The Statutory Commander in Chief

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INTRODUCTION

This symposium asks us to consider the scope and limits of presidential power in the context of war and terrorism. This question strongly suggests a constitutional focus.[1] Because the Constitution establishes the presidential office and sets forth its powers and duties, it is the appropriate starting point for considering this question. The Constitution alone, however, does not get us very far. A wide range of statutes bear on the President's power in this realm and serve to define the extent and limits of his power. As a practical matter, then, the question of presidential power in the context of war and terrorism is one of statutory interpretation. Recognizing the centrality of statutory interpretation in this crucial area, a number of scholars have turned their attention to this question. From their writings, a consensus appears to be emerging on some important foundational points. First, these scholars claim that the President is entitled to deference. Second, where assertions of presidential power implicate individual constitutional rights, these scholars claim that the President's assertion must be founded on a statute that includes a clear statement of authority.

In this Article, I challenge both aspects of the emerging consensus. Each aspect unjustifiably privileges some constitutional values over others. Instead, I advocate an approach to statutory interpretation—grounded in Justice Jackson's concurring opinion in *Youngstown Sheet & Tube*—that seeks to effectuate all relevant constitutional values and to vindicate the underlying constitutional structure of power. In Part I, I will examine the underlying constitutional framework for understanding the scope of executive power. In Part II, I will examine and critique the emerging consensus that advocates both deference to the President and the protection of individual rights through a clear statement rule. Finally, in Part III, I will offer a prescription for how to conduct statutory interpretation in a way that is faithful to constitutional values.

I. CONSTITUTIONAL FRAMEWORK

The first constitutional question one must ask when interpreting the extent of presidential power over military and foreign affairs is how to read the Constitution's allocation of powers between the President and Congress. There are two possible

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1. The President's constitutional authority has been the nearly exclusive focus of the leading academic literature. *See, e.g.*, JOHN HART ELY, WAR AND RESPONSIBILITY (1993); LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1990); H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS (2002); JOHN YOO, THE POWERS OF WAR AND PEACE (2005).

approaches: one focuses on the way the Constitution divides power among the branches and reads those powers as separate and distinct—call this the exclusivity model; the other focuses on the way the Constitution contemplates that power will be shared among the branches—the reciprocity model. For example, the Constitution grants the President some powers relating to war—notably the commander-in-chief power—and grants others to Congress, sucb as the power to make rules for the regulation and government of the land and naval forces. The exclusivity view reads these as separate and distinct powers, which means that Congress may not make rules and regulations that burden the President's ability to act as commander in chief. The reciprocity model views these powers as components of a shared war power. The Constitution, on this view, means for the President and Congress each to wield aspects of the war power, which means that the powers should be understood in a way that accommodates the exercise of each and recognizes that they overlap and interrelate. While debate over these competing conceptions stretches back to our early constitutional history,[2] the reciprocity model has come to be accepted as the appropriate way to approach questions of power.[3] The model has its most famous articulation in Justice Jackson's concurring opinion in *Youngstown Sheet & Tube*.[4] "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[5]

The reciprocity model follows from James Madison's formulation of the principle of separation of powers. Those opposing the ratification of the Constitution argued that the document mingled powers among the President and Congress, thus violating the principle. Madison rejoined that this objection misapprehends the separation of powers principle. The separation of powers principle does not forbid the blending of power between the branches:

> [Montesquieu] did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.[6]

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2. ALEXANDER HAMILTON & JAMES MADISON, LETTERS OF PACIFICUS AND HELVIDIUS (1845).

3. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality opinion); Dames & Moore v. Regan, 453 U.S. 654 (1981) (specifically adopting Justice Jackson's concurring opinion in *Youngstown* as the appropriate framework for resolving controversies about the scope of presidential power).

4. Youngstown Sheet & Tube v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952). Justice Jackson's formulation recognizes that there may be instances in which the Constitution actually grants a power exclusively to one branch, but this possibility appears to apply to only a very small set of circumstances. *Id.* at 634–55 (Jackson, J., concurring).

5. *Id.* at 635.

6. THE FEDERALIST NO. 47 (James Madison), at 338 (Benjamin Fletcher Wright ed., 1961) (emphasis in original).

Nevertheless, the exclusivity model occasionally rears its head. Most notoriously, the Department of Justice employed this model in its original Torture Memo.[7] In that memorandum, the Office of Legal Counsel (OLC) opined that the anti-torture statute could not prohibit the President from ordering the use of torture in interrogations of enemy combatants, because such a prohibition would violate the President's constitutional powers. OLC opined that the Constitution assigns the war power to the President.[8] It failed even to cite to Justice Jackson's seminal opinion from *Youngstown*. This is no mere violation of citation etiquette, for it led OLC to fail to acknowledge that Congress has any relevant authority whatsoever. Had OLC employed Justice Jackson's framework, OLC would have been unable to avoid recognizing Congress's relevant powers, including the power to make rules to govern the military and to define and punish violations of the law of war. As there is no plausible interpretation that these powers are irrelevant to the validity of the prohibition on torture, the application of the correct interpretive model—reciprocity rather than exclusivity—has decisive significance.

