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Cass R. Sunstein

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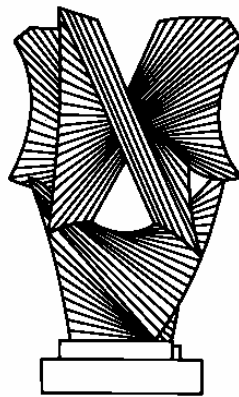
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## ADMINISTRATIVE LAW GOES TO WAR

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## **Administrative Law Goes to War**

Cass R. Sunstein \*

### **Abstract**

*What are the President's war-making powers? This essay, a brief reply to an article by Curtis Bradley and Jack Goldsmith, contends that the answer lies in administrative law, at least in the first instance. The President's authority often depends on what Congress has said, and under established principles, the President has a great deal of power to interpret ambiguities in congressional enactments – in war no less than in peace. The principal qualifications involve interpretive principles, also found in administrative law, that call for a narrow construction of presidential authority to invade constitutionally sensitive interests. The relevant arguments are illustrated throughout with reference to the 2001 authorization for the use of military force in response to the attacks of September 11; the authorization may or may not include the power to make war on Iraq and Afghanistan, to use force against those suspected of giving financial aid to terrorist organizations, and to detain American citizens.*

In the 2001 Authorization for the Use of Military Force (AUMF), Congress authorized the President to

use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts

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of international terrorism against the United States by such nations, organizations or persons.<sup>1</sup>

Consider some illustrative problems:

1. The President initiates military action under the AUMF against Iraq in 2003, contending that the best evidence suggests that Saddam Hussein “aided the terrorist attacks that occurred on September 11, 2001.”
2. The President initiates military action against Iran in 2006, contending that the Central Intelligence Agency can show that its government has “harbored” members of Al Qaeda since 1999.
3. The President initiates military action against North Korea, contending that the Central Intelligence Agency can show that its government has been “assisting” Al Qaeda financially since 2003.
4. The President authorizes the use of force to arrest and to detain citizens of France, who are brought to the United States and imprisoned because they knowingly provided significant financial assistance to organizations that supported Al Qaeda in 2000.<sup>2</sup>
5. The President detains an American citizen captured at an American airport, contending that the citizen “aided the terrorist attacks that occurred on September 11, 2001.” He plans to detain the citizen indefinitely.
6. The President orders the killing of an American citizen at an American airport, contending that the citizen “aided the terrorist attacks that occurred on September 11, 2001.”

Is there a body of principles that can help to evaluate the legality of these actions? I suggest that there is, and that it can be found in a single area: administrative law. Most obviously, presidential action under the 2001 AUMF, or any imaginable AUMF, would appear subject to the principles that have emerged in the wake of the Supreme Court’s extraordinarily influential decision in *Chevron USA v Natural Resources Defense*

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<sup>1</sup> Authorization for Use of Military Force, S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001).

<sup>2</sup> See *In Re Guantanamo Detainee Cases* 355 F Supp 2d 443, 475 (DDC 2005) (noting government’s assertion of authority to detain a “little old lady in Switzerland” who unknowingly writes a check to a front to finance al-Qaeda activities).

Council, Inc.<sup>3</sup> As we shall see, the logic of *Chevron* applies to the exercise of executive authority in the midst of war.<sup>4</sup>

Curtis Bradley and Jack Goldsmith make an exceedingly important contribution to our understanding of presidential power amidst war.<sup>5</sup> But I believe that their analysis would be clearer, simpler, and more straightforward if they focused more systematically on administrative law principles and if the international laws of war played a more subordinate role.<sup>6</sup> As we shall see, a special advantage of this approach is that it imposes the right incentives on all those involved, including Congress itself.

My general conclusions are that the President should have a great deal of discretion in interpreting the AUMF, and that any ambiguities are for him to resolve, subject to a general constraint of reasonableness. The principal qualification is that if the President is infringing on constitutionally sensitive interests, the AUMF must be construed narrowly, whatever the President says. Under this framework, the President plainly has the authority to act in cases (1), (2), and (4) above. He lacks that authority in case (6). For reasons to be explored, cases (3) and (5) are extremely difficult.

