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with “scrupulous exactitude.”).

manage real-world harms that seem to implicate multiple constitutional interests in part, but resist easy placement into any one doctrinal silo in whole, criticism has been singularly intense.<sup>78</sup> In addition to compromising the nature of the expressive function a judgment of the Court might serve,<sup>79</sup> the tendency to see rights claims only in terms of existing doctrinal silos may thus risk the underenforcement of rights the framers assumed the Constitution would leave intact.<sup>80</sup>

The misalignment described may also reflect something about the instinctive unease many seem to feel about bulk collection—a worry that may be conceived of less as about individual rights than about government power.<sup>81</sup> Apart from the Tenth Amendment (more on which below),<sup>82</sup> the Bill of Rights does not generally sound in power terms. Yet the Constitution as a whole most assuredly does. Cases about the existence and allocation of federal power have been at the core of constitutional law from the outset,<sup>83</sup> and such structural cases remain today a steady part of the Court’s docket.<sup>84</sup> It is for this reason among others that one might be surprised to find such paltry discussion in the legal literature of the scope and nature of the President’s Article II power to engage in surveillance outside the United States. That is the topic to which the Article thus first turns.

## II. EXECUTIVE FOREIGN INTELLIGENCE SURVEILLANCE POWER

The relative scholarly silence on the power of the executive to engage in bulk foreign intelligence collection, it should be noted, is no doubt in part a function of the relative activity of Congress. Congress has acted repeatedly over the past century to regulate communications surveillance, including through legislation

78. Efforts to bridge the rights-reality divide are particularly well known in the world of decisional privacy, see *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (positing “that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”), as are criticisms of that effort, see, e.g., Ryan C. Williams, *The Path to Griswold*, 89 NOTRE DAME L. REV. 2155, 2177 (2014) (“To characterize Justice Douglas’s ‘penumbras’ and ‘emanations’ reasoning as unsuccessful would be an understatement. The line is at once among the most widely recognized statements . . . and ‘one of the most ridiculed sentences in the annals of the Supreme Court.’”) (quoting Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1485-86 (2008)); see also Williams, *supra*, at 2177 & n.151 (citing similar scholarly assessments); Ernest A. Young, *United States v. Windsor and the Role of State Law in Defining Rights Claims*, 99 VA. L. REV. ONLINE 39, 40 & n.4 (2013) (collecting criticisms of *Windsor*’s mix of doctrinal rationales).

79. See, e.g., Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2028 (1996) (“[T]he close attention American society pays to the Court’s pronouncements is connected with the expressive or symbolic character of those pronouncements. When the Court makes a decision, it is often taken to be speaking on behalf of the nation’s basic principles and commitments.”).

80. See *infra* Part III.

81. See, e.g., MARY MADDEN & LEE RAINIE, PEW RESEARCH CENTER, AMERICANS’ ATTITUDES ABOUT PRIVACY, SECURITY AND SURVEILLANCE 10 (2015), [http://www.pewinternet.org/files/2015/05/Privacy-and-Security-Attitudes-5.19.15\\_FINAL.pdf](http://www.pewinternet.org/files/2015/05/Privacy-and-Security-Attitudes-5.19.15_FINAL.pdf) (reporting 65% of adults do not think “there are adequate limits on what telephone and internet data the government can collect”).

82. U.S. CONST., amend. X (providing that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”).

83. See *M’Culloch v. Maryland*, 17 U.S. 316, 406-07 (1819).

84. See, e.g., *Zivotofsky v. Kerry*, 135 S.Ct. 2076 (2015).



that governs, and therefore occupies debate about, a significant set of U.S. foreign intelligence surveillance activities.<sup>85</sup> Beyond this, scholars and courts share a common—and reasonable—assumption that the question of inherent executive surveillance power has been answered, or at least answered sufficiently to resolve any outstanding question of the legality of E.O. 12333 operations. Indeed, one can find baseline acknowledgment in judicial decisions,<sup>86</sup> legislative enactments,<sup>87</sup> and executive branch legal opinions<sup>88</sup> of the existence of at least some constitutional power in the President to engage in foreign intelligence surveillance, making the question of the power’s existence, if not scope, effectively settled. There is also likely a third reason for the relative silence. A contemporary constitutional instinct, developed under headlines of the past half-century describing the age of the “imperial presidency,”<sup>89</sup> assumes the President simply must have the power: executives and their agents have engaged in spying and other forms of foreign intelligence since Washington, they are best suited among governmental bodies to act quickly and in secret, and so long as Congress has not expressly prohibited a particular method of collection, we should assume Presidents have whatever power in this realm they think best serves the national interest.

Yet as this Part contends, it is possible to embrace the basic claim that the President has some implicit Article II power to engage in foreign intelligence collection, and still not be persuaded that Article II extends so far as to permit what E.O. 12333 and a vast expansion in computing and storage power now allows: the wartime-independent prerogative, available in connection with any “lawful foreign intelligence, counterintelligence, international drug or international terrorism investigation,” to collect the content of all communications,

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85. See *infra* text accompanying notes 161-67 (congressional activities); see also, e.g., USA Freedom Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (2015); 50 U.S.C.A § 1861 (West 2017); Radio Act of 1927, ch. 169, 44 Stat. 1162 (repealed 1934); Radio Act of 1912, ch. 287, 37 Stat. 302 (1912). For an examination of the range of additional federal privacy statutes geared toward law enforcement in particular, see Erin Murphy, *The Politics of Privacy*, 111 MICH. L. REV. 485, 533 (2013).

86. See, e.g., *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 314-315 (1972); see also *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973); *United States v. Truong Dinh Hung*, 629 F.2d 908, 914 (4th Cir. 1980); *United States v. Buck*, 548 F.2d 871, 875 (9th Cir.), *cert. denied*, 434 U.S. 890 (1977); *United States v. Butenko*, 494 F.2d 593, 601 (3d Cir. 1974).

87. See, e.g., 407 U.S. at 302 (quoting Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2511(3)(f) (“Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities . . .”).

88. See, e.g., U.S. Dep’t of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (white paper) (Jan. 19, 2006), <https://www.justice.gov/sites/default/files//opinions//01/31/nsa-white-paper.pdf> [hereinafter 2006 DOJ White Paper]; U.S. Dep’t of Justice, Office of Legal Counsel, Memorandum for the Attorney General, Re: Review of the Legality of the STELLAR WIND Program (May 6, 2004), <https://fas.org/irp/agency/doj/olc/stellar.pdf> [hereinafter 2004 OLC Memorandum]; 1986 OLC Memorandum, *supra* note 31, at 159.

89. See generally ARTHUR M. SCHLESINGER JR., *THE IMPERIAL PRESIDENCY* (1973).

including those of millions of Americans, which at one point transit through a communications node located outside the territorial United States. To show this, this Part begins by setting forth the classic case in favor of Article II surveillance power—a case drawn from arguments made in decisional law and Justice Department memoranda. A second section then examines these arguments in detail, finding that they are surprisingly indeterminate even on their own terms.

*A. The Classic Case: Executive Foreign Intelligence Surveillance*

As the Supreme Court has repeatedly recognized, Article II of the Constitution grants certain affirmative powers to the President, who is, among other things, vested with “[t]he executive Power,”<sup>90</sup> made “commander in Chief of the Army and Navy of the United States,”<sup>91</sup> and given the duty to “take Care” that the laws are faithfully executed, and to “preserve, protect and defend the Constitution of the United States.”<sup>92</sup> From these spare textual sources, the Court has over the years discerned express or implied executive authority not only to defend the nation against foreign attack,<sup>93</sup> but also to employ secret agents to obtain intelligence about the enemy,<sup>94</sup> and to keep intelligence information shielded from public review.<sup>95</sup>

More directly, the Court has recognized that Article II affords the President power to conduct *domestic* communications surveillance in order to “protect our Government against those who would subvert or overthrow it by unlawful means.”<sup>96</sup> While refusing to find an exception to the Fourth Amendment’s warrant requirement in circumstances involving purely domestic threats to security,<sup>97</sup> the Court in *United States v. United States District Court (Keith)* located the President’s power to engage in communications surveillance in that context in the Oath Clause, establishing the duty to “preserve, protect and defend the Constitution of the United States.”<sup>98</sup> The Court was at pains to make clear that it was reserving judgment on the separate question of the scope of the President’s power to conduct communications surveillance of a *foreign* power, “within or without this country,” but it left open the possibility that the President’s power in the realm of *foreign* intelligence might be broad enough to

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90. U.S. CONST., art. II, § 1.

91. U.S. CONST., art. II, § 2.

92. U.S. CONST., art. II, §§ 1, 3.

93. *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863).

94. *Totten v. United States*, 92 U.S. 105, 106 (1876).

95. *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (“It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.”).

96. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 310 (1972).

97. *Id.* at 308 (disclaiming any intention to opine on “the scope of the President’s surveillance power with respect to the activities of foreign powers, within or without this country”); *see also id.* at 322 (again disclaiming this intention).

98. *Id.* at 310 (quoting U.S. CONST., art. II, § 1).

avoid compliance with the warrant requirement altogether.<sup>99</sup> Indeed, among the several appeals courts that had occasion to decide the question before Congress moved to authorize and regulate the practice of domestic foreign intelligence surveillance,<sup>100</sup> all but one held that the President could undertake surveillance of foreign powers even without a warrant.<sup>101</sup>

Central to the *Keith* Court's recognition of executive power in this realm was its finding that Presidents since at least Franklin Roosevelt had made a practice of engaging in intelligence surveillance in the United States.<sup>102</sup> As Justice Frankfurter had suggested in *Youngstown Sheet & Tube v. Sawyer*, executive practice, "engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by Art. II."<sup>103</sup> Indeed, as scholars and Justice Department lawyers have since explained, Presidents have engaged in warrantless wiretapping in wartime since there were wires to tap.<sup>104</sup> The U.S. Government and the Confederacy both wiretapped telegraph lines extensively during the Civil War, to important effect.<sup>105</sup> By World War I, the U.S. military had established radio listening posts along the U.S. border and in Mexico to intercept foreign communications.<sup>106</sup> As for President Roosevelt, he had, the day after Pearl Harbor, granted FBI Director J. Edgar Hoover "temporary powers to direct all news censorship and to control all other telecommunications traffic in and out of the United States."<sup>107</sup> While the temporary order was replaced less than two weeks

99. *Id.* at 321-22 ("express[ing] no opinion as to the issues which may be involved with respect to activities of foreign powers or their agents").

100. FISA Amendments Act, Pub. L. No. 95-511, 92 Stat. 1783 (1978).

101. *See, e.g.,* *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973) (locating the President's authority to engage in foreign intelligence surveillance in "the inherent power of the President with respect to conducting foreign affairs," and in the duty to "take care to safeguard the nation from possible foreign encroachment, whether in its existence as a nation or in its intercourse with other nations"); *see also* *United States v. Truong Dinh Hung*, 629 F.2d 908, 914 (4th Cir. 1980); *United States v. Buck*, 548 F.2d 871, 875 (9th Cir.), cert. denied, 434 U.S. 890 (1977); *United States v. Butenko*, 494 F.2d 593, 601 (3d Cir. 1974). *But see* *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975).

102. *U.S. Dist. Court*, 407 U.S. at 310-12; *see also* 2006 DOJ White Paper, *supra* note 88, at 7 ("[Domestic] wiretaps for [foreign intelligence] purposes thus have been authorized by Presidents at least since the administration of Franklin Roosevelt in 1940.").

103. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 611 (1952) (Frankfurter, J., concurring) ("It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."); *see also* *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (adopting the same view of presidential practice).

104. *See* *Banks & Bowman, supra* note 26, at 19-20; 2004 OLC Memorandum, *supra* note 26, at 29-30.

105. G.J.A. O'TOOLE, *THE ENCYCLOPEDIA OF AMERICAN INTELLIGENCE AND ESPIONAGE* 496-497 (1988) [hereinafter O'TOOLE, *ENCYCLOPEDIA*].

106. BRUCE W. BIDWELL, *HISTORY OF THE MILITARY INTELLIGENCE DIVISION, DEPARTMENT OF THE ARMY GENERAL STAFF: 1775-1941*, p. 199-200 (1986); *see also* G.J.A. O'TOOLE, *HONORABLE TREACHERY: A HISTORY OF U.S. INTELLIGENCE, ESPIONAGE, AND COVERT ACTION FROM THE AMERICAN REVOLUTION TO THE CIA* 281-83 (1991) [hereinafter O'TOOLE, *HONORABLE TREACHERY*].

