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REJOINDER
THE WAR ON TERRORISM:
INTERNATIONAL LAW, CLEAR STATEMENT
REQUIREMENTS, AND CONSTITUTIONAL DESIGN

Curtis A. Bradley and Jack L. Goldsmith***

In *Congressional Authorization and the War on Terrorism*,¹ we presented a framework for interpreting Congress's September 18, 2001 Authorization for Use of Military Force² (AUMF), the central statutory enactment related to the war on terrorism. *Congressional Authorization* addressed a puzzling gap in the academic literature: although both constitutional theory and constitutional practice suggest that the validity of presidential wartime actions depends to a significant degree on their relationship to congressional authorization, the meaning and implications of the AUMF have received little attention in the academic debates over the war on terrorism.

The framework in *Congressional Authorization* built on the plurality opinion in *Hamdi v. Rumsfeld*,³ which devoted significant attention to the AUMF. The framework, in a nutshell, is as follows: The meaning of the AUMF should be determined in the first instance by its text, as informed by a comparison with authorizations of force in prior wars, including declared wars. In clarifying the meaning of the "necessary and appropriate force" that Congress authorized,⁴ courts should look primarily to two interpretive factors: Executive Branch practice during prior wars and the international laws of war. Delegation concerns should not play a significant role in interpreting the AUMF, but a clear statement requirement is appropriate when the President takes actions under the AUMF that restrict the liberty of non-combatants in the United States.

Congressional Authorization did not attempt to resolve every question that might arise under the AUMF. Instead, it sought to establish a starting point for analysis that would be useful to courts and the Ex-

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** Professor, Harvard Law School. We thank Liz Magill, John Manning, Caleb Nelson, and David Strauss for helpful suggestions.

¹ Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005).

² Pub. L. No. 107-40, 115 Stat. 224 (2001).

³ 124 S. Ct. 2633 (2004).

⁴ See Authorization for Use of Military Force, § 2(a), 115 Stat. at 224.

ecutive Branch in addressing the complex and sometimes novel issues in the war on terrorism, and to stimulate academic discussion of Congress's important enactment. The latter goal is well served by the three Replies to *Congressional Authorization* in this issue of the *Harvard Law Review*.

Although each of the Replies approaches the AUMF from a different perspective, none expresses fundamental disagreement with our framework. Professors Goodman and Jinks describe our framework as "useful," but maintain that we have understated the importance of the international laws of war within the framework.⁵ Professor Sunstein argues that administrative law should play a greater role than we suggested, and the international laws of war a less substantial role. He also advocates a broader clear statement requirement.⁶ Otherwise, he approaches the AUMF in ways similar to *Congressional Authorization*, and reaches similar conclusions. Professor Tushnet suggests that ours is a reasonable approach to interpreting the AUMF, but he maintains that its very reasonableness demonstrates the danger of relying on Congress to police executive power during wartime, and suggests that the only solution may be a constitutional amendment.⁷

Below, we address three issues raised by these Replies: first, the proper role of the international laws of war in the interpretation of the AUMF; second, the circumstances in which a clear statement requirement is appropriate in ascertaining the scope of the AUMF; and third, the implications of our analysis for the ability of the current constitutional system to ensure optimal tradeoffs between liberty and security during war.

I. THE AUMF AND THE INTERNATIONAL LAWS OF WAR

Congressional Authorization argued that, in broadly authorizing the President to use "all necessary and appropriate force," Congress implicitly authorized actions permitted under the international laws of war. It also argued that, because the laws of war can inform the scope of Congress's authorization, they can also inform limitations on that authorization. Absent textual or other evidence to the contrary, therefore, the AUMF should not be viewed as authorizing presidential actions in violation of the laws of war.⁸ As a result, such actions would

⁵ See Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653 (2005).

⁶ See Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005).

⁷ See Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673 (2005).

⁸ For reasons explained in *Congressional Authorization*, we limited this claim to *jus in bello* rules of international law that govern the conduct of war and did not extend the claim to *jus ad*

be valid only if they fell within the independent constitutional authority of the President.

Professor Sunstein and Professors Goodman and Jinks take different, and conflicting, positions on the proper role of the international laws of war in our framework. While Professor Sunstein suggests that *Congressional Authorization* overstates the importance of the laws of war,⁹ Professors Goodman and Jinks contend that *Congressional Authorization* “systematically understate[s] the interpretive significance” of this body of law.¹⁰ We address these positions in turn.