This framework is properly used both by reviewing courts (subject to any justiciability constraints<sup>7</sup>) and by members of the executive branch advising the President about the legality of proposed courses of action. Indeed, this framework furnishes the appropriate principles not only for understanding any authorization for the use of force,

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<sup>3</sup>467 US 837 (1984). As a sign of *Chevron*'s influence, consider the fact that the decision was cited 2414 times in its first decade (between 1984 and January 1, 1994), 2,584 times in its next six years (between January 1, 1994 and January 1, 2000), and 2,235 times in its next five years (between January 1, 2000 and January 28, 2005).

<sup>4</sup> On some of the complexities here, see Curtis Bradley, *Chevron Deference and Foreign Affairs*, 86 Va L Rev 649 (2000).

<sup>5</sup> Curtis Bradley and Jack Goldsmith, *Congressional Authorization and the War on Terror*, 118 Harv L Rev 2047 (2005).

<sup>6</sup> There are difficult questions in the background. Why, exactly, do Bradley and Goldsmith place such emphasis on the laws of war? One possibility is that they believe that Congress legislates against the background that they set, and ought to be aware of them. This view seems to me artificial. A more promising possibility is that Bradley and Goldsmith believe that the laws of war provide an interpretive resource whether or not Congress is aware of them – that they furnish a set of principles, vindicated by tradition, against which authorizations for the use of force should be understood. On this view, the laws of war are invoked because their use serves to discipline and improve interpretation of any authorization to use force. This second view seems plausible and to justify attention, in hard cases, to the laws of war; but it is best to start with statutory text and with more familiar administrative law principles.

<sup>7</sup> These include the political question doctrine and administrative law doctrines governing reviewability. See *Webster v. Doe*, 486 US 592 (1988); *Dickson v. Secretary of Defense*, 68 F.3d 1396 (DC Cir 1995).

but also for evaluating all exercises of presidential power when Congress has authorized the President to protect the nation's security.<sup>8</sup>

## I. Presidential Power in Chevron's Shadow

*Chevron* creates a two-step inquiry.<sup>9</sup> The first question is whether Congress has directly decided the precise question at issue. The second is whether the agency's interpretation is reasonable. In the aftermath of *Chevron*, the Court has emphasized the need to ask another question, one that precedes application of the *Chevron* framework: Do *Chevron*'s deference principles apply at all<sup>10</sup>? Let us see how these ideas apply to the AUMF. The analysis is somewhat technical, but the conclusion is not: The President has broad authority to construe ambiguities as he sees fit.

### A. Chevron Step Zero<sup>11</sup>

In its important decision in *Mead*,<sup>12</sup> the Court divided the world of judicial deference to executive interpretations of law into two categories: *Skidmore*<sup>13</sup> cases and *Chevron* cases. In *Skidmore* cases, the question of statutory meaning is resolved judicially, not by the executive; but the court will pay attention to what the executive has said, granting its interpretation "respect according to its persuasiveness."<sup>14</sup> In *Chevron* cases, the agency's interpretation is binding unless it violates either of *Chevron*'s two steps.<sup>15</sup>

Under *Mead*, *Chevron* deference applies when "Congress intended" the executive's action "to carry the force of law."<sup>16</sup> Of course Congress does not usually say,

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<sup>8</sup> See, for example, the International Emergency Economic Powers Act, 50 USC 1701-1706, construed in *Dames & Moore v. Regan*, 453 US 654 (1981).

<sup>9</sup> 467 US at 842-44.

<sup>10</sup> *US v. Mead Corporation*, 533 US 218 (2001)

<sup>11</sup> See Thomas W. Merrill & Kristin Hickman, *Chevron's Domain*, 89 *Geo L J* 833, 836 (2001); Cass R. Sunstein, *Chevron Step One* (unpublished manuscript, May 2005).

<sup>12</sup> *Mead*, *supra*.

<sup>13</sup> *Skidmore v. Swift & Co.*, 323 US 134 (1944).

<sup>14</sup> *Mead*, 531 US at 221.

<sup>15</sup> It does matter whether an exercise of authority falls under *Skidmore* or *Chevron*; but the difference should not be overstated. It is one of degree, not one of kind, and under *Skidmore*, courts are likely to accept reasonable agency interpretations. *Skidmore* itself is good evidence here. 323 US at 140.