Despite the apparent resolution in favor of the reciprocity model, OLC has continued to apply the exclusivity model. Although the Department of Justice eventually withdrew the Torture Memo,[9] OLC continues to invest the dispute with significance by following the exclusivity model. The memorandum withdrawing the Torture Memo rescinds the section dealing with the President's commander-in-chief power only because it regards the discussion to have been unnecessary.[10] The withdrawing memo, however, does not repudiate or even question the substance of the Torture Memo's reasoning on the issue of presidential power. Moreover, contemporaneous OLC opinions—which have been neither repudiated nor withdrawn—continue to employ the exclusive approach to presidential power.

The continuing salience of the controversy over how to construe the President's powers relating to foreign and military affairs has been most recently highlighted in the debate over the legal validity of President Bush's domestic surveillance program. The particulars of the program remain secret, but the broad parameters pose the issues quite starkly. The President has authorized the National Security Agency (NSA) to engage in domestic surveillance by wire-tapping communications between persons within the United States (including, but not limited to, United States citizens) and persons outside the United States where one party to the communication is "linked to al Qaeda or related terrorist organizations."[11] The Justice Department has taken the position that

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7. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Dep't of Justice, to Alberto R. Gonzalez, Counsel to the President (Aug. 1, 2002) [hereinafter Torture Memo], *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.

8. *Id.* OLC appears to rest this conclusion mainly on an arguably tendentious reading of the inapposite *Federalist No. 23*. *See* FEDERALIST NO. 23 (Alexander Hamilton) (dealing with the division of war and foreign affairs powers between the federal government and the state governments and without addressing the allocation of power within the federal government).

9. *See* Memorandum from Daniel Levin, Acting Assistant Att'y Gen., Office of Legal Counsel, to James Comey, Deputy Att'y Gen. (Dec. 30, 2004), *available at* http://www.usdoj.gov/olc/18usc23402340a2.htm.

10. *Id.* at 2.

11. DEPARTMENT OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 1 (2006), 81 IND. L.J. 1374

the President has "inherent constitutional authority" to engage in surveillance designed to protect national security.[12]

This much is, or should be, uncontroversial. It is widely accepted that the President holds a protective power[13] to respond to emergencies that threaten national security. What is controversial is the claim that this power is exclusive and not subject to regulation or limitation. This assertion was the foundation of the Torture Memo[14] and underlies the Justice Department's defense of the domestic surveillance program.

The domestic surveillance program directly implicates the controversy over the nature of the President's inherent constitutional powers because it runs afoul of a specific statutory prohibition, the Foreign Intelligence Surveillance Act (FISA). FISA is a comprehensive regulation of electronic surveillance within the United States. FISA requires that the government acquire a warrant from a special court (the Foreign Intelligence Surveillance Court) before undertaking any electronic surveillance within the United States.[15] By the terms of the act, FISA is the "exclusive means by which electronic surveillance . . . may be conducted."[16] FISA sets forth several categories of exception to the warrant requirement, and the nature of these exceptions underscores FISA's comprehensive scope. For example, FISA specifically addresses itself to the context of wartime surveillance, authorizing warrantless searches for a fifteen-day period after war is declared.[17] Moreover, FISA provides that in an emergency situation, surveillance may commence before a warrant is obtained, as long as a warrant application is made within seventy-two hours after surveillance is initiated.[18]

If the President's inherent authority to engage in national security surveillance is exclusive, in that it is not susceptible to statutory regulation, then FISA is unconstitutional in requiring that such surveillance be conducted only pursuant to a warrant. If, on the other hand, the President's inherent power is not exclusive, Congress retains power to impose regulations that apply to the President's exercise of his authority. Here, Congress has authority to regulate the instrumentalities of interstate and foreign commerce, which paradigmatically include lines of communication such as cell phones, telephones, and email.[19] Moreover, the agencies that the President would deploy to conduct the surveillance are created and structured by Congress pursuant to its substantive powers generally under Article I, Section 8, and especially under the

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[hereinafter DOJ whitepaper]. The program was first disclosed by a report in the *New York Times*. *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A5. The President acknowledged the existence of the program in a press conference held on December 19, 2005. The extent of the program is detailed in JAMES RISEN, STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION 44–49 (2006).

12. DOJ whitepaper, *supra* note 11, at 6–10, 81 IND. L. J at 1379–83.

13. The classic expression is Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993).

14. *See* Torture Memo, *supra* note 7, at 34–39.

15. 50 U.S.C. § 1803(a) (Supp. II 2002).

16. 18 U.S.C. § 2511(2)(f) (Supp. III 2003).

17. 50 U.S.C. § 1811 (2000).

18. 50 U.S.C. § 1805(f) (Supp. II 2002).

19. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995); United States v. Southwestern Cable Co., 392 U.S. 157 (1968); Houston E. & W. Ry. Co. v. United States, 234 U.S. 342 (1914); Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1 (1877); *see also* 47 U.S.C. §§ 151–152 (setting forth the jurisdiction of the FCC).