107. 2006 DOJ White Paper, *supra* note 88, at 15-16 (quoting Jack A. Gottschalk, *Consistent with Security . . . A History of American Military Press Censorship*, 5 COMM. & L. 35, 39 (1983)).

later with a more permanent system, the replacement system was nearly as invasive. As a 2006 Justice Department White Paper described it: “The President’s order gave the Government of the United States access to ‘communications by mail, cable, radio, or other means of transmission passing between the United States and any foreign country.’”<sup>108</sup>

Modern executive surveillance activities have hardly been limited to wartime. Following World War I, the federal government sought and received an extension of agreements with Western Union and other cable companies to continue accessing communications transmitted from “countries of interest.”<sup>109</sup> In the 1920s, the Office of Naval Intelligence maintained listening posts in various U.S. consulates, in Guam, and in the Philippines to intercept overseas telegram and radio communications that would later prove invaluable in enabling U.S. agents to translate and decode Japanese communications in World War II.<sup>110</sup> The Army Signals Intelligence Service cracked the main Japanese diplomatic cipher by 1936,<sup>111</sup> and the Office of Naval Intelligence had been tapping the phones of the Japanese consulate in Hawaii for months before the Pearl Harbor attack.<sup>112</sup> Even before the U.S. declaration of war in World War II, President Roosevelt had authorized Attorney General Robert Jackson to install within the United States “listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies.”<sup>113</sup> As the Justice Department Office of Legal Counsel put it on the strength of such examples, the President’s power to conduct warrantless foreign intelligence surveillance exists inside the country and out, even in “routine peacetime.”<sup>114</sup>

Having told at least part of this story of historical practice, the *Keith* Court also took care to emphasize functional considerations in support of its recognition of inherent executive surveillance authority. That is, the kind of argument that flows from the view that the framers themselves were acutely aware of the

108. 2006 DOJ White Paper, *supra* note 88, at 16 (citing Jack A. Gottschalk, *Consistent with Security . . . A History of American Military Press Censorship*, 5 COMM. & L. 35, 39 (1983), and citing Exec. Order No. 8985, § 1, 6 Fed. Reg. 6625 (Dec. 19, 1941)).

109. O’TOOLE, HONORABLE TREACHERY, *supra* note 106, at 330; *see also* JAMES BAMFORD, *THE PUZZLE PALACE: INSIDE THE NATIONAL SECURITY AGENCY, AMERICA’S MOST SECRET INTELLIGENCE ORGANIZATION* 237-47 (1982) (discussing similar efforts to convince cable companies to continue cooperation following World War II).

110. O’TOOLE, HONORABLE TREACHERY, *supra* note 106, at 333-35.

111. CHRISTOPHER ANDREW, *FOR THE PRESIDENT’S EYES ONLY: SECRET INTELLIGENCE AND THE AMERICAN PRESIDENCY FROM WASHINGTON TO BUSH* 104-05 (1995).

112. O’TOOLE, HONORABLE TREACHERY, *supra* note 106, at 375-76.

113. *United States v. U.S. Dist. Court*, 444 F.2d 651, 669-71 (6th Cir. 1971) (reproducing memoranda from President Franklin D. Roosevelt of May 21, 1940).

114. 2004 OLC Memorandum, *supra* note 88, at 43; *see also id.*, at 42 n. 34 (citing Intelligence—Warrantless Electronic Surveillance—Common Carriers, 2 Op. O.L.C. 123 (1978) and Warrantless Foreign Intelligence Surveillance—Use of Television—Beepers, 2 Op. O.L.C. 14, 15 (1978)); 2004 OLC Memorandum, *supra* note 88, at 45 (citing 1986 OLC Memorandum, *supra* note 31) (noting that “the conduct of secret negotiations and intelligence operations lies at the very heart of the President’s executive power”).

need to provide the new federal government “with all the powers requisite to the complete execution of its trust,”<sup>115</sup> and that one of the purposes of the Constitution’s allocation of powers was thus to ensure the new government, unlike the Articles of Confederation it replaced, was actually capable of working effectively.<sup>116</sup> For the *Keith* Court, it would be contrary “to the existence of an organized society essential to the maintenance of civil liberties” to deprive the government of the power to engage in communications surveillance where threats to security were at stake.<sup>117</sup> That the power should reside with the executive in the first instance was only consistent with that branch’s comparative expertise. As the *United States v. Curtiss-Wright* Court had explained, the executive’s insight into foreign threats, its ability to act quickly and in secret (unlike the other branches), made it sensibly government’s primary repository for the intelligence collection power. Indeed, as the OLC later put it, the President’s power thus included “all the discretion traditionally available to any sovereign in its external relations, except insofar as the Constitution places that discretion in another branch of the government.”<sup>118</sup> Other branch involvement—either through legislative regulation or judicial approval—would only compromise the secrecy and flexibility that otherwise gives the executive the advantage in the “vast external realm.”<sup>119</sup>

### B. *The Surprising Indeterminacy of the Classic Case*

While the Court has certainly recognized that Article II contains affirmative grants of power to the President, the vigorous case summarized above supports a degree of executive power not nearly as capacious as it might at first seem. The cases cited by the Justice Department and others for the broadest propositions on the scope of executive authority to act in the national defense are far too remote in circumstance to offer much instruction on surveillance activities in particular. The *Prize Cases*, for instance, holding that the President had inherent constitutional authority to use military force to institute a naval blockade in national defense if “war be made by invasion of a foreign nation,” seems to offer little support for the authority described by E.O. 12333, the terms of

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115. 2004 OLC Memorandum, *supra* note 88, at 37 (quoting THE FEDERALIST No. 23, at 147 (Jacob E. Cooke ed., 1961)).

116. See Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1585-86 (2009) (discussing functional purpose).

117. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 312 (1972).

118. 1986 OLC Memorandum, *supra* note 31, at 160-61.

119. *United States v. Curtiss-Wright*, 299 U.S. 304, 320 (1934) (“Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.”); see also *United States v. Truong Dinh Hung*, 629 F.2d 908, 913 (4th Cir. 1980) (contending that requiring the President to observe a warrant requirement in foreign intelligence surveillance would reduce the President’s flexibility in responding to threats that “require the utmost stealth, speed, and secrecy,” and may compromise security by increasing “the chance of leaks regarding sensitive executive operations”); 2006 DOJ White Paper, *supra* note 88, at 37 (“The Executive requires a greater degree of flexibility in this field to respond with speed and absolute secrecy to the ever-changing array of foreign threats [it] face[s] . . .”).

which contain no limitation to wartime much less invasion.<sup>120</sup> *Totten v. United States*, also a war-specific case, is cited for the broad proposition that “the President has the authority to use secretive means to collect intelligence necessary for the conduct of foreign affairs and military campaigns,”<sup>121</sup> but it in fact held narrowly and unremarkably that a spy could not maintain a lawsuit in open court over a secret contract for services, and in dicta noted that the President was surely authorized to spend money to hire a spy from an account Congress had provided for that purpose.<sup>122</sup>

The only case in which the Court has addressed the particular question of executive foreign surveillance authority is *Keith*, the 1972 opinion holding that the Fourth Amendment’s warrant requirement applies in *domestic* investigations of domestic security threats from political violence or other crimes. *Keith* certainly recognizes that the President has some degree of inherent power to engage in communications surveillance. But even apart from the Court’s insistence that domestic surveillance comply with the Fourth Amendment warrant requirement, the ruling is remarkably narrow. As the majority emphasizes more than once, its decision was limited to the circumstances of the case before it, in which the Government had deemed surveillance “necessary to protect the nation from attempts of domestic organizations to attack and subvert *the existing structure of Government*.”<sup>123</sup> Consistent with its efforts to limit the scope of its holding to this particularly extreme form of threat aimed at the government itself, the Court located the textual source of executive surveillance power neither in the general vesting of executive power with the President, nor in the

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120. 2006 DOJ White Paper, *supra* note 88, at 38 (quoting *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863)).

121. 2006 DOJ White Paper, *supra* note 88, at 7 (citing *Totten v. United States*, 92 U.S. 105, 106 (1876), as well as *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) and *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

122. *Totten*, 92 U.S. at 106 (recognizing that the President “was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy; and . . . to direct payment of the amount stipulated out of the contingent fund under his control”). Likewise, *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. at 111, featured oft-cited dicta (by Justice Jackson)—that “[t]he 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.” But that truism was in service of an exercise in statutory, not constitutional, interpretation about the availability of judicial review following an executive administrative decision required by statute. Given that Justice Jackson would just a few years later make clear executive power must be determined in relation to congressional action, and reject the notion that the President had the power to seize domestic steel mills despite claims of national security necessity in wartime, it is difficult to understand *Chicago & Southern Air Lines* as offering much insight into the nature of inherent executive power. Writing in his then capacity as attorney in the Justice Department Office of Legal Counsel, Antonin Scalia similarly expressed doubt about *Chicago & Southern Air Lines* utility in this context. Dep’t of Justice, Memorandum for the Attorney General, Re: Physical Intrusion for Foreign Intelligence Purposes (Aug. 19, 1975) (on file at the National Archives and Records Administration).

123. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 309 (1972) (quoting Attorney General affidavit) (emphasis added).

President's military role as Commander in Chief, but rather in the Oath Clause, establishing the duty to "preserve, protect and defend the Constitution of the United States."<sup>124</sup> *Keith* justifies executive surveillance power not by reliance on the President's general responsibility for national security or defense, but on the grounds that it was essential for "Government [to] safeguard[] its own capacity to function," lest "society itself . . . become so disordered that all rights and liberties would be endangered."<sup>125</sup> Neither E.O. 12333, nor its implementing regulations, contains any such narrowing restriction.<sup>126</sup>

To be sure, given *Keith's* important caveat that *foreign* intelligence surveillance might well be different—that is, that the President's power in that context might be broad enough to engage in surveillance without first obtaining a warrant—any serious argument that the President has sufficient inherent authority to support current E.O. 12333 operations must consider the case the Court *could have made* on the scope of foreign surveillance power if it had had occasion. Here, the decisions of the federal appeals courts that later upheld domestic warrantless surveillance for foreign intelligence purposes are of strikingly modest help. Nearly all passed quickly over the threshold question of presidential power, assuming without discussion that the President had some degree of power to conduct foreign intelligence surveillance, and proceeding directly to assessing the effect of the Fourth Amendment under the circumstances.<sup>127</sup> Only two courts took up the question of power directly, and those two split substantially in their analyses.

The Fifth Circuit in *United States v. Brown* upheld the introduction of evidence obtained by domestic warrantless surveillance of H. Rap Brown, then chairman of the Student Nonviolent Coordinating Committee, who had been arrested for interstate transportation of a firearm.<sup>128</sup> Notwithstanding the wholly domestic circumstances of Brown's case on the public record, both the Louisi-

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124. *Id.* at 310 (quoting U.S. Const., art. II, § 1); *see also id.* at 322 ("express[ing] no opinion as to the issues which may be involved with respect to activities of foreign powers or their agents").

125. *Id.* at 312.

126. *See, e.g.*, E.O. 12333, *supra* note 19, at § 2.2 ("This Order is intended to enhance human and technical collection techniques, especially those undertaken abroad, and the acquisition of significant foreign intelligence, as well as the detection and countering of international terrorist activities, the spread of weapons of mass destruction, and espionage conducted by foreign powers.").

127. *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973) (upholding the conviction of a man charged with transporting a firearm from New Orleans to New York while a passenger on Delta Airlines flight); *United States v. Truong Dinh Hung*, 629 F.2d 908, 914 (4th Cir. 1980) (citing *Keith*, 407 U.S., at 316-18 for the proposition that "the separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance"); *United States v. Buck*, 548 F.2d 871, 875 (9th Cir.), *cert. denied*, 434 U.S. 890 (1977) (recognizing, without discussion, that Foreign security wiretaps are a recognized exception to the general warrant requirement); *United States v. Butenko*, 494 F.2d 593, 603 (3d Cir. 1974) (en banc) (noting in passing that "it would appear" that the President's power to conduct surveillance is "implied from his duty to conduct the nation's foreign affairs"); *see also* *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002) (assuming for purposes of decision that President has "inherent authority to conduct warrantless searches to obtain foreign intelligence information").