<sup>16</sup> *Mead*, 533 US at 221.

with anything like clarity, whether it so intends.<sup>17</sup> In the ordinary cases, courts infer a delegation of law-making power from “the agency’s power to engage in adjudication or notice-and-comment rulemaking, “ or (and this phrase will turn out to be critical) by “some other indication of comparable congressional intent.”<sup>18</sup> It is clear that *Chevron* deference might be appropriate even if an agency’s decision does not follow from formal procedures of any kind.<sup>19</sup>

How do these points bear on the AUMF? It might be argued that the President has been given neither adjudicatory authority nor the authority to engage in notice-and-comment rulemaking -- and hence that he is not authorized to do anything, under the AUMF, having the force of law. On this view, the precondition for *Chevron* deference is absent. This argument might be supported with an analogy. The executive branch is not entitled to *Chevron* deference insofar as it is enforcing the criminal law.<sup>20</sup> The reason is straightforward: For the Department of Justice, the power of prosecution is not plausibly taken to confer law-interpreting authority.<sup>21</sup> Perhaps the same can be said when the President implements the AUMF; indeed, it might be urged that the President has the same relationship to the AUMF that the Department of Justice has to the statutes under which it brings prosecutions. In any case, the President is not an “agency” within the meaning of the Administrative Procedure Act,<sup>22</sup> and perhaps this point renders *Chevron* inapplicable.

But if we step back a bit, we will see that this argument is unconvincing. The central question is whether Congress should be understood to have conferred on the President the power to interpret ambiguities in the AUMF. Congress knows that the President will be construing any authorization to use force, and it has every incentive to limit his discretion if it wishes to do so. In ordinary *Chevron* cases, a delegation of law-interpreting power is inferred from the authority to produce rules or orders with the force

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<sup>17</sup> Id. at 230: “It is fair to assume generally that Congress contemplates administrative action with the force of law when it provides for a relatively formal administrative procedure. . . . “

<sup>18</sup> Id. at 227.

<sup>19</sup> See *Barnhart v. Walton*, 535 US 212, 222 (2002).

<sup>20</sup> See *Crandon v. US*, 494 US 152, 158 (1990).

<sup>21</sup> Note that for administrative agencies, Congress has a choice: It can grant rulemaking and adjudicatory power, or it can refuse to do so. *Chevron* and *Mead* deem that choice to be crucial to the decision whether the relevant agency is entitled to *Chevron* deference.

<sup>22</sup> See *Franklin v. Massachusetts*, 505 U.S. 788, 800-801 (1992).

of law.<sup>23</sup> But with an authorization to use force, what is authorized is the use of force; there is no grant of rulemaking or adjudicatory authority, and hence the grant or denial of such authority is irrelevant. By its very nature, any AUMF is best taken as an implicit delegation to the President to resolve ambiguities as he (reasonably) sees fit. This position does not only track Congress' likely expectations, to the extent that they exist; it has the additional advantage of imposing exactly the right incentives on Congress, by requiring it to limit the President's authority through plain text if that is what it seeks to do.

We can approach this question from a different direction. Why, exactly, does Chevron take ambiguities to count as implicit delegations? The answer lies in an attempted reconstruction of congressional will.<sup>24</sup> Where Congress has not spoken, interpretations must depend, at least in part, on assessments of the consequences of one or another approach; agencies are in a comparatively good position to make such assessments. And where questions of value are at stake, agencies, subject as they are to presidential control, should resolve those questions as they see fit.<sup>25</sup> And if these are the foundations for Chevron, the President should be taken to have the authority to interpret ambiguities as he chooses. Interpretation of an authorization to use force -- at least as much as any delegation of authority to agencies, and possibly more -- calls for appreciation of consequences and for complex judgments of value.

## **B. Chevron Steps 1 and 2**

If *Chevron* applies, the initial question is "whether Congress has directly spoken to the precise question at issue."<sup>26</sup> As Bradley and Goldsmith emphasize, the President

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<sup>23</sup> This point makes clear that Chevron stems from an understanding of organic statutes, not from the APA.

<sup>24</sup> See 467 US at 865-66; Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum L Rev 2071, 2086-87 (1990)

<sup>25</sup> There is a connection here between Chevron and Ronald Dworkin's view on interpretation, as set out in *Law's Empire* (1985). Dworkin contends that interpretation requires a judgment about "fit" with existing materials and also about "justification" of those materials; his conception of law as integrity requires judges to put existing materials in their "best constructive light." In modern government, courts are often less capable of accomplishing this task than are agencies, precisely because of the comparatively greater expertise and accountability. If interpretation of the AUMF is an interpretive exercise in Dworkin's sense, as I believe that it is, then the argument for deference to the President is overwhelming.