Necessary and Proper Clause.[20] Congress is empowered by these authorities to determine how those agencies will and will not operate. Under a reciprocal understanding of constitutional power, the appropriate inquiry is suggested by Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*: "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[21] The Supreme Court refined this inquiry in *Morrison v. Olson*, asking whether the statute in question "disrupts the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions."[22] Given the secrecy of the NSA surveillance program, it is impossible to offer a definitive conclusion to this question. Nevertheless, none of the Bush Administration's burgeoning attempts to defend the program would satisfy the standard.[23]

For the most part, the Bush Administration has not been shy about following its exclusivity theory to the conclusion that Congress is without authority to impose even seemingly moderate regulations on the ways in which the President exercises power.[24]

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20. U.S. CONST. art. I, § 8, cl. 18.

21. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

22. 487 U.S. 654, 695 (1988) (quoting Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977)).

23. The Bush Administration has repeatedly relied on the claim that warrantless surveillance is imperative because of the need to act quickly. In a speech defending the program, Attorney General Gonzales cited "necessary speed and agility" as a basis for the program. *See* Eric Lichtblau, *Gonzales Invokes Actions of Other Presidents in Defense of U.S. Spying*, N.Y. TIMES, Jan. 25, 2006, at A18. The DOJ whitepaper also quotes President Bush's statement that "the NSA activities 'enable us to move faster and quicker. And that's important. We've got to be fast on our feet, quick to deteet and prevent. This is an enemy that is quick and it's lethal. And sometimes we have to move very, very quickly.' FISA by contrast is better suited 'for long-term monitoring.'" DOJ whitepaper, *supra* note 11, at 5, 81 IND. L. J at 1378 (quoting press conference of President Bush (Dec. 19, 2005)). Yet none of the Bush Administration's defenses has substantiated how FISA is ill-suited to rapid response. In particular, the 72-hour period appears to allow the NSA to begin surveillance "quickly," indeed immediately, and to apply for a warrant later. While the Administration has offered numerous defenses in speeches, none of them offers even a hint as to why the 72-hour window does not adequately protect the President's ability to perform his constitutional role. *See, e.g.*, Remarks on the War on Terror and a Question-and-Answer Session in Manhattan, Kansas, 42 WEEKLY COMP. PRES. DOC. 101 (Jan. 23, 2006); Richard Cheney, Vice President, Remarks on Iraq and the War on Terror at the Manhattan Institute for Policy Research (Jan. 19, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/01/ 20060119-5.html; Alberto R. Gonzales, Attorney General, Address at the Georgetown University Law Center (Jan. 24, 2006), *available at* http://www.usdoj.gov/ag/speeches/2006/ ag_speech_0601241.html; Michael Hayden, Principal Deputy Director of National Intelligence, Address at the National Press Club (Jan. 23, 2006), *available at* bttp://www.dni.gov/ release_letter_012306.html; Press Briefing by Alberto Gonzales, Attorney General, and Gen. Michael Hayden, Principal Deputy Director for National Intelligence, in Washington, D.C. (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/ 12/20051219-1.html; *Larry King Live: Interview with Alberto Gonzales* (CNN television broadcast Jan. 16, 2006).

24. For example, when President Bush signed the Vision 100—Century of Aviation

While the Justice Department's whitepaper defending the NSA surveillance program reaffirms this view,[25] this is not the ground on which it rests the legality of the NSA surveillance program. Instead, the Justice Department reads a separate statute—the Authorization of Use of Military Force (AUMF)[26]—as overriding FISA's warrant requirement. This represents a shift from the Torture Memo and other opinions of the same vintage,[27] such as the opinion concluding that the Constitution authorizes the President to initiate war even if Congress has not declared war, in that it does not base the President's authority on the Constitution alone. Thus, the Justice Department's approach has shifted in its emphasis from questions of constitutional interpretation to questions of statutory interpretation.[28]

Reauthorization Act, he included in his signing statement four distinct objections to the ways in which the law would interfere with his authority as the head of the unitary executive hranch. *See* Statement on Signing the Vision 100—Century of Aviation Act, 39 WEEKLY COMP. PRES. DOC. 1795 (Dec. 12, 2003). This included an objection to the requirement that the administration provide information to the National Commission on Small Community Air Service. *See id.* Of course, not all of the signing statements based on the Bush Administration's theory of executive power have been quite so prosaic. The President eventually capitulated to congressional demands and signed the McCain Amendment prohibiting torture as well as cruel, inhuman, and degrading treatment of detainees, but issued a signing statement asserting the authority to ignore this law in the interest of national security. *See* Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918, 1918–19 (Dec. 30, 2005); Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2003, 42 WEEKLY COMP. PRES. DOC. 425 (Mar. 9, 2006). For a general review of the use of signing statements by the Bush Administration, see Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRES. STUDIES Q. 515 (2005).

25. If the warrant requirement were to apply to the NSA surveillance program, "FISA would be unconstitutional . . . ." DOJ whitepaper, *supra* note 11, at 3, 81 IND. L. J at 1376.

26. The AUMF provides

> [t]hat the President is authorized 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 of international terrorism against the United States, by such nations, organizations, or persons.