A. *Relevance*

In suggesting that the international laws of war should play a less significant role than the one we proposed in *Congressional Authorization*, Professor Sunstein states that “it is best to start with statutory text and more familiar administrative law principles.”¹¹ We agree with the beginning of this statement. The first two substantive parts of *Congressional Authorization* focus on the text of the AUMF, its drafting history, and its relationship to past authorizations of force.¹² We disagree, however, with Professor Sunstein’s suggestion that “administrative law principles,” particularly the *Chevron* doctrine, have logical priority over the international laws of war. As Professor Sunstein observes, *Chevron* deference is triggered only after a court determines, using the appropriate tools of statutory construction, that the statutory provision under consideration is silent or ambiguous.¹³ The international laws of war are one such tool for interpreting the AUMF and therefore would properly be considered under the first step of the *Chevron* doctrine, assuming, as Professor Sunstein contends, that doctrine applies to the AUMF.

The international laws of war reflect widely accepted background norms, relating to the very subject of the authorization (the use of force in international relations), against which Congress legislated.¹⁴ In addition, there is a long tradition of both courts and presidents rely-

bellum rules governing when nations can use force. See Bradley & Goldsmith, *supra* note 1, at 2089–91.

⁹ See Sunstein, *supra* note 6, at 2664.

¹⁰ Goodman & Jinks, *supra* note 5, at 2653.

¹¹ Sunstein, *supra* note 6, at 2664 n.7.

¹² See Bradley & Goldsmith, *supra* note 1, at 2056–83.

¹³ See Sunstein, *supra* note 6, at 2665; see also *Gen. Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236, 1248 (2004); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

¹⁴ See Bradley & Goldsmith, *supra* note 1, at 2091–92; cf. Sunstein, *supra* note 6, at 2664 n.7 (noting that the laws of war might “furnish a set of principles, vindicated by tradition, against which authorizations for the use of force should be understood”).

ing on the laws of war to inform the President's wartime powers.¹⁵ This consistent understanding during wartime is an especially relevant source of meaning because the AUMF purports to authorize presidential action in an area of concurrent presidential authority.¹⁶ Following in this tradition, the Supreme Court plurality in *Hamdi* properly looked to the laws of war in ascertaining the "necessary and appropriate" force that Congress authorized in the AUMF.¹⁷

We believe that Professor Sunstein's resolution of the six hypotheticals that he poses at the outset of his Reply would be more nuanced and persuasive if he looked to the international laws of war in interpreting the AUMF. For example, Professor Sunstein states that the President's ability to use force against entities that have assisted al Qaeda only after the September 11 attacks poses a "difficult" issue, but he does not attempt to resolve it.¹⁸ As we explained in *Congressional Authorization*, the international law principles concerning co-belligerency provide useful guidance in resolving this issue.¹⁹ In addition, Professor Sunstein simply asserts that the killing of an American citizen at a U.S. airport would not be a necessary and appropriate use of force under the AUMF.²⁰ The international law rules concerning the use of force against unarmed and nonthreatening combatants, by

¹⁵ See Bradley & Goldsmith, *supra* note 1, at 2091–92.

¹⁶ See *id.* at 2086 n.160, 2100.

¹⁷ See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2641 (2004) (plurality opinion).

¹⁸ Sunstein, *supra* note 6, at 2667 & n.31.

¹⁹ See Bradley & Goldsmith, *supra* note 1, at 2112–13. The text of the AUMF also provides more guidance than suggested by Professor Sunstein. He states that we emphasize that "the President could not use force against *nations or individuals* that cannot plausibly be connected with the attacks of September 11, 2001." Sunstein, *supra* note 6, at 2667 (emphasis added). This description omits the AUMF's reference to "organizations" with a connection to the September 11 attacks. Authorization for Use of Military Force, § 2(a), Pub. L. No. 107-40, 115 Stat. 224, 224 (2001). As *Congressional Authorization* explained, terrorist organizations with an adequately close post-September 11 connection to al Qaeda can properly be deemed part of an organization responsible for the attacks. See Bradley & Goldsmith, *supra* note 1, at 2110–12. The international law co-belligerency standard is relevant only as a guide for determining the adequacy of the connection. See *id.* at 2112.

²⁰ See Sunstein, *supra* note 6, at 2668. It is unclear from Professor Sunstein's treatment of his hypotheticals how he views the "necessary and appropriate" language in the AUMF. For example, although he views that language as precluding the use of excessive force in his hypothetical concerning the killing of a U.S. citizen at a U.S. airport, he does not impose such a restriction on excessive force in resolving the other hypotheticals, such as his hypotheticals about invading Iraq based on the AUMF or detaining French citizens who provide financial support to organizations that support al Qaeda. See *id.* at 2667–68. As we explained in *Congressional Authorization*, we do not believe that Congress intended the phrase "necessary and appropriate" to operate as an independent textual restriction beyond its possible implicit reference to prior Executive Branch practice and the laws of war. See Bradley & Goldsmith, *supra* note 1, at 2081–82.

contrast, provide more principled and refined justifications for his conclusion.²¹

B. Significance

Professors Goodman and Jinks agree with us that the laws of war are relevant to interpreting the AUMF, but they contend that we have understated their significance.²² First, they argue that the laws of war limit the class of individuals who can be subjected to the use of force more substantially than we suggested. Second, they argue that the President's power to detain enemy combatants is subject to a broader array of international law conditions than we suggested.