<sup>26</sup> 467 US at 842.



could not use force against nations that cannot plausibly be connected with the attacks of September 11, 2001.<sup>27</sup> To be sure, the goal of the AUMF is to permit the President “to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”<sup>28</sup> But that goal is to be pursued through a particular means, which is the use of force against those connected with the attacks of September 11. Case (3) is therefore a difficult one, requiring the President to resort to complex arguments on behalf of the exercise of force.<sup>29</sup>

On the other hand, an attack on Iraq in case (1) above would have been permissible under the AUMF in 2003, assuming that the President “determined,” on the basis of evidence at the time, that Iraq assisted Al Qaeda before the September 11 attacks. Iran is unquestionably subject to the use of force in case (2). Whenever there is a dispute about the meaning of relevant terms, such as “aided” or “harbored,” the President has a great deal of discretion to understand them as he sees fit. Those who provide financial assistance to Al Qaeda, certainly with the intention of doing so, appear to be subject to presidential exercises of force under step 1; hence presidential action is authorized for case (4).

Under step 2, the question is whether the executive’s “answer is based on a permissible construction of the statute,” which requires a judgment about the reasonableness of that construction.<sup>30</sup> Turn in this light to case (6). The President is supposed to use “all necessary and appropriate force,” and an execution of someone who can be detained instead is gratuitous; it is neither “necessary” nor “appropriate.” Or suppose that citizens of Switzerland, or the United States, gave small sums of money to

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<sup>27</sup> Cf. *In re Guantanamo Detainee Cases*, 355 F. Supp.2d at 475, discussing the detention of two people who were not connected with the attacks of September 11. One “was ‘associated’ with an Islamic missionary group,” who “planned to travel to Pakistan with an individual who later engaged in a suicide bombing,” and who “accepted free food, lodging, and schooling in Pakistan from an organization known to support terrorist acts.” The other had been indicted by a Spanish National High Court Judge “for membership in a terrorist organization.” These detentions are not authorized by the text of the AUMF.

<sup>28</sup> Authorization for Use of Military Force, S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001).

<sup>29</sup> There are hard questions about whether those who assist Al Qaeda can be considered accessories after-the-fact or (as Bradley and Goldsmith argue) as co-belligerents. It is not clear that the analysis of co-belligerents carries over to the analysis of those who aid a terrorist organization after the acts that are the predicate for the use of force.

<sup>30</sup> See, e.g., *Household Credit Services v. MBNA American Bank*, 541 US 232 (2004); *Republican National Comm. V. FEC*, 76 F3d 400, 47 (DC Cir 1996).

an umbrella organization, not knowing that some of its funds were going to Al Qaeda.<sup>31</sup> It would be unreasonable to interpret the AUMF to authorize the President to use force against those citizens.

## II. Canons and Countercanons

Chevron deference can be “trumped” by countercanons. Agencies are not permitted to interpret statutes so as to apply beyond the territorial boundaries of the United States.<sup>32</sup> Nor are they allowed to interpret ambiguous statutes to apply retroactively.<sup>33</sup> An agency cannot construe an ambiguous statute so as to raise serious constitutional doubts.<sup>34</sup> In these and other contexts, courts have insisted on a series of *nondelegation canons*, which require legislative rather than merely executive deliberation on the issue in question.<sup>35</sup> By their very nature, the nondelegation canons defeat Chevron deference. The reason is that they are specifically designed to require the nation’s lawmaker to make the relevant decisions explicitly.

### A. The Presumption of Liberty

1. In general. Requirements of clear congressional permission have been a defining part of American law involving the relationship between liberty and security in wartime.<sup>36</sup> Consider in this regard Ex Parte Endo,<sup>37</sup> in which the Court struck down the detention of concededly loyal Japanese-Americans on the West Coast. The Court said that in “interpreting a wartime measure we must assume that [Congress’] purpose was to

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<sup>31</sup> See *In re Guantanamo Detainee Cases*, *supra* note, at 61, in which government asserted such authority, and also the authority to detain someone “who teaches English to the son of an al Qaeda member, and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source.” *Id.* At least in the cases of unknowing financial assistance and mere instruction in English to a family member of someone in al Qaeda, the interpretation of the AUMF is unreasonable.

<sup>32</sup> *EEOC v Arabian American Oil Co*, 499 US 244, 248 (1991).

<sup>33</sup> *Bowen v Georgetown University Hospital*, 488 US 204, 208 (1988).

<sup>34</sup> See *Bowen v Georgetown University Hospital*, 488 US 204, 208–09 (1988).