Authorization for Use of Military Force, Publ. L. No. 107-40 § 2(a), 115 Stat. 224 (2001). This is the statute that authorizes the ongoing war in Afghanistan, as well as authorizing action against al Qaeda.

27. Of course, the NSA surveillance program itself was initiated in the same general timeframe that the Torture Memo was being written. This raises a troubling aspect of the DOJ whitepaper: it was written approximately four years after the NSA surveillance program was initiated. It cannot simply memorialize the opinion of the Justice Department at the time the program was launched, because the whitepaper relies heavily on legal authorities—most prominently Justice O'Connor's plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)—that post-date the program's origin. It would be highly irregular procedurally if there were no legal opinion issued at the time the program was initiated, but the existence of such an opinion is secret and, if such an opinion exists, so is its substance.

28. That said, the Justice Department's insistence that the President's inherent powers are also exclusive, rather than interstitial and reciprocal, remains crucial. With respect to the NSA surveillance program, for example, the Justice Department's conclusion that the AUMF

The controversy over the validity of the NSA surveillance program is typical. Most questions of presidential power over foreign and military affairs involve statutes, frequently a complex interaction of several statutes. Issues of the scope and content of presidential power, then, turn on considerations of statutory construction.

II. THE STATUTORY CONTEXT

While Justice Jackson's view of the Constitution as establishing an order of shared and reciprocal powers seems to have prevailed, his framework does not yield definitive answers to controversies over presidential power. Instead, it serves to structure the inquiry and to rule out extreme positions.[29] As Justice Jackson himself realized, "any actual test of power is likely to depend on the imperative of events and contemporary imponderables rather than on abstract theories of the law."[30]

It will be the rare circumstance indeed where Congress has actually been silent. To be sure, the array of statutes relating to military and foreign affairs is not so elaborate as that covering domestic affairs. Nevertheless, that array is quite extensive. As Justice Jackson's above-quoted caution indicates, it is very difficult to say much about these statutes, and therefore about presidential power, in the abstract. Each statute will potentially pull in different directions. An authorizing statute, by implication, prohibits that which is left unauthorized.[31] A prohibitory statute, similarly, may imply authority to do that which is not forbidden. Moreover, it will be common that a presidential action implicates several statutes, which may point in different directions.[32]

In addition to this type of complexity in the statutory regime relating to military and foreign affairs, statutes in this area will often be critically ambiguous, and unavoidably so. Especially where a statute means to authorize presidential action, the statute will be effective only if it allows the President enough leeway to respond to future

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overrides FISA's warrant requirement is based on the constitutional avoidance canon, that is, statutes should be interpreted to avoid serious constitutional questions. There is only a serious constitutional question involved in interpreting FISA to require warrants for the NSA surveillance program if the exclusivity view is correct. If it is not, then Congress plainly has authority to impose this operationally very slight procedural safeguard on the executive.

29. The Torture Memo, in asserting that the President may order the torture of enemy combatants despite an express congressional prohibition, might be defended as conceptualizing the President's power as one that prevails even within the low ebb of category three. *See* Eric Posner & Adrian Vermeule, *A 'Torture' Memo and Its Tortuous Critics*, WALL ST. J., July 6, 2004, at A22. Such a defense would be unpersuasive, however. First, as a descriptive matter, the Torture Memo never cited Youngstown, nor did it otherwise employ Justice Jackson's framework. Nothing in the opinion acknowledges Congress's relevant constitutional powers—such as the power to make rules and regulations to govern the military and the power to legislate to effectuate treaty obligations—let alone explains why Congress's power cannot encompass the torture of enemy combatants. Second, there is not even a vaguely colorable argument that Congress's power is irrelevant to the use of torture to interrogate enemy combatants. In other words, the Torture Memo does not make this argument, nor could it have.

30. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637 (1952).

31. How strongly is often a delicate matter. *Compare, e.g.*, *Steel Seizure*, 343 U.S. 579 (finding negative implication) *with* Dames & Moore v. Regan, 453 U.S. 654 (1981) (general tenor of acceptance).

32. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (implicating the AUMF and the Non-Detention Act).

contingencies and diplomatic or military developments as they evolve. For example, Congress enacted the International Emergency Economic Powers Act (IEEPA) to allow the President to respond to threats that may arise in the future. The President is authorized to undertake a broad array of economic sanctions, including the seizure of property against foreign persons, organizations, or nations if the President finds that there exists an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat."[33] While the statute uses modifiers—"unusual and extraordinary"—to describe the degree of threat that must be found to invoke presidential power, IEEPA does not define these terms and does not impose rigid limitations on the President. Instead, the law is drafted so as to allow the President flexibility in responding to actual circumstances. Similarly, Congress has authorized the President to "use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release" of a United States citizen who is held hostage "by or under the authority of any foreign government."[34] While this statute imposes some limits—the President may not engage in war to win the release of a hostage—its evident concern is with preserving the capacity of the President to respond effectively to the unforeseeable exigencies of a particular hostage crisis.[35]

Questions of presidential power, and limits on that power, are fraught with complexity and ambignity. Wiser commentators, heeding Justice Jackson's warning, tend to craft their observations around specific statutes and/or factual settings.[36] Yet, it is possible to draw some more general lessons about how to construe the President's power despite the complexity and ambiguity of the statutory overlay. The lessons are mostly negative; deference and clear statement rules have at best limited value and applicability.