1. *Individuals Covered by the AUMF.* — Congress in the AUMF authorized the use of force against “organizations” connected to the September 11 attacks,²³ which uncontroversially includes al Qaeda. In *Congressional Authorization*, we argued that, when it is unclear whether an individual is a member of an organization covered by the AUMF, the law-of-war criteria for combatancy can help resolve the issue. For example, because international law treats civilians who “directly participate” in hostilities as combatants who can be targeted and detained, persons who directly participate in al Qaeda's terrorist activities against the United States should be viewed as covered by the AUMF.²⁴

Professors Goodman and Jinks argue that the direct participation standard is not merely a relevant consideration, it is the *only* relevant consideration.²⁵ Under their analysis, the President would not have statutory authority to use force against or detain members of al Qaeda unless those members had directly participated in hostilities against the United States.²⁶ They also suggest that many (and perhaps most)

²¹ See Bradley & Goldsmith, *supra* note 1, at 2120–21 n.325.

²² See Goodman & Jinks, *supra* note 5, at 2653.

²³ See Authorization for Use of Military Force, § 2(a), 115 Stat. at 224.

²⁴ See Bradley & Goldsmith, *supra* note 1, at 2115–16.

²⁵ See Goodman & Jinks, *supra* note 5, at 2655, 2657.

²⁶ Professors Goodman and Jinks overstate matters in claiming that the direct participation standard is “precise,” *id.* at 2655, and suffers from only “modest . . . definitional squabbles,” *id.* at 2656. In its recent study on customary international law related to the laws of war, the International Committee of the Red Cross (ICRC), an organization expert in the laws of war and not unduly cautious about embracing progressive developments in customary international law, noted that “[a] precise definition of the term ‘direct participation in hostilities’ does not exist.” I JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 22 (2005); see also *id.* (noting that state practice “gives little or no guidance on the interpretation of the term ‘direct participation’”). U.S. military and academic commentators have similarly noted the unsettled nature of this standard. See, e.g., Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111, 116–20 (2001); Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 28 (2001).

members of al Qaeda do not meet this direct participation requirement.²⁷

As an initial matter, although Professors Goodman and Jinks purport to rely on international law only for its “interpretive significance for the AUMF,”²⁸ their analysis loses sight of the AUMF. The class of individuals subject to the AUMF is not, as they suggest, a free-floating question of international law. The AUMF expressly authorizes the use of force “against those . . . organizations” responsible for “the terrorist attacks that occurred on September 11, 2001,”²⁹ a description that, as noted above, includes al Qaeda. As a result, individuals who are uncontroversially part of that organization — because, for example, they admit to being members, or because they carry out orders in the organization’s chain of command — are covered by the AUMF regardless of whether they satisfy the direct participation standard.³⁰

Even if it were proper to disregard the AUMF’s text, Professors Goodman and Jinks’s insistence that direct participation is the only criterion for combatant status in the armed conflict against al Qaeda and related terrorist organizations is unsupported by the materials they cite and is inconsistent with standard assumptions underlying the laws of war. They assert that, under the laws of war, military force may be used against only two categories of individuals — lawful combatants and unlawful combatants — and, more importantly, that the latter category is limited to civilians who directly participate in hostilities.³¹ As a result, Professors Goodman and Jinks contend that because members of al Qaeda do not qualify as lawful combatants, they are presumptively civilians and the United States cannot use force against them unless they directly participate in hostilities against the United States.³² Like any syllogism, the validity of this argument depends on its premise, and the premise here — that in an armed conflict between a state and a terrorist organization, the members of the terrorist organization are deemed civilians unless they directly participate in hostilities — is flawed. The only support Professors Goodman and Jinks offer for this premise is Article 51 of the First Additional Protocol to

²⁷ See Goodman & Jinks, *supra* note 5, at 2657–58.

²⁸ *Id.* at 2654 n.5.

²⁹ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

³⁰ See Bradley & Goldsmith, *supra* note 1, at 2114–15. The authorization to use force against “nations” would not imply an authority to use force against all members of a nation because the international laws of war as applied to interstate conflicts specifically limit the use of force to a nation’s armed forces and related direct participants in the war, and affirmatively immunize from attack civilian non-combatants. By contrast, international law does not specifically limit the use of force to only a subset of a militant terrorist organization, especially an organization that, like al Qaeda, has as its defining purpose the waging of illegal war.

³¹ See Goodman & Jinks, *supra* note 5, at 2655.