<sup>35</sup> For general discussion, see Cass R. Sunstein, *Nondelegation Canons*, 67 *U Chi L Rev.* 315 (2000).

<sup>36</sup> See Richard Pildes and Samuel Issacharoff, Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Right During Wartime, 5 *Theoretical Inquiries in Law* (Online Edition) No 1, Article 1 (Jan 2004), online at <http://www.bepress.com/til/default/vol5/iss1/art1> (visited Dec 1, 2004); Cass R. Sunstein, *Minimalism At War*, *Supreme Court Review* (forthcoming).

<sup>37</sup> 320 US 81 (1943).

allow for the greatest possible accommodation between those liberties and the exigencies of war.”<sup>38</sup> The Court emphasized that even in the midst of war, the President would have to identify clear authorization: “if there is to be the greatest possible accommodation of the liberties of the citizen with this war measure, any such implied power [of the President] must be narrowly confined to the precise purpose of the evacuation program.”<sup>39</sup>

A similar principle underlies one of the most celebrated free speech decisions in American history: Judge Learned Hand’s in the Masses case.<sup>40</sup> Judge Hand’s narrow construction of the Act required the legislature, and not the executive alone, to focus specifically on the question whether national security justified an abridgement of liberty. These are many other examples.<sup>41</sup>

The lesson for the 2001 AUMF, or any other AUMF, is straightforward: The President is not permitted to interfere with constitutionally protected interests unless Congress has specifically authorized him to do so.<sup>42</sup> In fact this idea played a central role in the decision of the court of appeals in the Padilla.<sup>43</sup> At issue was the legality of the detention of an American citizen held as an enemy combatant after having been seized on American soil. In the court’s view, Congress’ authorization to use “all necessary and appropriate force” to respond to the September 11 attacks should be understood in light of Endo, which required a specific congressional statement to support an intrusion into the domain of liberty. No such statement could be found.<sup>44</sup>

In Hamdi, Justice Souter similarly emphasized “the need for a clearly expressed congressional resolution of the competing claims.”<sup>45</sup> Not having found any such

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<sup>38</sup> Id at 300.

<sup>39</sup> Id at 302.

<sup>40</sup> See Masses Publishing Co v Patten, 244 F 535 (SDNY 1917).

<sup>41</sup> See, e.g., United States v. Yates, 354 US 298 (1957); Sunstein, *supra* note.

<sup>42</sup> Bradley and Smith argue that the clear statement principles have been applied only in cases involving “presidential actions, unsupported by historical practice, which undermined the constitutional rights of U.S. citizen *non-combatants*.” Bradley and Smith at 2105. It seems, however, that in at least some circumstances such principles should be applied in cases involving U.S. citizen combatants or foreigners within the territorial boundaries of the United States. If, for example, the President attempted to interfere with the religious practices of either citizen combatants or foreigners, a clear congressional statement should be required.

<sup>43</sup> Padilla v Rumsfeld, 352 F3d 695 (2d Cir 2003), reversed on other grounds, Rumsfeld v Padilla, 124 S Ct 2711 (2004).

<sup>44</sup> Id at 723.

<sup>45</sup> Id.

resolution, he concluded that Hamdi's detention was unlawful. The *Hamdi* plurality disagreed, but it did not question Justice Souter's claim that a clear statement was required. It concluded instead that the AUMF provided that statement, because the detention of "enemy combatants," at least for the duration of the conflict in which the capture occurred, "is so fundamental and accepted an incident to war as to be" an authorized exercise of "necessary and appropriate force."<sup>46</sup>

Justice Souter's view in *Hamdi* is reasonable, but the plurality's position seems to me correct, and it is consistent with what I am emphasizing here: a requirement of legislative clarity for any interference with constitutionally sensitive interests. In case (5), which is *Padilla* itself, the question is whether the AUMF contains the requisite clarity: I tend to think so, but the point is reasonably disputed.<sup>47</sup>

## **B. Executive Authority and the Commander-in-Chief Power**

Under the Constitution, the President has "executive" power, and he is Commander in Chief of the Armed Forces. Perhaps the President has considerable authority to protect the nation when its security is threatened; perhaps this is a central part of "executive" authority.<sup>48</sup> If so, then the AUMF should be construed broadly, and in a way that is highly respectful of presidential prerogatives. On this approach, also conventional in administrative law, statutory enactments involving core executive authority should be construed hospitably to the president, so as to avoid the constitutional difficulties that would come from a narrow construction.<sup>49</sup>

In recent years, this view can be found most explicitly in the dissenting opinion of Justice Clarence Thomas in the *Hamdi* case.<sup>50</sup> Justice Thomas emphasized that the Constitution accords to the President the "primary responsibility . . . to protect the national security and to conduct the nation's foreign relations."<sup>51</sup> In support, Justice

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<sup>46</sup> *Id.* at 2640.