128. 484 F.2d 418 (5th Cir. 1973).

ana district court and the court of appeals reviewed the surveillance tapes *in camera* and agreed that the surveillance had been authorized by the Attorney General solely for the purpose of gathering foreign intelligence information.<sup>129</sup> Pointing to unrelated Supreme Court dicta about the breadth of executive foreign affairs authority (for example, to conclude executive claims settlement agreements), the Fifth Circuit found executive surveillance authority in “the inherent power” of the President as Commander-in-Chief and as the “Nation’s organ for foreign affairs” to “protect national security in the context of foreign affairs.”<sup>130</sup> Because the President has a duty to “take care to safeguard the nation from possible foreign encroachment, whether in its existence as a nation or in its intercourse with other nations,” the *Brown* court quickly concluded that the question *Keith* left open must be answered in the affirmative.<sup>131</sup>

Writing two years later, the D.C. Circuit in *Zweibon v. Mitchell* offered a far more limited, and detailed, assessment. Rejecting the approach taken in *Brown*, *Zweibon* held that a warrant was required for any wiretap of a domestic organization, even if the organization’s conduct had substantial effects on foreign relations, so long as the organization was not itself a foreign power or “acting in collaboration with a foreign power.”<sup>132</sup> In that case, the Attorney General had directed the warrantless wiretap of the Jewish Defense League (JDL), an organization devoted to pressing the Soviet Union to permit greater Jewish emigration. The JDL’s activities ranged from peaceful demonstrations to violent attacks on Soviet offices in the United States, attacks that triggered vigorous protests by the Soviets against the U.S. Government.<sup>133</sup>

While acknowledging “that the locus of initial decision-making power as to the propriety of a particular surveillance should itself rest with the Executive Branch,”<sup>134</sup> the court easily rejected arguments that prior judicial decisions had settled what limitations existed on the exercise of that power.<sup>135</sup> But the *Zweibon* court saved its greatest criticism for the argument that historic presidential practice provided a basis for the conduct of warrantless surveillance in any foreign affairs-related context. For one thing, the D.C. Circuit noted, the Supreme Court had never actually approved the intelligence surveillance practices the *Keith* court attributed to Presidents since Roosevelt,<sup>136</sup> and “there can be no doubt that an unconstitutional practice, no matter how inveterate, cannot

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129. *Id.*

130. *Id.* at 426 (citing *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) and *United States v. Belmont*, 301 U.S. 324, 328 (1937)). The limits of *Chicago & Southern Air Lines* are discussed in note 122 above.

131. 484 F.2d at 426 (citing THE FEDERALIST No. 64, at 434-36 (Jay); THE FEDERALIST No. 70, at 471 (Alexander Hamilton); THE FEDERALIST No. 74 at 500 (Alexander Hamilton) (J. Cooke ed. 1961).

132. *Zweibon v. Mitchell*, 516 F.2d 594, 614 (D.C. Cir. 1975).

133. *Id.*, at 608-09.

134. *Id.* at 633.

135. *Id.* at 639 (distinguishing *Belmont*, 301 U.S. 324, and *Chicago & S. Air Lines*, 333 U.S. 103); see also *supra* note 122 (noting limited context of *Chicago & Southern Air Lines*).

136. See *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 310 (1972).



be condoned by the judiciary.”<sup>137</sup> More, from 1928 until 1967, presidents who had approved such surveillance were acting under the Supreme Court’s then-prevailing view that the Fourth Amendment was inapplicable to non-trespassory electronic surveillance.<sup>138</sup> There was thus little reason to view any practice during that period as affirmative evidence that presidents understood the scope of their constitutional power invariably to allow warrantless surveillance in the interest of security, particularly as the court could unearth “no similar memoranda from these Presidents advocating unwarranted physical trespasses, to which the Fourth Amendment would have applied.”<sup>139</sup>

So what can be said of the presidential practice of electronic surveillance abroad? The public *legal* literature on the subject is essentially nonexistent. *Keith’s* passing discussion of memoranda from Presidents Roosevelt, Truman, and Johnson all involve varied degrees of *domestic* surveillance.<sup>140</sup> Memoranda by the Office of Legal Counsel that are publicly available undertake a somewhat more detailed analysis of historical practice, but these, too, focus heavily on domestic surveillance activities.<sup>141</sup> Beyond these, I am aware of no legal assessment of historic executive practice of communications surveillance overseas.<sup>142</sup>

Yet while a complete study of historical practice is surely beyond the scope of this paper, even a brief review suggests the story is not as straightforward as the classic account suggests. Consider first the practice that has been cited in

137. *Zweibon*, 516 F.2d at 616.

138. *Id.* at 617 (citing *Olmstead v. United States*, 277 U.S. 438 (1928)).

139. *Id.* at 618.

140. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 310 & n.10 (1972) (discussing without directly citing memoranda reprinted in *United States v. U.S. Dist. Court*, 444 F.2d 651 (6th Cir.1971) (appendix)). Although the 1972 *Keith* opinion cites memoranda from the Roosevelt, Truman, and Johnson administrations, the Court makes no reference to the practices of Presidents Eisenhower or Kennedy (although the opinion notes that Herbert Brownell, Attorney General under President Eisenhower, publicly in a law review article “urged the use of electronic surveillance both in internal and international security matters”, *id.* at 311 & n.11). Moreover, the memorandum issued by President Johnson reprinted in the appendix to the appeals court decision in *Keith* takes a sharply narrower view of the degree of surveillance permissible than Roosevelt or Truman. See *United States v. U.S. Dist. Court*, 444 F.2d 651, 670-71 (6th Cir. 1971) (reprinting memorandum requiring, *inter alia*, that “[e]very agency head shall submit to the Attorney General within 30 days a complete inventory of all mechanical and electronic equipment and devices used for or capable of intercepting telephone conversations . . . a list of any interceptions currently authorized and the reasons for them” and also expressing Johnson’s “strong[] oppos[ition] to the interception of telephone conversations as a general investigative technique” and cautioning that “indiscriminate use of these investigative devices to overhear telephone conversations, without the knowledge or consent of any of the persons involved, could result in serious abuses and invasions of privacy”).

141. See, *e.g.*, 2006 DOJ White Paper, *supra* note 88, at 7; 2004 OLC Memorandum, *supra* note 88, at 41-42.

142. While the federal appeals courts have on several occasions engaged questions involving constitutionality of extraterritorial electronic surveillance, those cases have generally focused on the applicability of the Fourth Amendment warrant requirement and related issues rather than on the existence of presidential authority. See, *e.g.*, *United States v. Bin Laden*, 126 F. Supp. 2d 264, 268 (S.D.N.Y. 2000), *aff’d sub nom.* In re Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 157 (2d Cir. 2008).

support of executive surveillance authority in public legal sources. For instance, it is certainly true that both sides in the Civil War made ample use of new wiretapping possibilities.<sup>143</sup> But between then and World War II, the United States was distinguished from every other major state power in mostly *not* spying on the communications of foreign agents and their governments, having essentially no foreign signals intelligence program in the lead up to World War I.<sup>144</sup> U.S. disengagement in this respect was to some extent a function of discomfort inside the executive branch itself. President Wilson, for example, strongly resisted the development of coordinated government surveillance apparatus, in part, it appears, for fear of compromising U.S. neutrality leading up to World War I.<sup>145</sup> After the war, President Hoover's Secretary of State, Henry Stimson, famously protested the continuance of what foreign U.S. signals intelligence operation had been established during the war, declaring that "it was a highly unethical thing for this Government to do to be reading the messages coming to our ambassadorial guests from other countries."<sup>146</sup> He accordingly ordered the State Department immediately to cease any such activities,<sup>147</sup> and funding was terminated for the key wartime intelligence bureau, which then closed its doors.<sup>148</sup>

Likewise, while it is true that military intelligence developed important *capacity* to intercept Japanese military communications during the 1920's and 30's,<sup>149</sup> actual U.S. signals *collection* between the wars diminished to almost nothing. In addition to radical budget cuts by Congress for relevant operations,<sup>150</sup> the Radio Communications Acts of 1912 and 1927 substantially prohibited the divulgence or interception of radio and telegraph transmissions, thus limiting government access to communications of any kind.<sup>151</sup> Indeed, and centrally important to claims of *presidential* practice, while the necessity of tactical intelligence during wartime prompted the development of new institutional competence and at least temporarily overcame any outstanding ethical

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143. 2006 DOJ White Paper, *supra* note 88, at 15.

144. *See, e.g.*, ANDREW, *supra* note 111, at 24-29 ("On the eve of the First World War . . . the intelligence system of the United States was more backward than any other major power."). The United States was substantially dependent on the British for foreign intelligence during the war, and the U.S. capacity that had been developed by the end of the war was quickly dismantled. *See id.*, at 30-74; *see also* BIDWELL, *supra* note 106, at 90-100, 327-30 (describing extensive budgetary, staffing, organizational and other limits of U.S. intelligence capacity until after the beginning of World War I).

145. ANDREW, *supra* note 111, at 30-67.

146. *Id.* at 72 (quoting Stimson and describing the termination of the office containing the six cryptographers who remained after the end of World War I).

147. *See* BIDWELL, *supra* note 106, at 330. Among the results, military proposals to install a foreign communications intercept station in China while U.S. troops were still stationed there in the 1920s were dropped by 1932. *Id.* at 332.

148. BAMFORD, *supra* note 109, at 17.

149. *See supra* text accompanying notes 110-12.

150. BIDWELL, *supra* note 106, at 529.

151. *See, e.g.*, BAMFORD, *supra* note 106, at 27-28 (describing the resumption of the effect of the Radio Communication Act of 1912 after World War I); *see also* BIDWELL, *supra* note 106, at 328 (describing effect of 1927 Act on military intelligence activities).

inhibitions in the U.S. government,<sup>152</sup> the expansion of foreign intelligence collection during the World Wars was generally carried out *pursuant to legislative authorization*. Thus, for example, the first listening posts to intercept messages originating in Mexico during World War I were created as part of the censorship operations of the military intelligence division, operations authorized by Executive Order—Orders expressly issued pursuant to several acts of Congress passed at the outset of the war.<sup>153</sup> Likewise, the often cited program by Roosevelt to access communications into and out of the United States lasted for all of eight days before that program was brought within congressional authorization. Moreover, at the end of World War I, the censorship office that Roosevelt’s order (and subsequent legislation) established was legislatively disbanded after the war.<sup>154</sup>

The failure of the classic case to fully engage the role of Congress in these and other respects is of no small moment. As Justice Jackson famously explained, “[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”<sup>155</sup> It is thus of negligible significance to establishing the scope of the President’s independent constitutional power to demonstrate that one president once took some action, or even that a series of presidents took similar action, if Congress had already authorized, or subsequently rejected or limited the executive’s behavior. Rather, what matters for purposes of assessing whether executive practice has given a “gloss” to the meaning of Article II is “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . .”<sup>156</sup> The story of U.S. surveillance practice is of constitutionally indeterminate effect without knowing the role of Capitol Hill.

In this regard, it is interesting to note that the sources supporting the classic case in favor of broad presidential power here—the judicial opinions and Justice Department memoranda discussed above—generally conclude their discussion of presidential practice in World War II.<sup>157</sup> Yet to the extent the record of surveillance practice thereafter is publicly available, it is clear that U.S. foreign communications surveillance subsequently developed bulk collection programs

152. See, e.g., O’TOOLE, HONORABLE TREACHERY, *supra* note 106 (describing the U.S. wartime development its own capacity to intercept and decode wire and radio communications).

153. See BIDWELL, *supra* note 106, at 195-200. Censorship activities had been authorized by Executive Order 2604, issued pursuant to the Constitution *and* the Joint Resolution passed by Congress on April 6, 1917, declaring the existence of a state of war. Executive Order 2729A, establishing (among other things) a national Censorship Board, was adopted pursuant to the Espionage Act and the Trading with the Enemy Act, both of 1917. U.S. censorship operations ended by early 1919. See BAMFORD, *supra* note 109, at 11.

154. BAMFORD, *supra* note 109, at 11-12.

155. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

156. *Id.* at 610-11 (Frankfurter, J., concurring); see also *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981) (“Past practice does not, by itself, create power, but ‘long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . .” (citing *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915))).

157. See, e.g., 2004 OLC Memorandum, *supra* note 88; 2006 DOJ White Paper, *supra* note 88.

of seemingly direct historical relevance to modern E.O. 12333 activities. Operation “Shamrock,” for instance, gave the NSA access to copies of virtually all telegraphic traffic sent to, from or transiting the United States from 1947 to 1973.<sup>158</sup> A separate NSA program known as “Minaret” involved the interception of international communications, looking for “selected American citizens and groups on the basis of lists of names [‘watchlists’] supplied by other government agencies.”<sup>159</sup> Why omit such significant examples of U.S. practice? Because it was precisely this type of broad collection program impacting Americans that Congress has found most disturbing.<sup>160</sup> Both Shamrock and Minaret were discontinued in the mid-1970s after they were exposed by congressional committees investigating the intelligence agencies.<sup>161</sup> By 1978, Congress had agreed on the Foreign Intelligence Surveillance Act (FISA),<sup>162</sup> enacted to regulate exactly the executive practice the *Keith* Court had cited as then-relevant history.<sup>163</sup> And while FISA initially contained a provision purporting to preserve whatever existing constitutional authority the President enjoyed to conduct warrantless foreign intelligence surveillance,<sup>164</sup> that provision was later repealed and replaced with language making clear that FISA and specific provisions of the U.S. criminal code were to be the “exclusive means by which electronic surveillance . . . may be conducted,” at least within the United States.<sup>165</sup>

That said, FISA did not purport to regulate foreign intelligence surveillance activities abroad,<sup>166</sup> and such activities certainly continued after FISA’s passage. Revelations beginning in the late 1980’s and 1990’s disclosed an overseas intelligence collection program known as “Echelon,” a software package that enabled the NSA to assemble and search all signals intelligence collected by the United States, the United Kingdom, Canada, Australia and New Zealand (with whom the United States still has intelligence sharing arrangements) in a unified

158. S. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, book 2, at 169 (1976).

159. S. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, book 3, at 739 (1976) [hereinafter *Intelligence Activity Report Supplement to S. REP. NO. 94-755*].