³² See *id.* at 2657–58.

the Geneva Conventions.³³ The United States, however, has not ratified that Protocol. Moreover, Article 51 does not state that everyone other than lawful combatants must be classified as civilians, let alone that members of a terrorist organization must be so classified. Rather, it merely states that civilians should receive certain protections “unless and for such time as they take a direct part in hostilities.”³⁴

Professors Goodman and Jinks’s approach is also inconsistent with standard assumptions underlying the laws of war. It is widely recognized that a nation involved in an armed conflict is permitted under the laws of war to use force against most of the enemy’s armed forces, regardless of whether those forces meet the direct participation standard.³⁵ By contrast, Professors Goodman and Jinks would disallow the use of force against most members of al Qaeda, even though al Qaeda is a military organization dedicated to waging illegal war. Under their proposed approach, al Qaeda military recruits training in Afghanistan could not be targeted or detained because these members of al Qaeda have not yet directly participated in hostilities.³⁶ Indeed, Professors Goodman and Jinks’s analysis could lead to the absurd conclusion that even Osama bin Laden could not be targeted or detained, since, while he is the leader of al Qaeda, it could be argued that he has not directly participated in hostilities (or is no longer participating in them).³⁷ In sum, Professors Goodman and Jinks’s approach to armed conflicts would confer substantially more immunity from attack and detention on unlawful combatant groups than on the lawful armed

³³ See *id.* at 2655 nn.6–7.

³⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, art. 51(3), 1125 U.N.T.S. 3, 26. The sources that Professors Goodman and Jinks cite concerning the scope of the direct participation test, see Goodman & Jinks, *supra* note 5, at 2655–57 nn.8–28, do not suggest that members of terrorist groups must be treated in an armed conflict as non-combatants unless they meet the test. Rather, these sources focus on the questions whether and when traditional civilian non-combatants can be deemed combatants because they directly participate in an armed conflict.

³⁵ See Bradley & Goldsmith, *supra* note 1, at 2114 & n.300; see also, e.g., YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 27 (2004) (noting that “[m]embers of the armed forces of a belligerent Party (except medical and religious personnel)” are considered combatants “even if their specific task is not linked to active hostilities” (citation omitted)); Knut Ipsen, *Combatants and Non-Combatants*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 65, 66 (Dieter Fleck ed., 1995) (“[F]or members of the armed forces combatant status is the rule, while the classification of non-combatant status is an exception.”).

³⁶ See Goodman & Jinks, *supra* note 5, at 2657 (noting that “training” is not direct participation (quoting W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989, at 9 app. C)).

³⁷ *Cf. id.* (articulating the direct participation test and concluding that “members [of the terrorist group] conducting ‘local intelligence, intermediate logistics, recruiting, [and] training’ would retain their status as noncombatants” (second alteration in original) (quoting Parks, *supra* note 36, at 9 app. C)).

forces of enemy nations — a result directly at odds with the usual assumptions of the laws of war and with common sense.³⁸

2. *International Law Conditions.* — Professors Goodman and Jinks also claim that we have understated the extent to which international law imposes conditions on the President's authority to detain enemy combatants. In *Congressional Authorization*, we argued that the President's violation of the laws of war would not negate authority otherwise implicitly conferred by the AUMF (such as the power to detain enemy combatants) unless the law-of-war rule in question were a condition, under international law, of that authority.³⁹ Professors Goodman and Jinks agree with this claim, but they contend that there will be a wide range of international law conditions that might be relevant to actions taken under the AUMF.

Congressional Authorization did not purport to make a quantitative assessment of the number of international law rules that are, or are not, conditions. We did argue, and Professors Goodman and Jinks do not appear to dispute,⁴⁰ that Article 5 of the Third Geneva Convention (which calls for hearings before competent tribunals when there is doubt about whether a captured belligerent qualifies as a prisoner of war⁴¹) is not framed as a condition on the power to detain.⁴² We also suggested that several other provisions in the Third Geneva Convention, such as access to a canteen, should not be viewed as conditions on the detention power,⁴³ but we made no other specific claims. As a result, although Professors Goodman and Jinks phrase this portion of their Reply as if it were a disagreement with our analysis, the basis for their disagreement is unclear.

Without engaging in a point-by-point assessment of the various rules they cite, we would emphasize that the rules must actually apply to terrorist combatants for them to operate as conditions on presidential action under the AUMF. Yet Professors Goodman and Jinks never establish that the various international law rules they cite actually do apply in the conflict between the United States and terrorists covered by the AUMF. For example, they assume without any argument or

³⁸ Cf. A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 33 (2d ed. 2004) (noting that “there is a strong argument that if a person belongs to a group of guerrilla fighters that carries out attacks on opposing armed forces,” and the group does not conduct its operations in accordance with the laws of war, “he may be considered to have forfeited his civilian status for the duration of his membership of, or participation in the actions of, that group” (emphasis added)).

