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Administrative Law Goes to War

Cass R. Sunstein

ADMINISTRATIVE LAW GOES TO WAR

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Consider the following cases:

(1) The President initiates military action 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 Iran's government has "harbored" members of al Qaeda since 1999.[1]

(3) The President initiates military action against North Korea, contending that the Central Intelligence Agency can show that North Korea's government has "assisted" al Qaeda financially since 2003.

(4) The President authorizes the use of force to arrest and 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.[2]

(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 under the 2001 Authorization for Use of Military Force[3] (AUMF)? 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, should be subject to the prin-

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[1] *See* Dan Eggen, *9/11 Panel Links Al Qaeda, Iran*, WASH. POST, June 26, 2004, at A12 ("While it found no operational ties between al Qaeda and Iraq, the commission investigating the Sept. 11, 2001, attacks has concluded that Osama bin Laden's terrorist network had long-running contacts with Iraq's neighbor and historic foe, Iran.").

[2] *Cf. In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (noting the government's assertion of authority to detain a "little old lady in Switzerland" who unwittingly writes a check to a front that finances al Qaeda activities).

[3] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

ciples that have emerged in the wake of the Supreme Court's extraordinarily influential decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[4] As we shall see, the logic of *Chevron* applies to the exercise of executive authority in the midst of war.[5]

Professors Curtis Bradley and Jack Goldsmith make an important contribution to our understanding of presidential power during wartime.[6] But I believe that their analysis would be clearer, simpler, and more straightforward if they focused more systematically on administrative law principles.[7] A special advantage of this approach is that it imposes the right incentives on all those involved, including Congress.

My general conclusion is that the President should have a great deal of discretion in interpreting ambiguities in the AUMF, subject to a 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, rooted in administrative law, is properly used both by reviewing courts (subject to any justiciability constraints[8]) 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, but also for evaluating all exercises of presidential power when Congress has authorized the President to protect the nation's security.[9]

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[4] 467 U.S. 837 (1984).

[5] On some of the complexities here, see Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000).

[6] *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005).

[7] Difficult questions lurk in the background of their analysis. For example, why, exactly, do Professors Bradley and Goldsmith place such emphasis on the laws of war? One possibility is that they believe that Congress legislates against the baseline of the laws of war and therefore ought to be presumed aware of them. This view seems to me artificial. A more promising possibility is that Professors 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 discipline and improve interpretation of any authorization to use force. This second view seems plausible and thus justifies attention, in hard cases, to the laws of war; but it is best to start with statutory text and more familiar administrative law principles.

[8] These constraints include the political question doctrine, *see* Goldwater v. Carter, 446 U.S. 996 (1979), and doctrines governing reviewability, *see* Webster v. Doe, 486 U.S. 592 (1988); Dickson v. Sec'y of Def., 68 F.3d 1396 (D.C. Cir. 1995).

[9] *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981) (construing the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1706 (1976 & Supp. III)).

I. PRESIDENTIAL POWER IN *CHEVRON*'S SHADOW

Chevron creates a two-step inquiry. The first question is whether Congress has directly decided the precise question at issue; the second is whether the agency's interpretation is reasonable.[10] 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*[11]

In the aftermath of *Chevron*, the Court has emphasized the need to ask a threshold question: do *Chevron*'s deference principles apply at all?[12] In its important decision in *United States v. Mead Corp.*,[13] the Court distinguished between two sets of cases in which agency interpretations receive deference: *Skidmore*[14] cases and *Chevron* cases.[15] In *Skidmore* cases, the question of statutory meaning is resolved judicially, but the court will pay attention to what the executive has said, granting its interpretation "respect according to its persuasiveness."[16] In *Chevron* cases, the agency's interpretation is binding unless it violates either of *Chevron*'s two steps.[17]

Under *Mead*, *Chevron* deference applies when "Congress intended" the executive's action "to carry the force of law."[18] Of course Congress does not usually say with anything approaching clarity whether it so intends.[19] In ordinary cases, courts infer a delegation of lawmaking power from "an agency's [exercise of] power to engage in adjudication or notice-and-comment rulemaking," or (and this phrase is critical) "by some other indication of a comparable congressional intent."[20]

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[10] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984).