160. See *Halkin v. Helms*, 598 F.2d 1, 4 (D.C. Cir. 1978); see also *Intelligence Activity Report Supplement to S. REP. NO. 94-755*, supra note 159, at 735-83.

161. *Intelligence Activity Report Supplement to S. REP. NO. 94-755*, supra note 159, at 740-44.

162. FISA Amendments Act of 1978, 50 U.S.C. § 1801 et seq.

163. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297 (1972).

164. FISA Amendments Act, Pub. L. 95-511, 92 Stat. 1783 (1978).

165. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: A Constitutional History*, 121 HARV. L. REV. 941, 1078 (2008) (citing 50 U.S.C. §§ 1801(f)(1)-(4), 1803(a), 1821(5), 1822(c)).

166. It is not clear from the legislative history why FISA was limited to searches occurring within the United States, apart from general concerns about broad differences in domestic and foreign intelligence surveillance. See, e.g., S. REP. NO. 95-701, at 7 n. 2 (1978) (noting that “legislation [governing foreign intelligence surveillance abroad] should be considered separately because the issues are different than those posed by electronic surveillance within the United States”).

network.<sup>167</sup> Yet again here, the program once revealed prompted a set of congressional (and parliamentary) hearings and subsequent actions, including the new requirement that NSA and CIA Directors and the Attorney General provide Congress detailed explanation of the legal standards employed in signals intelligence collection.<sup>168</sup> This broad pattern—public revelations followed by the imposition of new statutory restrictions—emerged again in recent years as the Snowden revelations prompted Congress to engage, and enact new legislation restricting executive activities.<sup>169</sup> Even without knowing the full record of executive or legislative actions (more on which below), it seems thus at a minimum possible to conclude that the publicly available post-war history of congressional engagement suggests something far less straightforward than the existence of a “systematic, unbroken, executive practice” of foreign intelligence collection, “never before questioned.”<sup>170</sup>

Yet while it may be possible to demonstrate Congress has been anything but wholly quiescent in the realm of foreign intelligence surveillance, the account of when Congress has acquiesced and when it has not is, in available public records, unavoidably incomplete. Because the central congressional means of regulating executive intelligence activities is through legislative authorization and appropriations statutes, and because those laws have carried with them for more than 30 years detailed classified addenda, it has been and remains impossible to determine based on the open literature alone exactly what role Congress has played in authorizing, approving or regulating executive branch foreign communications surveillance.<sup>171</sup>

The absence of this information cuts both ways. It may be that Congress (or at least some handful of intelligence oversight committee members) has known

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167. See, e.g., JAMES BAMFORD, *BODY OF SECRETS: ANATOMY OF THE ULTRA-SECRET NATIONAL SECURITY AGENCY* 403-05 (2002) (describing Echelon); Dan Froomkin, *After 27 Years, Reporter Who Exposed ECHELON Finds Vindication in Snowden Archive*, *THE INTERCEPT* (Aug. 3, 2015, 11:04 AM), <https://theintercept.com/2015/08/03/-years-reporter-exposed-echelon-finds-vindication-snowden-archive/>.

168. See, e.g., Lawrence D. Sloan, *Echelon and the Legal Restraints on Signals Intelligence*, 50 *DUKE L.J.* 1467, 1488-89 (2001) (describing congressional hearings in response to concerns about Echelon and enactment of amendment to intelligence authorization act); Eur. Parliament, Rep. of the Temporary Comm. on the ECHELON Interception System, *Rep. on the Existence of a Global System for the Interception of Private and Commercial Communications (ECHLON Interception System) (2001/2098(INI))*, EUR. PARL. DOC. A5-0264/2001 (July 11, 2001), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2001-0264+0++PDF+V0//EN&language=EN>.

169. USA Freedom Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (2015). For more detail about new restrictions passed by Congress, see Cindy Cohn & Rainey Reitman, *USA Freedom Act Passes: What We Celebrate, What We Mourn, and Where We Go From Here*, *ELECTRONIC FREEDOM FOUND.* (June 2, 2015), <https://www.eff.org/2015/05/usa-freedom-act-passes-what-we-celebrate-what-we-mourn-and-where-we-go-here>.

170. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring); see also *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

171. Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 *HARV. NAT'L SEC. J.* 241, 255-63 (2015). Among other things, Congress is not required to publish any intelligence appropriations information beyond the bottom-line spending amount. See, e.g., *Implementing Recommendations of the 9/11 Commission Act of 2007*, Pub. L. No. 110-53, 121 Stat. 266 (2007).

the full extent of E.O. 12333 activities and that this knowledge should be considered evidence of congressional acquiescence in (or even authorization of) certain E.O. 12333 practices.<sup>172</sup> Or it may be that Congress has actively worked to regulate E.O. 12333 activities in various respects, in which case wholesale acquiescence would be impossible to show. In all events, it is clear that one of the key pieces of evidence one might marshal in support of independent executive power here is effectively unavailable for public constitutional analysis. The significance of this fact for interpreting the scope of executive power—in particular how clear a case of congressional acquiescence need be shown—is addressed further in Part III below.

Return then to the functional dimension of the classic case. In shallow form, the functional argument is that: (1) the government must have all the power it needs to combat threats to national security, (2) some of the power necessary to combat these threats is only useful if exercised quickly and in secret, and (3) the executive branch has unique competencies in these respects, competencies that will be fatally compromised if exercised with the regular engagement of the other branches.<sup>173</sup> Today, one might begin by questioning the continued accuracy of the latter claims, particularly the standard assumption of the executive's competence in keeping secrets. Congress' relative success at keeping authorization and appropriations conditions secret over decades—coupled with the relative failure of the executive branch in recent years to prevent the leak of vast swaths of classified information—would seem at a minimum to require some reconsideration of the executive's superiority in this respect.<sup>174</sup>

But even if the secrecy presumption were valid, or valid enough to guide constitutional interpretation in the regular course, there is a deeper set of questions posed by the claim that the executive must have all the power it says it needs to effectively protect the United States from foreign threats—namely a question about the nature of structural power under the Constitution. Is it sufficient for the President to assert the necessity of a particular power to protect

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172. The history of congressional-intelligence community relations in this regard suggests ample reason for skepticism, however. See, e.g., AMY B. ZEGART, *EYES ON SPIES: CONGRESS AND THE UNITED STATES INTELLIGENCE COMMUNITY* 102-04 (2011) (describing structural challenges congressional oversight committees face in accessing information about agency activities).

173. See 2006 DOJ White Paper, *supra* note 88, at 37 (executive requires a greater degree of flexibility in this field to respond with speed and absolute secrecy to the ever-changing array of foreign threats it faces); see also *United States v. Curtiss-Wright*, 299 U.S. 304, 320 (1934) (“Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.”); *United States v. Truong Dinh Hung*, 629 F.2d 908, 913 (4th Cir. 1980) (contending that requiring the President to observe a warrant requirement in foreign intelligence surveillance would reduce the President’s flexibility in responding to threats that “require the utmost stealth, speed, and secrecy,” and may compromise security by increasing “the chance of leaks regarding sensitive executive operations”).

174. Compare, e.g., Rudesill, *supra* note 171, at 253-83 (legislative secrecy), with, e.g., Jo Becker, et al., N.S.A. Contractor Arrested in Possible New Theft of Secrets, N.Y. TIMES (Oct. 5, 2016), <https://www.nytimes.com/2016/10/06/us/nsa-leak-booze-allen-hamilton.html> (listing disclosures by Wikileaks and Edward Snowden as among major recent disclosures of classified information). The facial deficiencies of this argument are discussed further in Part III.

the security of the nation, or must there be some more vigorous, process-based or other demonstration of functional need? For that matter, when it comes to establishing historical practice and congressional acquiescence sufficient to inform the meaning of Article II, should the President really have to show an *unquestioned* historical practice of the *particular kind* of foreign intelligence surveillance at issue to establish the existence of power here? As Part III shows, it is impossible to answer these more detailed questions of interpretive significance without relying on a first order set of conclusions about structural constitutional analysis.

### III. LESSONS FROM THE STRUCTURAL CONSTITUTION

In addition to simply listing the basic powers available to the branches, the Constitution's structural provisions—the “architecture-defining, power-conferring provisions of the Constitution”<sup>175</sup>—have long been a central source of insight into constitutional meaning. As an interpretive methodology,<sup>176</sup> structural reasoning invites us to characterize *what* the power-granting clauses *do*—for example, they list or enumerate certain powers—and infer from that characterization a logical interpretive presumption about the meaning of any particular power—for example, whatever “the executive power” means, it must mean something specific and limited, something less than all the power in the world, else there is little point in making a list of powers granted in the first place.<sup>177</sup> The Constitution's structural provisions have also centrally informed our understanding of the document's substantive goals. *Why* were the power-granting clauses drafted and assembled as characterized, to accomplish what purpose or end?<sup>178</sup> For example, as history and the Supreme Court regularly tell us, the Constitution enumerates powers at least in part for the purpose of protecting a free society from government tyranny.<sup>179</sup> Because the structural sharing of power is about “ensuring that laws enacted in excess of delegated governmental power cannot direct or control [the] actions” of the people,<sup>180</sup> the Court has thus reasoned, Article III must be understood to afford *individuals* standing to challenge whether the government has exceeded its power to enact laws “necessary and proper for carrying into Execution” the Treaty Power under Article II.<sup>181</sup>

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175. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1246 (1995).

176. See, e.g., BLACK, *supra* note 28.

177. See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 U.S. 2566 (2012) (Scalia, J., dissenting).

178. See, e.g., Barkow, *supra* note 28, at 997; Brown, *supra* note 28, at 1523-26.

179. See *infra* Part III.A.

180. Bond v. United States, 564 U.S. 211, 222 (2011) (“Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. (Citation omitted). By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.”); *id.* at 222 (“[w]hen government acts in excess of its lawful powers, [individual] liberty is at stake”).

181. *Id.* at 226 (citing U.S. CONST. art. I, § 8, cl. 18).

Stripped of other methodological trappings, particularly an indeterminate account of historical practice and legislative acquiescence, the argument for 12333-style foreign intelligence collection turns out to hinge almost entirely on this kind of structural reasoning—specifically, the claim that executive foreign affairs power outside the United States is substantially unbounded by the implications of enumeration that apply to the other branches,<sup>182</sup> and the separate assumption that functional necessity may be assessed independent of other structural purposes, including the preservation of liberty. This Part argues that, to the extent such views were ever viable, they can no longer be sustained. Indeed, structural reasoning, more properly applied, supports just the opposite conclusion: Where an asserted power burdens the structural purpose of ensuring a free political society, the Constitution demands particularly exacting evidence of functional necessity, historical practice, legislative approval or acquiescence, inside the United States or out, to support its executive exercise.

### A. *The Weight of Structural Purpose*

It would be foolish to imagine that the structure of constitutional governance was designed to fulfill only one purpose, and indeed the Court and scholars have long recognized that the framers intended the structure to serve multiple purposes at once.<sup>183</sup> While there is ample room for argument about some of these, there can be no dispute that the purposes of limiting and separating government power included both the need to have a government functionally capable of sustaining its own critical functions (unlike the Articles of Confederation government it replaced), and the desire to protect a free political society, republican in its nature, unburdened by tyrannical government interference. Evidence for the first of these purposes may be found in the framers' own descriptions,<sup>184</sup> and in numerous judicial opinions since in which functional effectiveness has been a basis for evaluating the constitutionality of executive power, including foreign intelligence surveillance,<sup>185</sup> as discussed above and again below.

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182. See 1986 OLC Memorandum, *supra* note 31, at 160-161 (positing that the President's power must include "all the discretion traditionally available to any sovereign in its external relations, except insofar as the Constitution places that discretion in another branch of the government"); see also, e.g., Prakash & Ramsey, *supra* note 31, at 236 ("unallocated foreign affairs powers [are] presidential executive powers").

183. See Pearlstein, *supra* note 116, at 1585-86 (discussing cases and history); see *id.* at 1549-629 (citing, *inter alia*, Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000), and Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996)).

184. See, e.g., THE FEDERALIST No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (describing the import of providing the new federal government "with all the powers requisite to the complete execution of its trust"); THE FEDERALIST No. 15, at 146 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("Are we in a condition to resent or to repel the aggression? We have neither troops, nor treasury, nor government.").

185. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981) (declining to challenge executive authority where settlement of foreign claims was "necessary incident to the resolution of a major foreign policy dispute between our country and another"); *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 312 (1972) (arguing that it would be "contrary to the public interest" to deprive the government of the power to engage in communications surveillance where existential threats to



The second of these purposes, the role of structure in the protection of liberty, is if anything even more clearly established. Yet given its substantial absence from the classic case above, and the dominance of rights-based arguments in debates about bulk collection more generally, it is worth pausing to recall in more detail the structural interest in societal liberty here. As Madison memorably explained, the reason to guard against “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands” was that such concentration of power “may justly be pronounced the definition of tyranny.”<sup>186</sup> Having committed to the creation of a republican government, empowered to support a free and independent people in their “pursuit of [h]appiness,”<sup>187</sup> the framers’ fear that the newly empowered federal government would be capable of exerting tyrannical control required restricting the new government to only a *partial* delegation of the power otherwise wholly possessed by the people. So clear was the expectation that this structural constraint of power would suffice to protect societal liberty, the Constitution’s Federalist supporters, including Madison and Hamilton, famously opposed the idea of a Bill of Rights as nonsensical and even dangerous. The notion of listing certain rights as separately protected undermined the central assumption that the people reserved all rights they did not expressly delegate away.<sup>188</sup> In Hamilton’s words, there could be no point in explaining “that things shall not be done which there is no power to do.”<sup>189</sup>

Under pressure from Antifederalists, who feared the new federal government had gained disproportionate power compared to the states, Madison eventually bowed to the idea of attaching the Bill of Rights after the Constitution was ratified; but his agreement came with the insistence that the amendments provided not new, but “*additional* guards in favor of liberty.”<sup>190</sup> To codify this

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security were at stake); *see also* 2004 OLC Memorandum, *supra* note 88, at 41 (noting the importance of gathering intelligence to thwart further attacks on the United States like that of September 11).

186. THE FEDERALIST No. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961); *see also* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 350 (Jonathan Elliot ed., 1941) (“The true principle of government is this—make the system complete in its structure, give a perfect proportion and balance to its parts, and the powers you give it will never affect your security.” (quoting Hamilton)); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 549 & n.42 (1998); HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 71 (1981) (explaining that the Constitution was created to ensure against tyrannical government and to protect liberty).

187. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see also* Edmond N. Cahn, *Madison and the Pursuit of Happiness*, 27 N.Y.U. L. REV. 265, 265 (1952) (“Madison’s *political* philosophy of republicanism corresponds to the *ethical* doctrines and convictions which are epitomized in a single phrase of the Declaration of Independence . . . ‘[T]he pursuit of happiness [sic].’”).

188. *See* THE FEDERALIST No. 84, at 578 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (explaining that bills of rights “have no application to constitutions professedly founded upon the power of the people” because the people “surrender nothing; and as they retain every thing, they have no need of particular reservations”); WOOD, *supra* note 186, at 538 (“No power was given to Congress to infringe on any one of the natural rights of the people by this Constitution.” (quoting Theophilus Parsons of Massachusetts)).

189. THE FEDERALIST No. 84, at 579 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

190. WOOD, *supra* note 186, at 543 (emphasis added).

understanding, and to help guard against the “dangerous” argument that because a bill of rights would “contain various exceptions to powers which are not granted,” the amendments “would afford a colorable pretext to claim more [powers] than were granted,”<sup>191</sup> Madison proposed and won enactment of the Ninth Amendment.<sup>192</sup> While the Ninth Amendment became the subject of vigorous academic controversy after the Court’s invocation of it in support of an affirmative right to privacy in *Griswold v. Connecticut*,<sup>193</sup> there remains broad agreement that the Amendment at a minimum exists “to preserve . . . the scheme of limited federal powers, to the end of securing the people’s rights.”<sup>194</sup> Both concurrence and dissent in *Griswold* agreed, “as every student of history knows, [the Amendment was] to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication.”<sup>195</sup> In this way, the Constitution’s primordial form of rights protection was to remain the structural limits on power themselves.<sup>196</sup>

That the Constitution’s basic framework would provide a bulwark against intrusions on the activities of a free people was from the beginning more than just a theoretical notion. Less than a decade after the Bill of Rights was drafted and submitted to the states for ratification, Congress passed the Alien and Sedition Acts of 1798, laws that (among other things) criminalized speech critical of the federal government. The United States was then engaged in an ongoing naval conflict with France (over outstanding Revolutionary War debt), and supporters of the act believed it necessary to guard against a threat of

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191. THE FEDERALIST No. 84, at 579 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“Why for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?”).

192. See *Griswold v. Connecticut*, 381 U.S. 479, 489-90 (1965) (Goldberg, J., concurring) (citing I ANNALS OF CONGRESS 439 (Gales & Seaton eds., 1834)); see also II JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 626-627 (5th ed. 1891); U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

193. See *Griswold*, 381 U.S. at 486-89. For a summary of part of the scholarly debate on the topic, see, for example, Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498 (2011). See also Thomas B. McAfee, *A Critical Guide to the Ninth Amendment*, 69 TEMP. L. REV. 61, 61-62 (1996) (summarizing debate over which “rights retained by the People” it was designed to protect).

194. McAfee, *supra* note 193, at 61-62; see also *id.* at 65 (describing the views of Justices Black and Stewart as “the conventional understanding”).

195. *Griswold*, 381 U.S. at 520 (Black, J., dissenting); see also *id.*, at 529-30 (Stewart, J., dissenting) (“The Ninth Amendment, like its companion the Tenth, . . . was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers.” (internal citations omitted)). The Tenth Amendment likewise would function to constrain federal power for the purpose of protecting those powers reserved to the states “or to the People” as a whole. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people.”).

196. See THE FEDERALIST No. 84, at 581 (Jacob E. Cooke ed., 1961) (“[T]he Constitution is itself, in every rational sense, and to every useful purpose, a Bill of Rights.”).

rebellion by French and French-sympathizing immigrants.<sup>197</sup> Madison was among the law's staunchest opponents, particularly challenging its constitutionality. But his constitutional argument was grounded first not on the First Amendment right to free speech, but rather on the claim that Congress must be assumed to lack the structural authority to regulate the press.<sup>198</sup>

However clear this history may be, even the most committed originalist would be at pains to reconcile such a limited conception of federal power with the operation of the federal government as it exists today. Does such a power-centered plan for the protection of liberty—do such structural arguments at all—still matter, in an era when Congress' power to regulate “interstate commerce” includes the authority to regulate a crop grown in the back yard purely for personal use,<sup>199</sup> or when the President has the (unenumerated) power to, for example, conclude executive agreements implicating Americans' property interests?<sup>200</sup> For that matter, is attention to the structural scheme for the protection of liberty still necessary when both the federal government and the states are today held in check by a now well-developed Bill of Rights?<sup>201</sup>

As it turns out, the notion that structural reasoning should play a role in protecting against various forms of government intrusion on liberty has not only remained salient, it has blossomed in constitutional theory and practice, particularly where the Court has seemed otherwise stymied by idiosyncrasies in the text and doctrinal development of protections codified in the Bill of Rights. Consider, for example, the constitutional “right to travel,” the existence of which the Supreme Court has recognized repeatedly throughout the nation's history, but which has perennially lacked a stable textual home.<sup>202</sup> While the Court has variously suggested that a right to travel might be found in the Due Process Clause,<sup>203</sup> the Equal Protection Clause,<sup>204</sup> or even a reanimated Privileges and Immunities Clause,<sup>205</sup> it has at least as frequently located the “right” to travel in such places as the Article I power of Congress under the Commerce Clause,<sup>206</sup> or indeed in the structural “objects which that Union was intended to

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197. See GORDON S. WOOD, *EMPIRE OF LIBERTY* 239-75 (2011) (providing a historical account of the 1798 naval conflict with France).

198. For a discussion of this history, see Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J.L. & POL. 63, 68-69 (1987).

199. See *Gonzales v. Raich*, 545 U.S. 1 (2005).

200. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

201. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (recognizing that the First Amendment applied to the states through the Fourteenth Amendment).

202. See *Crandall v. Nevada*, 73 U.S. 35, 48-49 (1867) (citing *The Passenger Cases*, 7 How. 283 (1849)); see also *United States v. Guest*, 383 U.S. 745, 759 (1966) (“Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, . . . [a]ll have agreed that the right exists.”).

203. *Kent v. Dulles*, 357 U.S. 116, 126-27 (1958) (“The right to travel abroad is part of the ‘liberty’ of which the citizen cannot be deprived without due process of law . . .”).

204. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1966).

205. *Saenz v. Roe*, 526 U.S. 489, 501-02 (1999).

206. *Edwards v. California*, 314 U.S. 160, 172 (1941).

attain.”<sup>207</sup> As the Court reasoned about those objects in one such case, because the Constitution creates a republican form of government, with institutions whose power is to be governed and constrained by the people, then the people must be understood to live in a society that permits “the freest intercourse between the citizens of the different States,” in order to access those institutions wherever they may be found.<sup>208</sup>

Charles Black conceived the structural theory of the right to travel even more broadly in his landmark 1969 essay *Structure and Relationship in Constitutional Law*—as flowing necessarily from the “consequence of . . . being one of the people in a unitary nation, to which, because of its nationhood, internal barriers to travel are unthinkable.”<sup>209</sup> Indeed, for Black, the derivation of an individual right from the structural objects of the Constitution should be understood as an unexceptional outcome of structural reasoning. While “we have preferred the [interpretive] method of purported explication or exegesis of the particular passage considered as a directive of action,”<sup>210</sup> the First Amendment, like the right to travel, is likewise “only evidentiary of what would in any case be reasonably obvious—that petition and assembly for the discussion of national governmental measures are rights founded on the very nature of a national government running on public opinion.”<sup>211</sup> In this view, even if there had never been a Bill of Rights, the Constitution would have to be read to protect certain elements of societal freedom in order for the governing structure it sets forth to function.<sup>212</sup>

One need not go nearly as far as Black in finding affirmative rights implicit in structural text, however, to recognize the ways in which, in a range of settings, the contemporary Court’s interpretation of the scope of federal power has been informed by the structural purpose of preserving a free society. Perhaps most well-known among examples is the Court’s modern Commerce Clause jurisprudence, where, in arguing for a limited construction of Article I grants of legislative power, the Court has invoked the purpose of protecting not just states’ rights but individual liberty as well.<sup>213</sup> As five justices thus urged in

207. *Crandall*, 73 U.S. at 49 (citing *The Passenger Cases*, 7 How. 283); see also *Edwards*, 314 U.S. at 173-74 (“The Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”).

208. *Crandall*, 73 U.S. at 48 (“Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States from the most remote States or territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every State in the Union . . .” (quoting *The Passenger Cases*, 7 How. 283 (dissenting opinion))).

209. BLACK, *supra* note 28, at 29 (1969) (citing *Edwards v. California*, 314 U.S. 160 (1941)).

210. BLACK, *supra* note 28, at 7.

211. *Id.* at 41.

212. *Id.* at 7.

213. See, e.g., *Printz v. United States*, 521 U.S. 898, 918-25, 923 n. 13 (1997) (holding that “[o]ur system of dual sovereignty” is incompatible with the congressional requirement that state officials be compelled to help implement federal gun control provisions); see also John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009) (criticizing

finding elements of the Affordable Care Act beyond Congress' Commerce Clause power, a legislative power to compel individuals to purchase health insurance "is not the country the Framers of our Constitution envisioned."<sup>214</sup> Justice Scalia in that case put it most directly: "What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power . . . . Whatever may be the conceptual limits upon the Commerce Clause . . . , they cannot be such as will enable the Federal Government to regulate all private conduct . . . ."<sup>215</sup>

While the Court has taken pains to avoid as frequently elaborating on the scope of Article II,<sup>216</sup> it has with far less controversy relied on the structural purpose of preserving liberty to help navigate the challenge modern administrative law poses to the traditional separation of powers.<sup>217</sup> Most recently, the Court in *Bond v. United States* emphasized that federalism, too, was, at base, about "protect[ing] the liberty of the individual from arbitrary power."<sup>218</sup> Concluding that a criminal defendant has standing to challenge the validity of a federal charging statute on the grounds that the statute exceeded Congress' powers under the Tenth Amendment,<sup>219</sup> the *Bond* Court remanded the case for consideration of the merits of defendant's claim—that the law at issue exceeded

these and other "new federalism" cases for displacing acts of Congress by relying on structural principles rather than any particular provision of the constitutional text) (citing also Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (requiring a clear statement of legislative intent before interpreting a statute "to alter the usual constitutional balance between the States and the Federal government" (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)) (internal quotation marks omitted)).

214. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 554-55 (2012) (citing THE FEDERALIST No. 45, at 293 (James Madison), No. 48, at 309 (James Madison) (Jacob E. Cooke ed., 1961)). As Chief Justice Roberts explained, allowing Congress not just to "regulate" existing commerce, but to force individuals to participate in commerce that they otherwise would avoid, would be "fundamentally changing the relation between the citizen and the Federal Government." *Sebelius*, 567 U.S. at 555.

215. *Sebelius*, 567 U.S. at 647 (Scalia, J., dissenting).

216. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 535-37 (2004) (noting that, having found adequate statutory authority for the detention of Afghanistan battlefield detainees, the Court need not reach the question of the executive's detention power under Article II).

217. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 120 (1976) ("When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner."); *see also* *Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." (citing *Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714, 725 (1986))).