An important issue that arises is whether and to what extent deference is owed to the President's interpretation of his own power.[37] In particular, commentators ask whether *Chevron* deference applies to the President.[38] The touchstone for this question is the

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33. 50 U.S.C.S. § 1701 (2004) (presidential authority to declare emergency); 50 U.S.C.S. § 1702 (2004) (setting forth permissible sanctions).

34. 22 U.S.C. § 1732 (2000).

35. These statutes, IEEPA, and the so-called Hostage Act, are discussed in *Dames & Moore*, 453 U.S. 654.

36. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005) (examining particular questions arising under the AUMF); Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005); Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673 (2005).

37. The emphasis on this question may be misguided and misleading. *See infra* notes 141–43 and accompanying text. It is misguided in that it focuses on how courts construe presidential power, where extra-judicial interpretation plays a key role. Outside the judicial ambit, the justifications for deference have little, and often no, application. It is misleading because such discussions may lead executive branch interpreters to forego their role of scrutinizing the factual and legal basis for presidential action.

38. *See, e.g.*, Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000); Sunstein, *supra* note 36. *Chevron* deference is essentially a doctrine of judicial

statute itself. Does the statute purportedly authorizing the President's conduct evince the intent to accord deference to the President's interpretation?[39] This, of course, will often be a contentious interpretive question, especially given the unavoidable ambiguity of statutes in this area.[40] Nevertheless, there is something of a consensus emerging that *Chevron* deference is appropriate except where individual rights are at issue.[41] As Professor Sunstein has put it, "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."[42] But it is generally appropriate to recognize "[a] clear statement requirement to protect individual liberties . . . [under] the AUMF."[43]

Put simply, the emerging consensus would hold that as to controversies in which it is asserted that the President has exceeded his power, and thus violated structural constraints, the President should enjoy deference. Where, however, the asserted excess invades individual rights, the President's assertion of power should be more closely scrutinized; it must satisfy a clear statement rule requiring that the President's authority be clearly expressed in a statute. This clear statement rule is designed to enforce and protect underlying constitutional guarantees. In the balance of this section, I will endeavor to show that this formulation is based on a rights/structure dichotomy that is unsupported and untenable.[44]

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restraint that upholds an agency's construction of a statute that it administers if the agency's interpretation of the statute is reasonable. Where there are competing alternatives, and each is reasonable, courts understand the statute to have delegated the choice among the reasonable alternatives to the agency.

39. *See* Mead Corp. v. Tilley, 490 U.S. 714 (1989).

40. *See id.* This is frequently the case on the domestic side as well. *See, e.g.*, Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687 (1995).

41. *See, e.g.*, Bradley & Goldsmith, *supra* 36; Sunstein, *supra* note 36. While still serving as an appellate court judge, Chief Justice John Roberts strongly implied his support for according *Chevron* deference to presidential interpretations, without qualification as to whether individual rights are implicated. *See* Acree v. Republic of Iraq, 370 F.3d 41, 60 (D.C. Cir. 2004) (Roberts, J., concurring), *cert. denied*, 125 S. Ct. 1928 (2005).

42. *See* Sunstein, *supra* note 36, at 2671. In an earlier issue of the Harvard Law Review, Professor Sunstein took a dimmer view of *Chevron* deference for the executive branch's interpretation of its own authority: "A rule of deference in the face of ambiguity would be inconsistent with understandings, endorsed by Congress, of the considerable risks posed by administrative discretion. An ambiguity is simply not a delegation of law-interpreting power." Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 445 (1989).

43. Bradley & Goldsmith, *supra* note 36, at 2104 (citing Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47). Professors Bradley and Goldsmith offer an appropriate caveat: "[n]ot every potential liberty intrusion during war warrants protection through a clear statement requirement." *Id.*

44. Professor Sunstein's formulation does not expressly track the rights/structure dichotomy. He urges deference to the President unless the assertion of presidential power involves "constitutionally sensitive interests." Sunstein, *supra* note 36, at 2670. The specific example he offers involves individual rights (specifically the individual rights involved in the indefinite executive detention of a United States citizen as an enemy combatant.) *See id.* Yet Professor Sunstein's prior writings certainly identify structural interests as important, and therefore at least potentially "sensitive." *See, e.g.*, Sunstein, *supra* note 42. But if structural