[11] *See* Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 836 (2001); *see also* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. (forthcoming Apr. 2006) (on file with the Harvard Law School Library).

[12] *See* United States v. Mead Corp., 533 U.S. 218, 219–31 (2001).

[13] 533 U.S. 218.

[14] *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[15] *Mead*, 533 U.S. at 234–35.

[16] *Id.* at 221.

[17] *Id.* at 229. It does matter whether an exercise of authority falls under *Skidmore* or *Chevron*, but the difference should not be overstated. As *Skidmore* itself illustrates, courts in *Skidmore* cases are likely to accept reasonable agency interpretations. *See* 323 U.S. at 140.

[18] *Mead*, 533 U.S. at 221.

[19] *Id.* at 229 ("Congress . . . may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law . . . ." (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984))).

[20] *Id.* at 227.

How do these points bear on the AUMF? It might be argued that, in using force under the AUMF, the President is not exercising adjudicatory authority or engaging in notice-and-comment rulemaking — and hence that his interpretations of the AUMF lack the force of law. On this view, the precondition for *Chevron* deference is absent. But if we step back a bit, we will see that this argument is unconvincing. *Mead* does not hold that *Chevron* deference is unavailable if the agency has not used adjudication or notice-and-comment rulemaking; on the contrary, the Court has made clear that *Chevron* deference is sometimes appropriate for informal decisions, and even for those lacking the force of law, if Congress is best read as calling for such deference in light of "the interpretive method used and the nature of the question at issue."[21] Hence, a number of lower court decisions have given deference to agency interpretations that do not result from any kind of formal process.[22] Under *Chevron* and *Mead*, the real question is what were Congress's instructions, and the grant of authority to act with the force of law is a sufficient but not a necessary condition for finding a grant of power to interpret ambiguous terms.

In ordinary *Chevron* cases, delegation of law-interpreting power is inferred from the authority to produce rules or orders with the force of law.[23] But with an authorization to use force, what is authorized is the use of force.[24] Congress knows that the President will construe any authorization to use force, and it has every incentive to limit his discretion if it so wishes. In cases (1) through (6), the AUMF is best taken, by its very nature, as an implicit delegation to the President to resolve ambiguities as he (reasonably) sees fit.[25] This position tracks Congress's likely expectations, to the extent that they exist; it also imposes exactly the right incentives on Congress, by requiring it to limit the President's authority through plain text if that is what it wishes to do.

We may also approach this question from a different direction. Why, exactly, does *Chevron* take ambiguities to count as implicit dele-

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[21] Barnhart v. Walton, 535 U.S. 212, 222 (2002) (citing *Mead*, 533 U.S. at 229–31).

[22] *See, e.g.*, Mylan Labs., Inc. v. Thompson, 389 F.3d 1272, 1279–80 (D.C. Cir. 2004); Alfaro v. Comm'r, 349 F.3d 225, 228, 231–32 (5th Cir. 2003); Davis v. EPA, 348 F.3d 772, 779 n.5 (9th Cir. 2003).

[23] This point makes clear that *Chevron* stems from an understanding of organic statutes, not from the Administrative Procedure Act.

[24] The authorization likely includes the power to engage in rulemaking or adjudicatory authority insofar as rules and adjudications are necessary or appropriate to the use of force. For example, the President could surely issue rules governing the detention of enemy combatants. Any such rules would of course be entitled to *Chevron* deference.