218. *Bond v. United States*, 564 U.S. at 211, 222 (2011) ("Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. (Citation omitted). By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.").

219. *Id.* (noting "the individual liberty secured by federalism is not simply derivative of the rights of the States.").

the government's power to enact laws "necessary and proper for carrying into Execution" the President's Treaty Power under Article II.<sup>220</sup>

Indeed, recognition that the protection of a free society is a fundamental purpose of the structural Constitution has appeared with at least as much frequency in the Court's cases involving national security as in its other separation-of-powers cases.<sup>221</sup> Thus the Court's reframing of a case involving the right of non-citizen detainees at Guantanamo Bay to seek a writ of habeas corpus as an effort to reinforce "an essential mechanism of the separation-of-powers scheme."<sup>222</sup> On its face, the *Boumediene* detainees' suit presented the most basic question of individual liberty—a right to challenge the legality of state imprisonment. But in constitutional terms, the case was best understood as ensuring that it was impossible "for the political branches to govern without legal constraint."<sup>223</sup> As the Court put it directly (but hardly for the first time) in an earlier case challenging executive detention authority: "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."<sup>224</sup>

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220. *Id.* (citing U.S. Const., Art. I, § 8, cl. 18). *Cf.* *Zivotofsky v. Clinton*, 566 U.S. 189 (2012) (Breyer, J., dissenting) (arguing that congressional power to override an executive passport determination presented a non-justiciable political question). *But see id.* at 218 (Breyer, J., dissenting) (noting the case might not present a political question if the claimant had instead asserted "an interest in vindicating a basic right of the kind that the Constitution grants to individuals and that courts traditionally have protected from invasion by the other branches of Government.").

221. *See, e.g., Loving v. United States*, 517 U.S. 748, 756 (1996) ("Even before the birth of this country, separation of powers was known to be a defense against tyranny." (citing both Montesquieu, *The Spirit of the Laws* 151–52 (T. Nugent trans. 1949) and 1 W. Blackstone, *Commentaries* \*146–47, \*269–70)); *Reid v. Covert*, 354 U.S. 1, 23–24 (1957) ("The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better to secure liberty . . ."); *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946) ("Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued." (citing *Ex parte Quirin*, 317 U.S. 1, 19 (1942))).

222. *Boumediene v. Bush*, 553 U.S. 723, 743–44 (2008) (describing the Suspension Clause as an "exception" to the "power given to Congress to regulate courts"); *see also* U.S. CONST., art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

223. *Boumediene*, 553 U.S. at 765; *see also id.* ("The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.").

224. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (emphasis omitted) (citing *Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("[I]t was 'the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.'"); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) ("[T]he war power . . . is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties."); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) ("Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid.").

This summary may suffice for the moment to establish the existence and continued salience of this particular structural purpose, at least in broad contours. We return below to the question how this—or any—such broad purpose may be distilled to useful guidance in interpreting the scope of constitutional power in a particular case. For now, we revisit the classic case for executive foreign intelligence power, better able to put what structural rationale it provides in clearer context.

### B. *The Unstructured Executive*

Facing an uncertain text, a lack of judicial precedent on point, and an at best indeterminate case for the view that Congress has historically acquiesced in an unbroken practice of foreign communications surveillance (much less bulk collection impacting the communications of U.S. nationals), advocates of E.O. 12333-type executive power are left to fall back on a set of quintessentially structural claims. The first is the position that, notwithstanding standard assumptions about the limited nature of enumerated constitutional power, the President's power in "external relations" must include "all the discretion traditionally available to any sovereign . . . except insofar as the Constitution places that discretion in another branch of the government."<sup>225</sup> In surveillance practice, this appears to amount to the claim that, as long as Congress, in the exercise of its own constitutional authority, has not expressly prohibited a particular exercise of executive surveillance power, the executive should be presumed to have all power to gather intelligence outside the United States through whatever means he deems of value. Second, and independent of any structural purpose in the preservation of liberty, the functional purpose of effective government requires all necessary and otherwise unallocated surveillance power to rest with the executive, as the most functionally competent branch in foreign affairs.<sup>226</sup>

While such claims have long been subject to criticism, the bulk collection context highlights the respects in which they must be understood to rest on increasingly unsteady ground.

1. *The Sovereign Unbound Abroad.* – Written in 1972, the *Keith* Court's opinion that the President has Article II power to conduct domestic intelligence surveillance, and perhaps even broader such power abroad, was issued against what was then a still-working theory of constitutional law, most associated with 1934's *United States v. Curtiss-Wright*, that the power of the executive in the "vast external realm" did "not depend upon the affirmative grants of the Constitution," but rather on those powers of external sovereignty that predate the Constitution.<sup>227</sup> As President Truman (whose surveillance practice the *Keith*

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225. 1986 OLC Memorandum, *supra* note 31, at 161.

226. *See, e.g.,* Prakash & Ramsey, *supra* note 31, at 236 ("unallocated foreign affairs powers [are] presidential executive powers").

227. *United States v. Curtiss-Wright*, 299 U.S. 304, 318-19 (1934). The 6th Circuit in *Keith* rejected the government's reliance on *Curtiss-Wright* and other war powers or foreign relations powers cases as

Court relied on) had put it: “[T]he power of the President should be used in the interest of the people, and in order to do that the President must use *whatever power* the Constitution does not expressly deny him.”<sup>228</sup> While this *Curtiss-Wright* view of extra-constitutional executive power was roundly criticized from the outset,<sup>229</sup> and while there was even at the time ample support for the position that Congress could restrict the President’s power to undertake many foreign affairs activities,<sup>230</sup> the lower courts and the Justice Department continued to invoke *Curtiss-Wright* regularly to support the view that executive power in foreign affairs was not limited by the ordinary implications of enumerated power.<sup>231</sup> Indeed, with constitutional thinking about executive power in foreign intelligence essentially frozen in time since *Keith*,<sup>232</sup> the *Curtiss-Wright*-type view of executive power has remained an essential premise underlying the constitutional justification for the exercise of executive foreign intelligence surveillance power abroad.<sup>233</sup>

To the extent that *Curtiss-Wright* view of executive power was ever reconcilable with the idea of enumerated power,<sup>234</sup> it has today been conclusively rejected by the Supreme Court. The Court has not once since *Curtiss-Wright* embraced the notion that the President’s power outside the United States is unmoored by the Constitution, and has instead repeatedly begun its analyses of presidential power with reference to the *Youngstown* view that the “President’s power . . . must stem either from an act of Congress or from the Constitution itself.”<sup>235</sup> The Court’s rejection of *Curtiss-Wright* became particularly explicit in 2015’s *Zivotofsky v. Kerry*. While recognizing for the first time a narrow exclusive executive power that prohibits Congress from contradicting a position the President has previously taken on the recognition of a foreign govern-

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supporting a claim of presidential domestic surveillance power. United States v. U.S. Dist. Court, 444 F.2d 651, 658-59 (6th Cir. 1971). The Supreme Court in *Keith* made no mention of *Curtiss-Wright*. See United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297 (1972).

228. MARCUS CUNLIFFE, *AMERICAN PRESIDENTS AND THE PRESIDENCY* 343 (2d ed., rev. 1976) (emphasis added).

229. See, e.g., Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 28-32 (1973) (criticizing the decision and its resulting impact).

230. See, e.g., *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177 (1804) (recognizing legislative limitation on presidential power to use force); see also Barron & Lederman, *supra* note 165, at 947 (detailing the history of legislative restrictions on presidential military powers).

231. See, e.g., United States v. U.S. Dist. Court for E. Dist. Of Mich., 444 F.2d 651 (6th Cir. 1971) (discussing government brief); U.S. Dep’t of Justice, Office of Legal Counsel, Memorandum Opinion for the Special Counsel to the President, Presidential Authority to Permit IncurSION Into Communist Sanctuaries in the Cambodia-Vietnam Border Area (May 14, 1970), <https://www.justice.gov/file/20821/download>.

232. See *supra* text accompanying note 127 (reasons why there has been no examination of the scope of executive power in the context of current mass surveillance controversies).

233. See *supra* note 31.

234. *But see, e.g., Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 635 (Jackson, J., concurring) (“President’s power . . . must stem either from an act of Congress or from the Constitution itself.”) (distinguishing, rather than overruling, *Curtiss-Wright*).

235. See, e.g., *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)).



ment,<sup>236</sup> *Zivotofsky's* majority and dissent both reached out to call into fatal question the *Curtiss-Wright* dicta describing the President as unbound by ordinary constitutional limits on power outside the United States. As the Chief Justice put it, tweaking the Solicitor General for citing the case “no fewer than ten times” in his brief, “our precedents have never accepted such a sweeping understanding of executive power.”<sup>237</sup>

More important, even if *Curtiss-Wright* itself had not been so discredited, the assumptions on which its view of executive power is based can no longer be reconciled with the world as it is. The executive power *Curtiss-Wright* described was one over “foreign affairs” as that category was understood in a largely pre-twentieth century sense. In *Curtiss-Wright's* judgment, the powers of “external sovereignty” that had been vested in the union of the United States pre-constitutionally included the powers to “declare and wage war, to conclude peace, to make treaties, [and] to maintain diplomatic relations with other sovereignties”—that is, a set of activities involving the relationship between one sovereign state and another.<sup>238</sup> Indeed, it was this preoccupation with protecting the United States’ position in “international relations”—the relationships between the government of the United States and other governments—that drove the *Curtiss-Wright* Court to reject the possibility of a useful legislative role in, for example, treaty negotiations. The kind of foreign intelligence conducted by sovereigns in Truman’s time and before—the tapped diplomatic cables of Wilson’s era, the spies of *Curtiss-Wright* dicta—fit reasonably comfortably within this understanding of external affairs being those involving relations between one sovereign and another. U.S. foreign intelligence efforts, such as they were, were a reflection of the world in which foreign affairs and international security were matters of the affairs of sovereign states, dominated by the targeting of communications by foreign governments, their militaries and other state agents.<sup>239</sup>

As various scholars have by now demonstrated, globalization (for lack of a better term encompassing a range of geopolitical phenomena) has categorically changed that world. A vast range of non-governmental actors, state subdivisions, and unassociated individuals have become the focus of U.S. foreign affairs and global security efforts, with the power of non-state terrorist actors and ease of international communications serving as exhibits A and B in

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236. *Zivotofsky v. Kerry*, 135 S.Ct. 2076 (2015).

237. *Id.*, 135 S.Ct. at 2115 (Roberts, C.J., dissenting); see also *id.*, at 2089 (“In support of his submission that the President has broad, undefined powers over foreign affairs, the Secretary quotes [*Curtiss-Wright*], which described the President as ‘the sole organ of the federal government in the field of international relations.’ This Court declines to acknowledge that unbounded power . . . . This description of the President’s exclusive power was not necessary to the holding of *Curtiss-Wright* . . . .” (quoting *Curtiss-Wright*, 299 U.S. at 320)).

238. *Curtiss-Wright*, 299 U.S. at 318; see also Prakash & Ramsey, *supra* note 31, at 236 (discussing the understanding of “executive power” held by Locke, Montesquieu and Blackstone).

239. See *supra* text accompanying notes 110-112.

exemplifying those changes.<sup>240</sup> What were received incidents of sovereign spying in the contemplation of *Curtiss-Wright* bear no resemblance to the power asserted in E.O. 12333 bulk collection—a power aimed not particularly at foreign governments or officials but at any communications that happen to transit outside the United States, collected along channels trafficking in substantial measure in content having nothing to do with foreign states.<sup>241</sup> Even further from that Court’s mind was the notion that the exercise of executive power outside the United States could have an effect on the nature of the free political society inside the country.<sup>242</sup> Yet in an era in which standard internet routing protocols can “naturally cause traffic originating in a U.S. network to be routed abroad, even when it is destined for an endpoint located on U.S. soil,” and indeed protocols that can be “deliberately manipulated to force traffic originating in American networks to be routed abroad,”<sup>243</sup> it is today apparent that executive activity outside the United States can have precisely that effect.<sup>244</sup> E.O. 12333 bulk collection is in this sense an exercise of executive power all untethered even to the sweeping conception of sovereign power *Curtiss-Wright* imagined.

2. *The Misunderstanding of Functional Purpose.* – What then of the important argument that just as much as the structure of the Constitution wanted to protect societal liberty, it also meant to provide for a government that was effective in achieving its necessary aims? Foreign intelligence surveillance seems a self-evident example of such a necessary national power, one equally necessarily subject to something less than a fully transparent democratic process (including, say, express legislative authorization, or even clear evidence of legislative acquiescence to executive practice), lest the targets of surveillance be alerted to our methods and change their conduct accordingly.<sup>245</sup> More, the

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240. For an excellent earlier discussion of this phenomenon and its implications for U.S. constitutional law, see Peter Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649 (2002).