A. The Distinction Is Incoherent

The distinction between individual rights and structure withers on examination. First, the government's constitutional structure is designed, in large part, to promote liberty. Thus, for example, the states may not consent to federal violations of state sovereignty, because the federal structure is not designed for the benefit of the states but for the benefit of the people.[45] The same holds for separation of powers, especially the separation of powers between the President and Congress. Thus, the fact that the President signed a bill does not cure objections that it upsets the constitutional balance of power by aggrandizing Congress at the expense of the President, even where the objection involves no assertion of individual rights.[46] To take an example, Congress enacted the AUMF in the wake of the September 11, 2001 terrorist attacks, authorizing the President to use all necessary and appropriate force against persons, nations, or organizations he determines to have aided or participated in those attacks or to harbor those responsible. Imagine, for example, the President decides to invade another country under the AUMF. The rights/structure distinction would hold that the President's decision to initiate a war is entitled to deference because it does not implicate individual rights. President Bush's decision to commence a war in Afghanistan was based on the AUMF and no deference at all is required to sustain the action; it is nearly impossible to conceive of the argument that the AUMF did not authorize the war in Afghanistan. But subsequent military ventures, especially as we move temporally further away from the attacks that prompted the AUMF, may well raise exceedingly difficult questions. Such a decision would immediately implicate Congress's constitutional power to declare war. Not because Congress may not delegate the power to initiate a war,[47] but because too readily ascribing such a result to Congress will have the effect of altering the balance of power between the President and Congress. While this is a structural issue, it is grounded on concerns about protecting individuals from all that a national engagement in war entails.[48]

The distinction also leads to anomalous results. For example, it requires reading *Youngstown* as a case that is primarily about vindicating domestic private property rights rather than about constraining presidential power with respect to foreign and

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interests—such as preserving Congress's legislative role—are also to be considered as the sort of interests that exclude deference and raise a requirement of legislative clarity, then it is difficult to see when the President would ever be entitled to deference. Indeed, once we accept structural interests as sensitive in the same sense as individual rights, we will only apply deference after determining that a particular assertion of presidential power is legislatively authorized and does not violate constitutional values, at which point deference is hardly needed. On this conceptualization, then, claims for deference are conclusory.

45. *See* New York v. United States, 505 U.S. 144 (1992).

46. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417 (1998) (Kennedy, J., concurring); Bowsher v. Synar, 478 U.S. 714 (1986); Buckley v. Valeo, 424 U.S. 1 (1976). *Cf.* United States v. Munoz-Flores, 495 U.S. 385 (1990); Myers v. United States, 272 U.S. 52 (1926) (Brandeis, J., dissenting).

47. *See, e.g.*, Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); Talbot v. Seaman, 5 U.S. (1 Cranch) I (1801).

48. *See, e.g.*, ST. GEORGE TUCKER, 1 BLACKSTONE'S COMMENTARIES, app. at 269–72 ¶ 11 (1803); JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION § 1166 (1833).

military affairs. The Supreme Court rejected this reading in *Hamdi v. Rumsfeld*.[49] Were *Youngstown* limited to domestic property rights, would we apply deference to the President's determination that he was authorized to seize *Canadian* steel mills to supply the troops under the laws authorizing the Korean War or under other statutes like the Food and Forage Act?[50]

Clear statement rules also may both over- and under-protect individual rights. Clear statement rules notoriously overprotect the values that they are designed to advance. Where a clear statement rule protects a constitutional value, for example, it provides "cover" for an interpreter—and especially a court—to push the value further than it would if it had to do so forthrightly as a matter of express constitutional interpretation, frequently resulting in a declaration that a law is unconstitutional.[51]

A clear statement rule designed to protect individual rights would also be underprotective. Those who benefit from presidential action—for example, by the improved security against terrorist attack—have an individual liberty interest in seeing that the President carries out his proposed action. The clear statement approach does not take into account these liberty interests. In *FDA v. Brown & Williamson Tobacco Corp.*,[52] for example, the Supreme Court considered whether the FDA's jurisdiction includes the authority to regulate nicotine and the tobacco products that deliver it. By the terms of the relevant statute, the FDA has jurisdiction over drugs and the devices by which drugs are delivered. Nicotine satisfied the statutory definition of a drug, while cigarettes and other tobacco products are well-within the definition of a device. At first glance, then, the FDA seemed to have jurisdiction over nicotine and tobacco products.

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49. Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion) ("We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." (citing Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 587 (1952)). *But see* Dalton v. Specter, 511 U.S. 462, 473–74 (1994).

50. 41 U.S.C. § 11 (2000). The Food and Forage Act provides that:

> No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Department of Defense and in the Department of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year.

§ 11(a). If the Department of Justice's argument on domestic wiretapping is correct, then it appears to follow that the Food and Forage Act provides the President with authority to finance the wars in Afghanistan and Iraq without receiving an annual appropriation from Congress. The prohibition against entering into a purchase or contract is drafted in a way that parallels the prohibition in FISA. *Compare* § 11(a) ("unless the same is authorized by law") *with* Foreign Intelligence Surveillance Act, 50 U.S.C. § 1803 (Supp. II 2002) ("[n]otwithstanding any other law"). If the AUMF is an authorization to the President to engage in surveillance aimed at persons somehow linked to the enemy because Presidents have done that in past wars, certainly Presidents have procured weapons and war material (including steel) in past wars. Why, then, isn't the AUMF an authorization within the terms of the Food and Forage Act, just as it is an authorization in the terms of FISA?

51. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 637 (1992).