³⁹ See Bradley & Goldsmith, *supra* note 1, at 2094–96.

⁴⁰ See Goodman & Jinks, *supra* note 5, at 2660 n.39.

⁴¹ See Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, *opened for signature* Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 3322–24, 75 U.N.T.S. 135, 140–42 [hereinafter Third Geneva Convention].

⁴² See Bradley & Goldsmith, *supra* note 1, at 2095–96.

⁴³ See *id.* at 2095.

qualification that the Third Geneva Convention (governing the treatment of prisoners of war) and the Fourth Geneva Convention⁴⁴ (governing the treatment of “civilians”) apply in this conflict.⁴⁵ The basis for this assumption is never specified, and in the unqualified fashion in which it is suggested by Professors Goodman and Jinks it is very likely wrong. Among other things, Common Article 2 of these Conventions appears to preclude their applicability to conflicts with non-state terrorist organizations. It provides that the Geneva Conventions “shall apply to . . . any . . . armed conflict which may arise *between two or more of the High Contracting Parties*.”⁴⁶ Al Qaeda is not a state, much less a high contracting party to the Geneva Conventions. Common Article 2 also applies the Geneva Conventions to a non-party Power that “accepts and applies the provisions thereof.”⁴⁷ It is doubtful that al Qaeda is a “Power” within the meaning of Common Article 2, but even if it were, it does not accept and apply the Conventions.⁴⁸ For these reasons, the President appears to have correctly concluded that al Qaeda is not a party to the Third Geneva Convention and is therefore not covered by it.⁴⁹

⁴⁴ Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, *opened for signature* Aug. 12, 1949, art. 79, 6 U.S.T. 3517, 75 U.N.T.S. 287.

⁴⁵ See Goodman & Jinks, *supra* note 5, at 2659–61.

⁴⁶ Third Geneva Convention, *supra* note 41, art. 2, 6 U.S.T. at 3318, 75 U.N.T.S. at 136 (emphasis added).

⁴⁷ *Id.*

⁴⁸ Nor does it matter, for purposes of Common Article 2, that al Qaeda may have been fighting in conjunction with the Afghan Taliban forces, who we can assume (as President Bush determined) are covered by the Geneva Conventions. Common Article 2 states that, “[a]lthough one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations.” *Id.* This provision makes clear that even when two states fight together against a third state in a traditional armed conflict, the third state is bound by the Geneva Conventions only vis-à-vis the enemy that is a party to the Geneva Conventions, not with respect to the enemy that is not a party to the Conventions. See, e.g., MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 68, 97 (1959); HOWARD S. LEVIE, *PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICTS* 24–25 (U.S. Naval War Coll., Int’l Law Studies Vol. 59, 1979). At a minimum, the same rule should apply when the non-party armed forces are members of a terrorist organization. In addition, al Qaeda probably cannot benefit from Article 4 of the Third Geneva Convention, which provides that militias and other volunteer corps that “belong[] to a Party to the conflict” can qualify as prisoners of war under the Convention if they satisfy the four traditional prerequisites for lawful combatancy. See Third Geneva Convention, *supra* note 41, art. 4(a)(2), 6 U.S.T. at 3320, 75 U.N.T.S. at 138. Because it is unlikely that al Qaeda “belongs to” Afghanistan (which is a Party to the conflict), one need not even reach the issue whether it has satisfied the four traditional criteria (which, as Professors Goodman and Jinks acknowledge, it almost certainly has not, see Goodman & Jinks, *supra* note 5, at 2657).

⁴⁹ See Office of the White House Press Sec’y, Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>. Professors Goodman and Jinks suggest that President Bush has “determine[d] that [the law of armed conflict] is inapplicable to the conflict” against terrorists and that the Executive Branch is not using the law-of-war framework. Goodman & Jinks, *supra* note 5, at 2659 n.35. In fact, President Bush simply determined that the Third Geneva Convention did not apply to the conflict with al Qaeda

II. CLEAR STATEMENT REQUIREMENT

Congressional Authorization analyzed at length when a clear statement requirement would be appropriate in interpreting the AUMF.⁵⁰ It concluded that a clear statement requirement is warranted for presidential wartime actions that restrict the liberty of non-combatants in the United States, but not for presidential actions that restrict the liberty of combatants.⁵¹

Professor Sunstein proposes a different clear statement requirement. Specifically, he contends that, although the President should receive *Chevron* deference when he interprets the AUMF, “if the President is infringing on *constitutionally sensitive interests*, the AUMF must be construed narrowly, whatever the President says.”⁵² He also claims that, in interpreting the AUMF, “liberty should always receive the benefit of the doubt.”⁵³