241. See Ashley Deeks, *Checks and Balances from Abroad*, 83 U. CHI. L. REV. 65, 72 (2016) (contrasting today’s intelligence activities with states’ historical role) (“In espionage’s long history, the majority of state intelligence activities were directed almost exclusively against other states.”). Indeed, E.O. 12333 is at times written broadly enough to reach beyond obviously “foreign” affairs. See, e.g., E.O. 12333, *supra* note 19, at § 2.3 (authorizing intelligence agencies to collect information about U.S. persons, including “[i]ncidentally obtained information that may indicate involvement in activities that may violate federal, state, local or foreign laws”) (emphasis added).

242. Cf. *Curtiss-Wright*, 299 U.S. at 318 (emphasizing the limits of its holding to the circumstance in which “[t]he whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs”).

243. Ambak & Goldberg, *supra* note 22, at 323.

244. See *supra*, text accompanying note 71 (chilling effect of government surveillance).

245. See, e.g., Robert S. Litt, General Counsel, Office of the Dir. of Nat’l Intelligence, Keynote Remarks at American University Washington College of Law: Freedom of Information Day Celebration (Mar. 18, 2014), <https://www.sgp/eprint/litt.pdf> (“Snowden’s criminal leaks have seriously damaged our national security. The articles that have appeared have compromised specific and lawful intelligence collection capabilities, and we know that our enemies are taking note of these disclosures.”); Rudesill, *supra* note 171, at 262 (citing Author interview with former General Counsel, SSCI, July 31, 2015)

argument might go, congressional regulation of a program previously left to executive discretion will limit the flexibility the executive intelligence community otherwise enjoys—flexibility arguably also essential to its function.<sup>246</sup> Congress is classically prone to slowness, dysfunction, and indiscretion—institutional deficits that have long supported arguments in favor of broad executive power in matters of national security.<sup>247</sup> Such characteristics make it especially unlikely that overly detailed legislative authorization or regulation can keep pace with rapidly advancing technology or rapidly evolving threats.<sup>248</sup>

Even on their face, such functional arguments—modern iterations of Hamilton’s classic claims of executive branch virtues of “unity, secrecy, and dispatch”<sup>249</sup>—are surprisingly weak in the context of long-term bulk collection. It is, for example, increasingly unclear to what extent the executive branch retains an advantage over Congress in protecting secret information,<sup>250</sup> as the American Bar Association has suggested, we may rapidly be approaching a time when the maintenance of prolonged secrecy over massive governmental surveillance programs is simply no longer reliably possible.<sup>251</sup> Moreover, while Congress may rightly be faulted for failing to ensure that the panoply of federal privacy laws, for example, keep pace with changing technology,<sup>252</sup> the executive branch may be equally blameworthy in this respect. As of 2013, for instance, there had been no comprehensive revision to E.O. 12333 guidelines to protect information “concerning U.S. persons” for nearly thirty years.<sup>253</sup> As for the relative flexibility of executive-only vs. executive + legislative regulation of E.O. 12333

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(arguing that there is “no good alternative means of doing substantive, detailed, binding legislative regulation of classified activities.”).

246. See, e.g., OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, SAFEGUARDING THE PERSONAL INFORMATION OF ALL PEOPLE: A STATUS REPORT ON THE DEVELOPMENT AND IMPLEMENTATION OF PROCEDURES UNDER PRESIDENTIAL POLICY DIRECTIVE 28, at 9 (July 2014), [https://www.dni.gov/files/documents/1017/PPD-28\\_Status\\_Report\\_Oct\\_.pdf](https://www.dni.gov/files/documents/1017/PPD-28_Status_Report_Oct_.pdf) (urging that intelligence community retain flexibility to deviate from PPD-28 procedures when national security requires).

247. See, e.g., Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2523 (2006) (quoting THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number . . .”).

248. See Erin Murphy, *The Politics of Privacy*, 111 MICH. L. REV. 485, 533-34 (2013) (providing examples of obsolete provisions from the Electronic Communications Privacy Act of 1986).

249. See Pearlstein, *supra* note 116, at 1601 (describing classical and ‘new functionalist’ assessments of comparative institutional competence).

250. See *supra* note 174 and accompanying text. Compare, e.g., Rudesill, *supra* note 171, at 253-83 (legislative secrecy), with e.g., Jo Becker, et al., *N.S.A. Contractor Arrested in Possible New Theft of Secrets*, N.Y. TIMES (Oct. 5, 2016), <https://www.nytimes.com/2016/10/06/us/nsa-leak-booze-allen-hamilton.html> (listing disclosures by Wikileaks and Edward Snowden as among major recent disclosures of classified information).

251. See AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LAW AND NATIONAL SECURITY, NO MORE SECRETS: NATIONAL SECURITY STRATEGIES FOR A TRANSPARENT WORLD (Jan. 2010), [http://www.americanbar.org/dam/aba/migrated/2011\\_build/law\\_national\\_security/no\\_more\\_secrets\\_final\\_report.authcheckdam.pdf](http://www.americanbar.org/dam/aba/migrated/2011_build/law_national_security/no_more_secrets_final_report.authcheckdam.pdf).

252. Murphy, *supra* note 248, at 533-34.

253. Letter from David Medine, PCLOB Chair, to the Director of National Intelligence (Aug. 22 2013), [https://www.pclob.gov/library/Letter-DNI\\_AG\\_12333\\_Guidelines.pdf](https://www.pclob.gov/library/Letter-DNI_AG_12333_Guidelines.pdf).

operations, executive branch rules are only inherently more flexible than legislative rules if one assumes either (1) that the executive is not as careful as complying with its own rules as with acts of Congress, or (2) that it is easier or faster for the executive to change its own rules than it is for Congress to change its rules. Executive branch officials would be the first to reject explanation one; as former DNI General Counsel Robert Litt put it, it is a “bedrock concept” that intelligence collection activities are “bound by the rule of law,” including executive regulations on the protection of information of U.S. persons, “among the first things that our employees are trained in, and . . . at the core of our institutional culture.”<sup>254</sup> Explanation two is equally suspect. As the prolonged failure to update E.O. 12333 guidelines should suggest, it is far from clear that the executive intelligence apparatus is significantly more bureaucratically or politically agile than Congress on these matters.<sup>255</sup> Rules once made by any organization, particularly a set of agencies as insular as the intelligence community, can be hard to change absent outside engagement.<sup>256</sup> Indeed, as one recent study found, where federal privacy statutes have succeeded at all in maintaining flexibility in their operation, it has been “a result[] of careful (or fortuitous) drafting that allows for expansive *judicial* interpretations as from subsequent amendment.”<sup>257</sup>

Above all, it remains entirely unclear to what extent bulk collection is a necessary method of serving the very broad set of “foreign intelligence, counter-intelligence, international drug or international terrorism” purposes to which it may be applied—and how much of a showing of necessity the executive may be required to make.<sup>258</sup> Far from reflexively giving the executive the unalloyed benefit of the doubt on such propositions, the Court has in multiple circumstances required that the executive put forward something more than mere assertion to support a claim for *structural* accommodation for a particular program.<sup>259</sup> Thus, for instance, while accepting the President’s position that the maintenance of steel supplies was necessary to sustain military operations, Justice Jackson examined and rejected the notion that exclusive presidential

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254. Litt, Remarks at the Brookings Institution, *supra* note 22.

255. Cf. Samuel J. Rascoff, *Presidential Intelligence* 129 HARV. L. REV. 633 (2016) (discussing the executive branch’s intelligence bureaucracy).

256. See AMY B. ZEGART, *SPYING BLIND: THE CIA, THE FBI, AND THE ORIGINS OF 9/11*, at 112-13 (2007) (describing organizational culture at CIA that regarded information sharing and other needed reforms as “unnatural acts”).

257. Murphy, *supra* note 248, at 533 (emphasis added).

258. E.O. 12333, *supra* note 19 at § 2.3(c). For critiques of other bulk collection programs, see PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT, at 11 (2014) [https://www.pclob.gov/library/215-Report\\_on\\_the\\_Telephone\\_Records\\_Program.pdf](https://www.pclob.gov/library/215-Report_on_the_Telephone_Records_Program.pdf) (concluding PATRIOT Act collection had proven substantially ineffective).

259. Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 832-35 (2011).

power was the necessary *structure* for accomplishing that goal.<sup>260</sup> In all events, functional effectiveness arguments that have been marshalled in support of executive surveillance authority also suffer from a deeper deficit: the expectation that such arguments may be assessed in isolation from an understanding of their impact on other structural constitutional goals. As the *Keith* Court recognized, the structural goal of ensuring that the government possessed “all the powers requisite to the complete execution of its trust,”<sup>261</sup> did not mean guaranteeing the government all power necessary to, for example, provide for the common defense, independent of the parallel structural goal of preserving societal liberty. As the *Keith* Court saw it, rejecting the limited, warranted form of communications surveillance approved in that case would be contrary not to the President’s duty to defend the nation writ large, but “to the existence of an organized society essential to the maintenance of civil liberties.”<sup>262</sup> It was not that a lack of intelligence surveillance power would compromise the President’s ability to protect the people, it was that a lack of such power would compromise the President’s ability to protect the structure of government on which the people’s freedom depends. For this reason, the surveillance power recognized in *Keith*, whatever its ultimate scope, would be textually grounded neither in the Vesting Clause, nor in the President’s military role as Commander in Chief, but rather in the Oath Clause, establishing the duty to “preserve, protect and defend the Constitution of the United States.”<sup>263</sup>

### C. *What It Means for Executive Bulk Collection*

We may now return to the question left unanswered above—namely, how the Constitution’s structural purpose of preserving societal liberty bears on the question whether the President has the power to engage in bulk collection of the content of communications accessed outside the United States. After all, a structural purpose in the preservation of liberty could only be relevant to constitutional interpretation when a challenged program actually compromises or threatens to compromise societal liberty in a constitutionally cognizable way. What is the nature of the liberty the Constitution’s structure recognizes as

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260. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 645-46 (Jackson, J., concurring); *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866) (“It is difficult to see how the safety of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them.”) (emphasis omitted); *accord* *Duncan v. Kahanamoku*, 327 U.S. 304, 328-35 (1946) (Murphy, J., concurring); *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (“We think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts.”).

261. 2004 OLC Memorandum, *supra* note 88, at 37 (quoting THE FEDERALIST No. 23, at 147 (Jacob E. Cooke ed., 1961)).

262. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 312 (1972) (“unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered”).

263. *Id.* at 310 (quoting U.S. CONST., art. II, § 1); *see also id.*, at 321-22 (“express[ing] no opinion as to the issues which may be involved with respect to activities of foreign powers or their agents”).

within its cognizance, and in what sense might it be implicated by bulk collection under E.O. 12333? More, how might a broad structural purpose of this nature inform the interpretation of constitutional power?

Here our analysis benefits especially from the nature of structural constitutional inquiry, which has recognized from the outset that such questions depend “on a fair construction of the whole instrument.”<sup>264</sup> As Chief Justice Marshall famously explained, a constitution that actually listed every government power would “partake of the prolixity of a legal code.”<sup>265</sup> Justice Jackson much later agreed that “[t]he actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.”<sup>266</sup> Instead, it has been necessary to recognize what powers were consistent with the “important objects” of the Constitution,<sup>267</sup> including the object of creating a free society as a whole.<sup>268</sup> In these respects, structural cases have made it possible to examine how government action may injure not just singular interests of particular individuals, but how allocations of power might cause multiple kinds of harms damaging to the project of republican governance writ large.

A useful starting point for assessing the nature of the structural liberty the Constitution protects may thus be found in the Court’s own decisions. Most apparent among the liberties identified as relevant in cases construing the scope of powers granted under Articles I, II and III are those expressly recognized elsewhere in the Constitution. Thus, for example, the rights to which individuals are entitled under the Due Process Clause limit the plausible scope of power asserted under the Take Care Clause;<sup>269</sup> First Amendment interests are among those weighing against recognizing a congressional power to appoint members of an independent regulatory agency;<sup>270</sup> and the right to be free from bills of attainder is among the liberties weighing against recognizing the power of one house to effectively mandate the deportation of a particular individual.<sup>271</sup>

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264. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406-07 (1819); *see also* *Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2085 (2015) (“The inference that the President exercises the recognition power is further supported by his additional Article II powers . . .”).

265. *McCulloch*, 17 U.S. (4 Wheat.) at 407.

266. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

267. *McCulloch*, 17 U.S. (4 Wheat.) at 406-07 (“[A Constitution’s] nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.”).

268. *See, e.g., Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 555 (2012) (allowing Congress not just to “regulate” existing commerce, but to force individuals to participate in commerce that they otherwise would avoid, would “fundamentally change the relation between the citizen and the Federal Government”); *id.*, at 554-55 (arguing that such a requirement is not consistent with “the country the Framers of our Constitution envisioned”) (citing *THE FEDERALIST* No. 45, at 293; and then citing *THE FEDERALIST* No. 48, at 48, at 309 (J. Madison)).

269. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

270. *See Buckley v. Valeo*, 424 U.S. 1 (1976).