[25] *See Barnhart*, 535 U.S. at 222 (emphasizing the importance of "the nature of the question at issue" and "the related expertise of the Agency, the importance of the question to administration of the statute, [and] the complexity of that administration"). These ideas, in an opinion by Justice Breyer, build directly on the analysis in Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372–82 (1986).

gations? The answer lies in an attempted reconstruction of congressional will.[26] When 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.[27] And when questions of value are at stake, agencies, subject as they are to presidential control, should resolve those questions as they see fit. If these are the foundations for *Chevron*, the President should have the authority to interpret ambiguities in the AUMF 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 One and Two*

If *Chevron* applies, the initial question is "whether Congress has directly spoken to the precise question at issue."[28] As Professors Bradley and Goldsmith emphasize, the President could not use force against nations or individuals that cannot plausibly be connected with the attacks of September 11, 2001.[29] 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."[30] 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 because the link to al Qaeda postdates the attacks; hence, the President must resort to complex arguments on behalf of the exercise of force.[31]

On the other hand, an attack on Iraq in case (1) would have been permissible under the AUMF in 2003, assuming that the President "de-

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[26] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2086–87 (1990).

[27] *See Chevron*, 467 U.S. at 865; Sunstein, *supra* note 26, at 2086.

[28] *Chevron*, 467 U.S. at 842.

[29] Bradley & Goldsmith, *supra* note 6, at 2107–08. A good example of such an unconnected individual is the Guantánamo detainee who merely "was 'associated' with an Islamic missionary group[,] . . . planned to travel to Pakistan with an individual who later engaged in a suicide bombing, and . . . accepted free food, lodging, and schooling in Pakistan from an organization known to support terrorist acts." *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 476 (D.D.C. 2005). *But cf. id.* (recognizing the possibility that the detention was authorized by the AUMF, but finding it nonetheless violative of due process).

[30] Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

[31] There are hard questions about whether those who assist al Qaeda can be considered accessories after-the-fact or, as Professors Bradley and Goldsmith argue, cobelligerents. *See* Bradley & Goldsmith, *supra* note 6, at 2112. It is not clear that the analysis of cobelligerents carries over to the analysis of those who aid a terrorist organization after the occurrence of the acts that are the predicate for the use of force.

termined" 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 the meaning of relevant terms, such as "aided" or "harbored," is disputed, the President has a great deal of discretion to understand them as he sees fit. Those who provide financial assistance to al Qaeda, at least with the intention of doing so, appear to be subject to presidential exercises of force under step one; hence, presidential action is authorized for case (4).

Under *Chevron* step two, 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.[32] Turn in this light to case (6). The President may use "all necessary and appropriate force." An execution of someone who can be detained instead is gratuitous; it is neither "necessary" nor "appropriate."[33]

II. CANONS AND COUNTERCANONS

Chevron deference can be "trumped" by countercanons. Agencies are not permitted to interpret statutes to apply outside the territorial boundaries of the United States.[34] Nor are they allowed to interpret ambiguous statutes to authorize retroactive rulemaking.[35] And an agency cannot construe an ambiguous statute so as to raise serious constitutional concerns.[36] In these and other contexts, courts have insisted on a series of *nondelegation canons* that require legislative rather than merely executive deliberation on the issues in question.[37] By their very nature, the nondelegation canons defeat *Chevron* deference because they specifically require the nation's lawmakers to make the relevant decisions explicitly.

A. The Presumption of Liberty

Requirements of clear congressional permission have been a defining feature of American law involving the relationship between liberty

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[32] *Chevron*, 467 U.S. at 843. The Supreme Court has rarely struck down a regulation at step two, *see* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 387–92 (1999), although the D.C. Circuit does so more frequently, *see, e.g.*, Republican Nat'l Comm. v. FEC, 76 F.3d 400, 406–07 (D.C. Cir. 1996).

[33] *Cf. Guantanamo Detainee Cases*, 355 F. Supp. 2d at 475 (noting the government's unreasonable assertion of the authority to detain someone who unwittingly donated small sums of money to an Islamic charity that was actually a front for al Qaeda, and to detain someone "who teaches English to the son of an al Qaeda member").

[34] EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257–58 (1991).

[35] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208–09 (1988).