52. 529 U.S. 120 (2000); *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

Granting the FDA jurisdiction to regulate tobacco products would have dramatic consequences, and the Court referred particularly to the economic consequences for tobacco companies and their suppliers, tobacco farmers. Given these consequences, the Supreme Court declined to find that the FDA has jurisdiction to regulate tobacco products absent a clear indication from Congress of the intent to extend the FDA's jurisdiction to tobacco. This decision might be understood as vindicating the individual rights of the tobacco companies as well as the farmers who supply them. But it can just as readily be characterized as undermining the individual rights of those who would have benefited from FDA regulation, particularly children who might have been prevented from taking up smoking. These individuals are not identifiable and were not before the Court. The Court's opinion did not consider their interests.[53]

Finally, the rights/structure dichotomy appears to rest on a negative conception of liberty.[54] Construing statutes in a way that defers to the President on structural matters may well detract from the social and political conditions necessary for individuals to enjoy meaningful liberty. Indeed, this appears to be the theory expressed by James Madison[55]—that the Constitution structures power among the branches of government in order to deploy each branch as a check on the others.[56]

B. Against Loaded Dice

The framework that yields deference to the President in cases involving "mere" structure, but requires a clear statement of presidential authority where the exercise of that authority implicates individual rights results from an attempt to effectuate and enforce constitutional principles in the context of statutory interpretation. The rights/structure dichotomy, however, rests on an incomplete, and ultimately tendentious, reading of the Constitution. It thus unfairly loads the dice in favor of particular outcomes.

The rights/structure dichotomy is on both scores inconsistent with the essential view of the Constitution found in Justice Jackson's *Youngstown* concurrence.[57] The opinion's strength is its highly nuanced understanding of the tensions—indeed the paradoxes—inherent in the Constitution.[58]

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the

53. *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 191 (Breyer, J., dissenting).

54. This is especially peculiar for Cass Sunstein, who has made much of the incoherence of this distinction. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).

55. THE FEDERALIST NOS. 47, 48 & 51 (James Madison).

56. *See infra* Part II.B.

57. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

58. This is also the opinion's chief weakness. *See* EDWIN S. CORWIN, *The Steel Seizure Case: A Judicial Brick Without Straw*, *in* PRESIDENTIAL POWER AND THE CONSTITUTION 121 (1976).

> dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.[59]

The Constitution, as explained by Justice Jackson, means simultaneously to protect against oppressive abuse of power and to enable the effective use of government power. In a sense, this is the opinion's weakness; it is so nuanced and abstract that it is hard to derive useful principles to guide interpretation.[60] But, insofar as Justice Jackson's view is correct, it at least counsels against simple formulas that weight the scales of interpretation in favor of one institution or constitutional value. What Justice Jackson's insight calls for is careful case-by-case examination that gives due weight to all the competing constitutional values and institutions and that recognizes that those weights will vary from setting to setting.

C. Structure and Individual Rights in Constitutional Adjudication

A review of cases demonstrates that the Supreme Court has in fact not followed the rights/structure dichotomy. In a number of cases that do not directly implicate individual rights, the Court declined to defer to the executive branch and intervened to construe statutes to effectuate its view of underlying structural values. On the individual rights side, the Court has not actually articulated a clear statement rule and in fact has declined to employ the principle sub silentio even where it means to protect individual liberty interests.

1. Deference in Statutory Adjudication

a. *Hamdi v. Rumsfeld*[61]

It is possible to read the Supreme Court's ruling in *Hamdi* as being all about individual rights. While the case certainly vindicates the rights of United States citizens detained as enemy combatants, the controlling opinions[62] also amount to a forceful rejection of claims for deference to the President's interpretation of his powers. The case presented two major questions. First, is the President authorized to detain United States citizens as enemy combatants?[63] Second, if the President is so authorized, is a citizen detained as an enemy combatant entitled to challenge the validity of the enemy

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59. *Steel Seizure*, 343 U.S. at 635.

60. Justice Jackson himself says as much, "I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable practical implications instead of the rigidity dictated by a doctrinaire textualism." *Steel Seizure*, 343 U.S. at 640.

61. 542 U.S. 507 (2004).

62. There is no single majority, but the opinions of Justices O'Connor (for the plurality) and Souter (concurring along with Justice Ginsburg) represent a six-Justice majority of the Court and share a common approach, even if they differ somewhat as to application. Two of those six Justices (Justice O'Connor and Chief Justice Rehnquist) are no longer on the Court, which leaves doubt as to the future vitality of the *Hamdi* approach.

63. *Hamdi*, 542 U.S. at 509.

combatant designation, and, if so, through what process?[64] The solicitor general specifically urged that the Court defer to the President on this second set of questions.