<sup>47</sup> As Bradley and Goldsmith emphasize, the constitutionality of any procedures for detention raise separate issues from the question of authorization to detain.

<sup>48</sup> See *Hamdi*, 124 S Ct 2633 (Thomas, J., dissenting).

<sup>49</sup> *Department of Navy v. Egan*, 484 US 518 (1988); *US v. Johnson*, 481 US 681 (1987); *Cartlucci v. Doe*, 488 US 939, 99 (1988).

<sup>50</sup> *Hamdi*, 124 S Ct 2633, 2674 (2004).

<sup>51</sup> *Id.*

Thomas might well have cited the Court’s decision in Ex Parte Quirin,<sup>52</sup> where the Court upheld the use of military commissions to try German saboteurs captured during World War II. In that case, the President asked the Court to hold that as Commander in Chief, the President had inherent authority to create and to use military tribunals. The Court refused to accept this argument: “It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions.”<sup>53</sup> But where had Congress done so? The Court relied on Article 15 of the Articles of War<sup>54</sup>; but Article 15 did not specifically authorize such commissions. Hence the Court’s ruling is best seen as motivated by a desire to avoid ruling on the President’s broad claims about his constitutional authority as Commander in Chief.

Insofar the AUMF is being applied in a context that involves the constitutional powers of the President, it should be interpreted generously so to permit the President to do as he sees fit. In this domain, the President receives the kind of super-strong deference that comes from the combination of Chevron with what are plausibly taken to be his constitutional responsibilities.<sup>55</sup>

### **C. Canons at War**

Some of the most difficult cases will arise when the relevant canons point in opposing directions. Suppose, for example, that the President makes a reasonable claim of inherent authority to engage in actions that threaten constitutionally sensitive interests.<sup>56</sup> The question is whether it is possible to develop rules of priority and harmonization to sort out the relevant conflicts.

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<sup>52</sup> 317 US 1 (1942).

<sup>53</sup> Id at 39.

<sup>54</sup> See Quirin, 317 U.S. at 27.

<sup>55</sup> Note that we are not assuming that the President has clear constitutional power to do as he proposes. Under that assumption, the AUMF is irrelevant. The question here is how the AUMF should be construed when there is a plausible claim – not a holding – that the President has the constitutional power to act.

<sup>56</sup> Of course the likelihood of such conflicts depends on judgments about the merits – about the substance of the underlying constitutional principles. If the President has inherent authority to act in the relevant domains, then no such conflicts will arise, simply because clear statements principles will not be required.

In my view, the answer is straightforward: Constitutionally sensitive rights have a kind of interpretive priority, so that the President needs explicit legislative permission to invade them even if he claims, plausibly, that he is operating in the general domain of his constitutional authority. Consider the constitutional analogue. Even if the President is acting in accordance with his inherent power, he remains subject to the constraints established by the rights-protecting provisions of the Constitution. It follows that for the interpretation of an authorization to use force, liberty should always receive the benefit of the doubt. This point strengthens the conclusion that the President cannot act in case (6), and it helps explain why case (5) is so difficult; it bears on many other issues as well.

### **Conclusion**

In war no less than peace, the inquiry into the authority of the President can be organized and disciplined if it is undertaken with close reference to standard principles of administrative law. It follows that the President has a great deal of discretion to interpret congressional authorizations for the use of force, subject only to the limits of reasonableness. I am suggesting, in short, that Chevron has imperialistic aspirations. Its broad coverage includes the President's statutory authority in the war on terror.

The principal qualification is the standard one: Executive branch interpretations are constrained by principles that require explicit congressional deliberation on the question at hand. From the standpoint of national security, this conclusion might seem to give the President less than he needs. But if national security is genuinely at risk, clear congressional authorization will almost certainly be forthcoming.

Readers with comments should address them to:

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So too if the Constitution's various safeguards of liberty rarely apply in the contexts in which the AUMF is properly invoked. But let us imagine that on the correct view, ambiguous provisions must sometimes be construed in the face of canons pointing in opposite directions.

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