In our view, this formulation is overly broad and indeterminate. It is unclear what the phrase “constitutionally sensitive interests” (and the related phrases that Professor Sunstein uses in his Reply⁵⁴) entails. For example, Professor Sunstein does not explain whether his clear statement requirement is limited to constructions of the AUMF that violate constitutional rights, or whether it also applies to constructions that raise constitutional questions or, even more broadly, to constructions that implicate constitutional values. It is also unclear what Professor Sunstein means by “liberty.”⁵⁵ Most presidential actions under the AUMF will affect liberty, and many of these actions might also affect constitutionally sensitive interests, especially if they are directed against U.S. citizens. For example, if the President orders the bombing or detention of enemy combatants covered by the AUMF in Afghanistan, that action will have a significant effect on the liberty of those combatants and may (especially if they are U.S. citizens) implicate constitutionally sensitive interests. Yet we doubt that Professor Sunstein

and that Taliban detainees did not qualify under the Convention for prisoner-of-war status. See Office of the White House Press Sec’y, *supra*; see also William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 320 (2003) (then-Legal Adviser to the U.S. State Department stating that “[t]he body of the law of armed conflict would thus apply — and, from a U.S. perspective, there was never a question of not applying the law, or of stepping away from international rules”).

⁵⁰ See Bradley & Goldsmith, *supra* note 1, at 2102–06.

⁵¹ See *id.* at 2106.

⁵² Sunstein, *supra* note 6, at 2664 (emphasis added).

⁵³ *Id.* at 2672.

⁵⁴ Professor Sunstein uses a variety of formulations for his clear statement test, and it is not clear whether the different formulations all have the same meaning. Compare *id.* at 2664 (“constitutionally sensitive interests”), with *id.* at 2669 (“constitutionally protected interests”), and *id.* at 2672 (“constitutionally sensitive rights”).

⁵⁵ See *id.* at 2668–70.

believes Congress should be required to enact additional legislation beyond the AUMF before the President could bomb or detain enemy combatants in Afghanistan. Indeed, the Court in *Hamdi* implicitly held that such additional legislation was unnecessary.⁵⁶

Congressional Authorization argued that the relevant precedent supports a more precise trigger for the clear statement requirement: the requirement should apply when presidential actions under the AUMF restrict the liberty of non-combatants in the United States, but not when they restrict the liberty of combatants.⁵⁷ The Supreme Court in *Duncan v. Kahanamoku*⁵⁸ and *Ex parte Endo*⁵⁹ applied a clear statement requirement in the context of presidential actions against civilian non-combatants, but suggested that the same requirement would not apply if the President engaged in traditional military functions against combatants.⁶⁰ By contrast, in *Ex parte Quirin*,⁶¹ the Court did not apply a clear statement requirement, even though the case involved the detention and trial of a U.S. citizen — practices that restricted liberty and presumably implicated constitutionally sensitive interests. Similarly, the plurality in *Hamdi* did not purport to apply a clear statement requirement, even though the case involved the detention of a U.S. citizen in the United States.⁶² The central difference between *Duncan* and *Endo* on the one hand, and *Quirin* and *Hamdi* on the other, is that the latter cases involved actions taken against combatants.

⁵⁶ See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640–42 (2004) (plurality opinion) (interpreting the AUMF as authorizing detention of U.S. citizen enemy combatants captured in Afghanistan).

⁵⁷ See Bradley & Goldsmith, *supra* note 1, at 2105–06.

⁵⁸ 327 U.S. 304 (1946).

⁵⁹ 323 U.S. 283 (1944).

⁶⁰ See *Duncan*, 327 U.S. at 310; *Endo*, 323 U.S. at 300–04; see also Bradley & Goldsmith, *supra* note 1, at 2104–05. Professor Sunstein also relies on a district court decision by Judge Learned Hand, *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917). See Sunstein, *supra* note 6, at 2669. In *Masses*, the court held that in the absence of specific congressional authorization, the Executive Branch could not interfere with U.S. mail in an effort to stop antiwar propaganda during World War I. 244 F. at 536, 539–41, 543. This decision is consistent with our position that a clear statement requirement is appropriate during wartime when the President takes action to restrict the liberty of non-combatants in the United States. It is also worth noting that the relevant government actor in *Masses* was the Postmaster General, whose authority, the court noted, was entirely derived from statute. *Id.* at 538 (“The defendant’s authority is based upon the act of Congress, and the intention of that act is the single measure of that authority.”). The decision therefore does not speak to situations in which the President is acting pursuant to independent constitutional authority.

⁶¹ 317 U.S. 1 (1942).