[36] *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

[37] *See generally* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

and security in wartime.[38] Consider in this regard *Duncan v. Kahanamoku*,[39] which involved the imposition of martial law in Hawaii during World War II. The Court concluded that the Hawaii Organic Act did allow the governor to declare martial law, but it refused to agree that, as a statutory matter, the governor, even with clear presidential approval, could "close all the courts and supplant them with military tribunals."[40] The Court acknowledged that the statutory language and history were unclear and emphasized, as relevant to the interpretive question, "the birth, development, and growth of our political institutions."[41] Because "courts and their procedural safeguards are indispensable to our system of government," the Court would not construe an ambiguous statute to authorize the displacement, by the Executive, of ordinary courts with military tribunals.[42]

A similar principle underlies one of the most celebrated free speech decisions in American history: Judge Learned Hand's decision in *Masses Publishing Co. v. Patten*.[43] Judge Hand's interpretation of the Espionage Act as applying only to willfully false materials, and not to merely subversive materials, forced the legislature, not the Executive alone, to focus specifically on whether national security justified an abridgment of liberty.[44] There are many other examples.[45]

The lesson for the 2001 AUMF, or any AUMF, is straightforward: the President may not interfere with constitutionally protected interests unless Congress has specifically authorized him to do so.[46] In fact, this idea played a central role in the decision of the court of appeals in *Padilla v. Rumsfeld*.[47] At issue was the legality of the detention of an

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[38] *See* Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, THEORETICAL INQUIRIES L., Jan. 2004, at 1, 6–9; Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 77–93.

[39] 327 U.S. 304 (1946).

[40] *Id.* at 315.

[41] *Id.* at 319.

[42] *Id.* at 323; *see also Ex parte* Endo, 323 U.S. 283, 297 (1944) (refusing to construe statutory enactments to permit detention of a concededly loyal Japanese American).

[43] 244 F. 535 (S.D.N.Y. 1917).

[44] *See id.* at 542–43.

[45] *See, e.g.*, United States v. Yates, 354 U.S. 298, 318 (1957) (interpreting the Smith Act's prohibition on advocacy of forcible overthrow of the government as applicable only to direct incitement); Sunstein, *supra* note 38.

[46] Professors Bradley and Goldsmith argue that the clear statement principles have been applied only in cases involving "presidential actions . . . unsupported by historical practice [that] implicate[] the constitutional rights of U.S. citizen *non-combatants*." Bradley & Goldsmith, *supra* note 6, at 2105. It seems, however, that in at least some circumstances such principles should also apply 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.

[47] 352 F.3d 695 (2d Cir. 2003), *rev'd on other grounds*, 124 S. Ct. 2711 (2004).

American citizen held as an enemy combatant after having been seized on American soil.[48] In the court's view, Congress's authorization to use "all necessary and appropriate force" to respond to the September 11 attacks should be understood in light of *Ex parte Endo*,[49] which required a specific congressional statement to support an intrusion into the domain of liberty.[50] The court found no such statement.[51]

In his concurring opinion in *Hamdi v. Rumsfeld*,[52] Justice Souter similarly emphasized "the need for a clearly expressed congressional resolution of the competing claims."[53] Not having found any such resolution, he concluded that Hamdi's detention was unlawful.[54] 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 exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[55]

Justice Souter's view in *Hamdi* is reasonable, but the plurality's position seems to me correct, and it is consistent with what I emphasize here: a requirement of legislative clarity for any interference with constitutionally sensitive interests. In case (5), which is close to *Padilla* itself, the question is whether the AUMF contains the requisite clarity. I tend to think it does, but the point is reasonably disputed.[56]

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.[57] If so, then the AUMF should be construed broadly, and in a way that is

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[48] *Id.* at 698.

[49] 323 U.S. 283 (1944).

[50] *Padilla*, 352 F.3d at 722–23 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001)) (citing *Endo*, 323 U.S. at 298–300).

[51] *Id.*

[52] 124 S. Ct. 2633 (2004).