271. *See INS v. Chadha*, 462 U.S. 919, 935 & n.8, 953 & n.17 (1983); *see also id.* at 962 (Powell, J., concurring); *THE FEDERALIST* No. 84, at 576 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (listing

Critically in these cases, the invocation of these ambient rights mattered for the purpose of understanding the scope of federal power independent of any conclusion of whether the challenged assertion of power would actually *violate*, for example, the Due Process Clause.<sup>272</sup> Rather, existing rights are invoked in these cases as evidence of the *kind of* liberty the Constitution's structure was designed to protect. Much as the Court has at times employed the canon of constitutional avoidance to guide statutory interpretation without deciding the constitutional question an alternative statutory interpretation would raise,<sup>273</sup> the Court in these cases invokes the structural purpose of protecting liberty as an interpretive guide without necessarily engaging the substantive scope of the potentially implicated constitutional right in detail, or indeed at all.

Beyond this, it seems implausible to conclude that the incidents of liberty the Constitution's structure protects are limited to those rights expressly protected elsewhere in the Constitution. The Ninth Amendment was, after all, included exactly to foreclose arguments that the free republican society the Constitution was to make possible protected only those rights expressly enumerated.<sup>274</sup> Modern constitutional 'rationality' review regularly tests legislation as against the potential violation of liberty interests writ large, as opposed to one specifically enumerated right in the first ten amendments. And, as noted above, while the Bill of Rights makes no mention of anything like a right to travel, the Court has for generations acknowledged that freedom to travel must be an incident of a form of government in which, for a variety of reasons, "internal barriers to travel are unthinkable."<sup>275</sup> Indeed, it seems in part because burdens on travel risk compromising so many different liberties seen incidental to a free society at once—from the ability to access courts and other government institutions,<sup>276</sup> to the ability to pursue intellectual inquiry and personal relationships<sup>277</sup>—that so many courts over so many years have insisted upon recognizing a right to do it.

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the prohibition against bills of attainder as among those privileges in the Constitution proper that serve the same purpose as a Bill of Rights).

272. See, e.g., *Youngstown*, 343 U.S. at 646 (Jackson, J., concurring) (highlighting the structural purpose of protecting liberty and noting, without discussing, the existence of the Due Process Clause protection against the arbitrary deprivation of property); *Chadha*, 462 U.S. at 956-59 (highlighting the structural purpose of protecting liberty and raising, without deciding, whether the deportation scheme in that case would violate any express constitutional right).

273. See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Construction Trades Council*, 485 U.S. 568, 575 (1988) (requiring that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"); see also *Clark v. Martinez*, 543 U.S. 371, 381 (2005) ("The canon is not a method of adjudicating constitutional questions by other means." (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (refusing to engage in extended analysis in the process of applying the avoidance canon "as we would were we considering the constitutional issue"))).

274. See *supra* text accompanying notes 192-96 (Ninth Amendment).

275. BLACK, *supra* note 28, at 7; see also *supra* text accompanying notes 202-03 (right to travel).

276. See *Crandall v. Nevada*, 73 U.S. 35, 44 (1867).

277. See *Kent v. Dulles*, 357 U.S. 116, 126-28 (1958).

It here becomes apparent how similar in effect are contemporary burdens on electronic communications, most especially in light of growing evidence that individuals adjust expressive and other electronic activities as a result of knowledge of government surveillance.<sup>278</sup> Electronic communications subject to “incidental” E.O. 12333 collection are today a part of the critical infrastructure of our democracy, without which it is increasingly impossible to engage in a vast range of activities recognized as incidental to our free society and without which we lose the capacity to achieve the basic objects of government—from expression and association,<sup>279</sup> to intellectual inquiry,<sup>280</sup> to access to courts and other government institutions.<sup>281</sup> It is in this kind of context that structural reasoning may be most useful. With its ready familiarity and long history of looking across the text, considering not just singular harms or interests of particular individuals, but also allocations of power that might cause multiple harms damaging to a free republican society writ large, the structural purpose of protecting societal liberty seems designed to account for just such effects.

Yet the conclusion that E.O. 12333 collection implicates multiple incidents of structural liberty can hardly mean that it is unconstitutional full stop. As with every other interest the Constitution protects, nothing is absolute; the government imposes a host of burdens on interstate travel in the interest of security (not least metal detectors at the airports), and such relatively minor burdens regularly survive constitutional challenge. What follows instead from the recognition that bulk communications collection implicates a range of constitutionally cognizable liberty interests is a set of consequences for the chronic interpretive dilemmas that arise in any assessment of executive power—a set of ways in which the existence of this structural argument interacts with the broader task of discerning the scope of executive power. Thus, to the extent executive practice matters in our assessment of constitutional power, the presence of structural liberty concerns should argue in favor of requiring a particularly searching inquiry into its basis.<sup>282</sup> Where defenders of current E.O. 12333 programs might argue that congressional acquiescence should by now be inferred from funding appropriations or constructive knowledge of executive activities, uncertainties surrounding the actuality of congressional consent become overwhelming in the face of such weighty structural liberty concerns on the other side. Given the stakes, the executive should have to show both the existence of the specifically contested “unbroken” executive practice (rather

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278. See *supra* text accompanying notes 71-73 (chilling effects).

279. See *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring).

280. See, e.g., PEN AMERICAN CENTER, CHILLING EFFECTS, *supra* note 73, at 3-4.

281. See, e.g., C.D. Cal. Local Rule 5-4.1; C.D. Cal. Local Crim. Rule 49-1.1 (electronic filing mandatory for attorneys in all civil and criminal cases in the Central District of California).

282. Cf. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 430-31 (2012) (arguing that the weight given to historical practice should vary depending on the availability of other interpretive evidence).



than evidence of, for example, targeted electronic surveillance),<sup>283</sup> that the practice endured over a sustained period of time without objection (rather than, for example, a temporary wartime assertion of power), and clear indicia of congressional acquiescence in the face of actual knowledge (rather than, for example, general funding authority for communications surveillance, or constructive knowledge of general surveillance activities supported by congressional funding).<sup>284</sup> In this context especially, indeterminacy should cut against a finding of power.

The same argument supports requiring the executive to make a more rather than a less specific showing of functional necessity. In this respect, E.O. 12333 collection has taken upon itself a particularly heavy burden. Unlike the seizure of the steel mills during the Korean War or the resolution of the Iranian hostage crisis, for example, neither E.O. 12333 nor its implementing regulations make any attempt to narrow the scope of its utilization to circumstances of armed conflict or diplomatic crisis, of particular exigency or imminent harm.<sup>285</sup> Rather, E.O. 12333 is by all indications designed to remain a permanent fixture of U.S. collection in any “lawful foreign intelligence, counterintelligence, international drug or international terrorism investigation.”<sup>286</sup> Neither *Keith*—addressing a claim that executive surveillance power was “necessary to protect the nation from attempts of domestic organizations to attack or subvert *the existing structure of Government*”<sup>287</sup>—nor any of the Court’s executive power cases reflect a comparably sweeping claim.

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283. *Cf. Medellin v. Texas*, 552 U.S. 491, 530-32 (2008) (rejecting government argument that presidential practice demonstrates constitutional “authority to resolve claims disputes with foreign nations” on grounds that practice supports such dispute resolution authority only in “narrow set of circumstances”); *id.*, at 532 (characterizing the relevant existing practice as a “narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement”).

284. Appropriations legislation might authorize particular surveillance programs, but as even the OLC has acknowledged in considering military authority, “general funding statutes do not necessarily constitute congressional approval” unless the “appropriations measure is directly and conspicuously focused on specific military action.” Dep’t of Justice, Office of Legal Counsel, Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327, 339 (Dec. 19, 2000). Likewise, the inference of congressional knowledge of the specifics of NSA operations is particularly problematic in the face of persistent complaints by Members about the sufficiency of available information on intelligence surveillance activities. *See, e.g.*, Press Release, Sen. Dianne Feinstein, Feinstein Statement on Intelligence Collection of Foreign Leaders (Oct. 28, 2013), <https://www.feinstein.senate.gov/index.cfm/press-releases?ID=61f9511e-5d1a-4bb8-92ff-a7eaa5becac0>.

285. *See, e.g.*, E.O. 12333, *supra* note 19 at § 2.2 (“This Order is intended to enhance human and technical collection techniques, especially those undertaken abroad, and the acquisition of significant foreign intelligence, as well as the detection and countering of international terrorist activities, the spread of weapons of mass destruction, and espionage conducted by foreign powers.”).

286. *See Bamford, supra* note 18.

287. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 309 (1972) (quoting Attorney General affidavit) (emphasis added).

In the absence of such clarity, it is reasonable to conclude the executive lacks the power to undertake such activity on its own authority, without separate authorization by Congress. The Court itself has more than once suggested that more than one element (one branch) of the government's structure should be engaged in the exercise of any unenumerated power that implicates the liberty that structure is designed to protect. Justice Jackson, for instance, weighing the imperative of workable and effective government against the lessons of Germany, France, and Britain, whose experiments with emergency powers had resulted in more and less disastrous consequences for liberty, argued that it might be possible to recognize unenumerated executive powers in the interest of protecting public safety, but that such recognition would be "consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them."<sup>288</sup> Functional effectiveness or even historical practice might help determine the necessity of government power, but where the assertion of such a power burdens the exercise of structural liberty, congressional authorization is required.

While the requirement of clear congressional authorization for bulk collection is far from a categorical ban on such activities—any more than the straightforward application of a provision of the Bill of Rights would be, for every right is subject to balancing against other interests—it is likewise non-negligible. As has been long understood in administrative law,<sup>289</sup> political process theory,<sup>290</sup> and elsewhere, a transparent legislative process is an essential mechanism by which a democratic electorate holds its representatives politically accountable. Congress is of course hardly a panacea, with a host of institutional deficits of its own, including legal and political barriers to action, as scholars have well highlighted.<sup>291</sup> Yet there is cause in the surveillance context in particular to anticipate at least some prospect of legislative activity. For one thing, Congress has amassed a significant record through the present day of engaging on questions of surveillance impacting Americans, with its degree of engagement repeatedly spiking after public revelation of previously secret executive practice, at times in ways that impose *more* constraints on executive action in the

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288. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 652 (1952) (Jackson, J., concurring); cf. *Dames & Moore v. Regan*, 453 U.S. 654, 686-87 (1981) (emphasizing that the Court's recognition of unenumerated executive power to settle foreign claims found essential support in "the fact that the means chosen by the President to settle the claims of American nationals provided an alternative [adjudicative] forum . . . , which is capable of providing meaningful relief"); *id.*, at 689-90 (again noting additional channels for judicial redress); *Kent v. Dulles*, 357 U.S. 116, 129 (arguing that because "the right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment," any regulation of that liberty "must be pursuant to the lawmaking functions of the Congress" (citing *Youngstown*, 343 U.S. 579)).

289. Pearlstein, *supra* note 259, at 817-22.

290. See Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721, 1768 (2014).

291. See, e.g., Aziz Huq, *Structural Constitutionalism as Counterterrorism*, 100 CAL. L. REV. 887 (2012).

interest of preserving societal liberty.<sup>292</sup> Whatever else this history means, it suggests that the story of congressional oversight of executive intelligence activities is more complicated than a blanket congressional preference for non-involvement in the first instance, and involvement only in the interest of expanding national security authority in the second. Moreover, while political incentives driving decision-makers may lead them at times to prioritize short-term tactical gains over long-term strategic success,<sup>293</sup> an increasingly vigorous public constituency—including a significant group of corporate interests—concerned about the scope of government surveillance has proven itself able at least to some extent to create competing political incentives that may temper standard judgments.<sup>294</sup> In part for this reason, a rule that requires clear congressional authorization for a favored executive program may give the executive an incentive to disgorge more information to Congress in the interest of advancing its legislative cause.

#### CONCLUSION

All apart from our expectations of privacy, structural analysis matters to our understanding of the constitutionality of bulk communications collection. Whether in demanding that we revisit the case for executive foreign intelligence power, or in guiding our approach to the interpretation and recognition of such power, the Constitution's decision to enumerate and separate power should shape our expectations about how government surveillance operates.

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292. See *supra* text accompanying notes 85, 160-174.

293. See Pearlstein, *supra* note 116, at 1620-22 (citing, e.g., ZEGART, *supra* note 256, at 103-04).

294. See, e.g., PEW RESEARCH CENTER, WHAT AMERICANS THINK ABOUT NSA SURVEILLANCE, NATIONAL SECURITY, AND PRIVACY (2015), <http://www.pewresearch.org/fact-tank/2015/05/29/what-americans-think-about-nsa-surveillance-national-security-and-privacy/> (reporting a majority of Americans oppose government bulk data collection involving citizens, and two-thirds think existing limits on data collection are inadequate); ELECTRONIC FRONTIER FOUNDATION, 2015 ANNUAL REPORT (2015), <https://www EFF.ORG/files/annual-report/2015/index.html> (privacy advocacy organization reporting more than 25,000 dues-paying members).

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