⁶² Professor Sunstein asserts that the plurality implicitly and correctly found in the AUMF a clear statement authorizing detention of U.S. citizens, see Sunstein, *supra* note 6, at 2670, but his interpretation of the plurality opinion can only be sustained if one adopts a weak version of the clear statement requirement — so weak, in fact, that it is not apparent what work the clear statement requirement is doing. The AUMF, after all, does not even refer to detention, let alone the detention of U.S. citizens, which was the presidential action at issue in *Hamdi*.

In sum, the clear statement requirement outlined in *Congressional Authorization* provides better guidance to courts and the Executive Branch than the one proposed by Professor Sunstein, and is consistent with *Hamdi* and prior Supreme Court decisions regulating presidential power during wartime.

III. CONSTITUTIONAL DESIGN

Professor Tushnet suggests that our framework is premised on a separation-of-powers model for supervising presidential power, by which he means that it assumes that Congress is the primary agent for policing Executive Branch wartime action and ensuring that the President makes optimal wartime tradeoffs between liberty and security. He contends that the framework “indirectly challenge[s] the adequacy” of this model because it shows that the AUMF can reasonably be interpreted to authorize actions in the United States that threaten the liberties of U.S. citizens.⁶³ He also expresses doubt about whether the principal alternative model — a judicial-review model in which courts are charged with controlling political branch excesses during wartime — is any better, given the tendency of courts to defer to the political branches.⁶⁴ He concludes his Reply by suggesting the possibility of amending the Constitution in order to address the problem of protecting liberty during wartime.⁶⁵

Professor Tushnet’s questions about constitutional design, while thought-provoking, are beyond the scope of our project. Ultimately, *Congressional Authorization* is about how to interpret the AUMF within the context of our current constitutional system, not how to design a system that would best regulate the conduct of war. We do, however, have several observations about Professor Tushnet’s analysis.

First, Professor Tushnet appears to overstate the dichotomy between the separation-of-powers and judicial-review models. These models have never been mutually exclusive means of regulating presidential action during wartime. For example, although the Supreme Court has never invalidated a presidential wartime action that it concluded was authorized by Congress,⁶⁶ it has sometimes exercised searching judicial review to conclude that a seemingly authorized Ex-

⁶³ See Tushnet, *supra* note 7, at 2675.

⁶⁴ See *id.* at 2679–80.

⁶⁵ *Id.* at 2680–82.

⁶⁶ The Court in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), stated that Congress could not authorize military commissions to try non-combatant civilians where civilian courts were open, *id.* at 121–22, but as the dissent there pointed out, this statement was dicta because Congress had in fact *prohibited*, not *authorized*, the use of military commissions. See *id.* at 136 (Chase, C.J., dissenting).

ecutive Branch action was not in fact authorized.⁶⁷ The interpretive tools that the Court has employed in these cases — such as requiring a clear statement before construing a statute to authorize presidential acts that impinge on the rights of U.S. citizen non-combatants — are important aspects of our framework for interpreting the AUMF.⁶⁸ Furthermore, the mere possibility of judicial review can have important effects on Executive Branch action, as evidenced by the Executive Branch's decision to confer additional procedural rights on enemy combatants after the Supreme Court granted certiorari in *Hamdi* and *Rasul* last Term and especially after the Court made clear in those decisions that it would exercise judicial review over the Executive's actions.⁶⁹

Second, we believe that Professor Tushnet's concerns stem from an unduly narrow conception of the limitations in our framework on the scope of Congress's authorization in the AUMF. He maintains that our framework's "only operative limitation" on the AUMF is the September 11 nexus requirement.⁷⁰ But *Congressional Authorization* identifies many other important limits on what Congress authorized in the AUMF, including the international laws of war, traditional practice, the clear statement requirement for action against non-combatants in the United States, and habeas corpus review, which includes an independent judicial assessment of, among other things, the procedural adequacy of presidential determinations related to the detention, and possibly the trial, of enemy combatants.⁷¹

These factors preclude an interpretation of the AUMF that would authorize Professor Tushnet's hypothetical mass detention of Arab American males in the United States.⁷² Since the AUMF only authorizes the use of force against "nations, organizations, or persons" with a connection to the September 11 attacks,⁷³ it would not authorize the detention of Arab American males who do not have, and are not members of an organization that has, such a connection. Independent of this textual limitation, the hypothesized mass detention would restrict

⁶⁷ Two examples are *Duncan and Endo*. A third example is *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), in which the government and the dissent argued that the President was simply taking care to execute an array of congressional statutes related to national security. See *id.* at 701 (Vinson, C.J., dissenting).

⁶⁸ See Bradley & Goldsmith, *supra* note 1, at 2102–06.

⁶⁹ See *id.* at 2126–27.

⁷⁰ Tushnet, *supra* note 7, at 2675.

⁷¹ See Bradley & Goldsmith, *supra* note 1, at 2122; see also *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2636–39 (2004) (plurality opinion) (allowing a U.S. citizen detained in the United States as an enemy combatant to challenge the factual basis for his designation through a writ of habeas corpus).