[53] *Hamdi*, 124 S. Ct. at 2655 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

[54] *Id.*

[55] *Hamdi*, 124 S. Ct. at 2640 (plurality opinion) (quoting Authorization for Use of Military Force, § 2(a), 115 Stat. at 224).

[56] As Professors Bradley and Goldsmith emphasize, the question of the constitutionality of detention procedures is independent of the question of authority to detain. Bradley & Goldsmith, *supra* note 6, at 2095.

[57] *See Hamdi*, 124 S. Ct. at 2675 (Thomas, J., dissenting).

highly respectful of presidential prerogatives.[58] Under 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 a narrow construction would introduce.[59]

In recent years, this view is set out most explicitly in Justice Thomas's *Hamdi* dissent.[60] 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."[61] In support, Justice Thomas might well have cited the Court's decision in *Ex parte Quirin*,[62] in which the Court upheld the use of military commissions to try German saboteurs captured during World War II.[63] In that case, the President asked the Court to hold that as Commander-in-Chief, the President had inherent authority to create and use military tribunals. The Court declined to resolve this argument, reasoning that Congress had "authorized trial of offenses against the law of war before such commissions."[64] But where had Congress done so? The Court relied on Article 15 of the Articles of War;[65] but as Professors Bradley and Goldsmith note, Article 15 did not specifically authorize such commissions.[66] 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 as the AUMF is applied in a context that involves the constitutional powers of the President, it should be interpreted generously. In this domain, the President receives the kind of super-strong deference that derives from the combination of *Chevron* with what are plausibly taken to be his constitutional responsibilities.[67]

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[58] Of course it is possible that executive action could encroach on legislative authority, *see, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–89 (1952), but an authorization of that possibility would take me far beyond the scope of this Reply.

[59] *See* Carlucci v. Doe, 488 U.S. 93, 102–03 (1988) (reading statutory removal procedures as not narrowing executive authority to remove employees for national security reasons); Dep't of the Navy v. Egan, 484 U.S. 518, 529–30 (1988) (favoring strong deference to the Executive in security-clearance decisions); United States v. Johnson, 481 U.S. 681, 690–91 (1987) (noting that suits against the government for injuries related to military service are barred because of the importance of deference to the military). In these cases, the Court did not suggest that Congress lacks the power to intrude on the President, but its reading of statutes was informed by an appreciation of traditional presidential prerogatives.

[60] *Hamdi*, 124 S. Ct. at 2674 (Thomas, J., dissenting).

[61] *Id.* at 2675.

[62] 317 U.S. 1 (1942).

[63] *Id.* at 48.

[64] *Id.* at 29.

[65] *See id.* at 27 (quoting Article 15 of the Articles of War).

[66] Bradley & Goldsmith, *supra* note 6, at 2129–30.

[67] I am not assuming that the President has clear constitutional power to do as he proposes. Under that assumption, the AUMF would be irrelevant. The question here is how the AUMF

C. Canons at War

Some of the most difficult cases will arise when the relevant canons point in opposite directions. Suppose, for example, that the President makes a reasonable claim of inherent authority to engage in actions that threaten constitutionally sensitive interests.[68] The question is whether it is possible to develop rules of priority and harmonization to sort out the relevant conflicts.

In my view, the answer is straightforward: constitutionally sensitive rights have a kind of interpretive priority, so the President needs explicit legislative permission to invade them even if he plausibly claims 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.

III. CONCLUSION

In war no less than in peace, the inquiry into presidential authority can be organized and disciplined if it is undertaken with close reference to standard principles of administrative law. These principles accord the President a great deal of discretion to interpret congressional authorizations for the use of force, subject only to the limits of reasonableness. In short, *Chevron* has imperialistic aspirations.

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

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should be construed when there is a plausible claim — not a holding — that the President has the constitutional power to act.

[68] Of course the likelihood of such conflicts depends on judgments about the merits — 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 statement principles will not be required. Nor will conflicts arise if the Constitution's various safeguards of liberty rarely apply when 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.