⁷² See Tushnet, *supra* note 7, at 2673.

⁷³ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

the liberty of non-combatants in the United States, and thus should not be viewed as authorized by Congress absent a clear statement.

Professor Tushnet discounts these limitations, and focuses instead on the past Executive Branch practice of interning civilians in the United States — most notably, the exclusion and internment of Japanese Americans during World War II.⁷⁴ Since our framework contemplates that Executive Branch practice in prior wars informs the meaning of the AUMF, he concludes that it is plausible within our framework to view the AUMF as authorizing his hypothesized detention. Professor Tushnet's conclusion, however, cannot survive other elements of the framework, which, as just noted, rule out the possibility of the hypothesized mass detention. Moreover, even considering Executive Branch practice alone, his conclusion would not follow. The reason that Executive Branch practice is relevant to interpreting the AUMF is that Congress legislates against the backdrop of that practice and, absent evidence to the contrary, is presumed to accept it.⁷⁵ Congress, however, cannot plausibly be viewed as having approved the practice of excluding and interning Japanese Americans during World War II. To the contrary, Congress has made clear that it disapproves of that internment. In 1988, it “acknowledge[d] the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II,”⁷⁶ and authorized the payment of monetary compensation to the victims of the internment.⁷⁷ Moreover, as we noted in *Congressional Authorization*,⁷⁸ the legislative history of 18 U.S.C. § 4001(a), which states that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress,” suggests that Congress specifically wanted to avoid a repetition of that sort of detention of non-combatants.⁷⁹

Third, although we agree with Professor Tushnet that during wartime Congress faces political and institutional hurdles to policing Executive Branch action, and that the courts often defer to the political

⁷⁴ See Tushnet, *supra* note 7, at 2676–77.

⁷⁵ See Bradley & Goldsmith, *supra* note 1, at 2085–86.

⁷⁶ Civil Liberties Act of 1988, Pub. L. No. 100-383, § 1(1), 102 Stat. 903, 903 (codified at 50 U.S.C. app. § 1989 (2000)).

⁷⁷ See *id.* § 105, 102 Stat. at 905–08 (codified as amended at 50 U.S.C. app. § 1989b-4).

⁷⁸ See Bradley & Goldsmith, *supra* note 1, at 2106 n.271.

⁷⁹ See H.R. REP. NO. 92-116, at 2 (1971), *reprinted in* 1971 U.S.C.A.N. 1435, 1435–36. In contrast, Congress has not expressed disapproval of, and there has not been general criticism of, the detention of hundreds of thousands of prisoners of war — including some U.S. citizens — in the United States during World War II. See Bradley & Goldsmith, *supra* note 1, at 2106–07 n.271. This fact, in addition to the approach taken by the Supreme Court in several World War II-era decisions, supports our claim that the AUMF is best viewed as authorizing the President to detain those who qualify as enemy combatants under the AUMF, even though it does not authorize the detention of non-combatants.

branches, we do not believe that these observations by themselves establish the case for amending the Constitution. Among other things, Professor Tushnet's claim that the current constitutional system is inadequate depends on the assumption that the President (who, despite the points noted by Professor Tushnet, remains regulated by Congress and the courts, scrutinized by the press, and subject to regular elections) will, in acting pursuant to the AUMF, overvalue national security and undervalue individual liberty, and that he is doing so in the war on terrorism. Professor Tushnet neither justifies this assumption nor offers an example of a presidential act authorized by the AUMF that would involve such an improper tradeoff between security and liberty.⁸⁰ Moreover, any defense of his assumption would be difficult, since it would depend on a contested normative baseline for the appropriate balance between security and liberty, as well as contested factual assumptions about the security threats the nation currently faces.

Finally, to justify an amendment to the Constitution, Professor Tushnet would need to show that there is a realistic alternative to the current constitutional arrangement that would operate better in practice. He tentatively suggests a constitutional amendment to create an institution of elected judges, legislators, military officers, and civilians who would promulgate and enforce "legally binding rules for the conduct of military engagements."⁸¹ It is not obvious why such an institution would do a better job than our current constitutional scheme of balancing liberty and security, but it does seem likely that such an institution would be less effective in fighting wars.

IV. CONCLUSION

Each of the three Replies offers a useful perspective on the framework for interpreting the AUMF that we set forth in *Congressional Authorization*. Despite our disagreement with some aspects of the Replies, we believe that they confirm the importance of focusing on the AUMF, at least as a starting point, in making legal assessments of the President's authority in the war on terrorism.

⁸⁰ As noted above, we do not believe that his hypothetical about mass detention of Arab Americans can plausibly be said to be authorized by the AUMF.

⁸¹ Tushnet, *supra* note 7, at 2681.