In response to the first question, the Court concluded that the President may detain United States citizens as enemy combatants. In her plurality opinion, Justice O'Connor located this authority in the AUMF. Not one word of the plurality rests this conclusion on deference to the President's interpretation. Indeed, Justice O'Connor's determination hinges on her reading of the international law of war principles, which she took to be a relevant interpretive background because they show what *Congress* meant in enacting the AUMF.[65] While Justice Souter's concurring opinion did not find this background persuasive in answering the question, his opinion accords with Justice O'Connor's in withholding any hint of deference to the President's interpretation of his authority.[66]

On the second question, the Solicitor General argued that "'[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict' ought to eliminate entirely any individual process . . . ."[67] In the alternative, the Solicitor General contended that the judiciary should review particular enemy combatant designations "under a very deferential 'some evidence' standard."[68] Justice O'Connor's opinion rejected these claims for deference. Instead, the Court declared that the Due Process Clause requires that citizens who are designated enemy combatants are entitled to an adjudication of their status before a neutral tribunal, with notice of the charges against them and an opportunity to rebut those charges and the evidentiary basis for them. Rather than deferring to the President, Justice O'Connor's opinion noted that "[i]n so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances."[69]

b. The Rights/Structure Dichotomy Generally

In advocating the rights/structure dichotomy, Professor Sunstein suggests that we look to ordinary principles of domestic law. In particular, he points to administrative law and the doctrine of *Chevron* deference. But two sets of cases illustrate the Court has not actually followed the rights/structure dichotomy. First, in a line of cases culminating in *Skinner v. Mid-America Pipeline*,[70] the Court addressed the issue of whether Congress may delegate its taxation power. In two cases decided in 1974, the

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64. *Id.*

65. *Id.* at 519 ("Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.").

66. In fact, only Justice Thomas's opinion can be understood as granting a degree of deference to the President. Because the opinion of Justices Scalia and Stevens is based on their reading of the Habeas Corpus Suspension Clause, they did not directly confront the question of deference to the President's reading of his statutory powers.

67. *Hamdi*, 542 U.S. at 527 (alterations in original).

68. *Id.*

69. *Id.* at 535.

70. 490 U.S. 212 (1989).

Court noted that interpreting a statute to have delegated taxing authority would raise a serious constitutional issue.[71] Those cases dealt with statutory authorizations to administrative agencies to impose fees on regulated industries. The Court held that the fee charged had to correspond to the cost of regulation and could not be designed to raise revenue for other public purposes of the administrative agency unrelated to the regulation of the fee-payer. If the amount of the fee was designed to underwrite the agencies other functions, it would be a tax.

If the Court were to follow the rights/structure dichotomy, the Court could have regarded the cases as involving individual rights (the right to property and to be free from the burden of taxation) and so have construed the statute narrowly in order to avoid the conflict with individual rights. Alternatively, the Court might have regarded the statute as raising no significant individual rights (being a mere economic regulation) and so have vindicated the executive branch's assertion of power. The Court, however, followed neither approach. Instead, the Court concerned itself with the role of Congress and the role of the administrative agencies. The Court emphasized that "[t]axation is a legislative function, and Congress . . . is the sole organ for levying taxes . . ."[72] and read the statutes so as to avoid authorizing the agency to conduct a "search of revenue in the manner of an Appropriations Committee of the House."[73] In *Skinner*, the Court resolved the underlying constitutional question, ruling that Congress may delegate its taxing power to administrative agencies.[74] The *Skinner* Court explained that the 1974 cases interpreted the statutes narrowly in order to avoid the delegation question,[75] which is a maneuver designed to protect the constitutional role of Congress, not to protect the President or individual rights.[76]

The second line of cases is that dealing with the relative roles of the judiciary and the President in the constitutional structure. For example, in *United States v. Nixon*[77] the Court considered the existence and scope of executive privilege in the context of a criminal proceeding. The Court rejected President Nixon's claims of executive privilege over the Watergate tapes on the ground that the tapes were essential to the fair administration of justice. While this aspect of the opinion has the ring of individual rights, speaking as it does of Due Process, in fact the case did not involve an assertion of individual rights. None of the Watergate defendants sought the production of the tapes. Instead, their production was demanded by the prosecutor. The Court's discussion of the "need to develop all relevant facts" was aimed at protecting the institutional interests of the judiciary itself.[78]

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71. Fed. Power Comm'n v. New England Power Co., 415 U.S. 345 (1974); Nat'l Cable Television Ass'n v. United States, 415 U.S. 336 (1974).

72. *Nat'l Cable Television Ass'n*, 415 U.S. at 340.

73. *Id.* at 341.

74. *Skinner*, 490 U.S. 212.

75. *Id.* at 224.

76. It is, of course, possible to conceptualize these cases as being designed as a procedural safeguard of individual rights. But this observation simply underscores the incoherence of the rights/structure dichotomy. All elements of the Constitution's structure are designed, in part, to secure liberty. *See supra* text accompanying notes 1–4.

77. 418 U.S. 683 (1974).

78. *Id.* at 709.

> The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.[79]

In *Hamdi v. Rumsfeld*,[80] the President claimed that his assertion of authority should not be subject to judicial review, or in the alternative to more than the most cursory review. In rejecting this claim, the Court did not rely on concern about individual rights. Instead, the plurality asserted the importance of the Court's own role within our constitutional structure: "the position that the courts must forgo any examination of the individual case . . . cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government."[81]

Lastly, the Court's cases vindicating the President's role in the structure of government do not support the rights/structure dichotomy. For example, the Court recently revived the *Totten* rule.[82] This rule prohibits suits against the United States based on covert espionage agreements. The plaintiffs in *Tenet* claimed that they spied on behalf of the United States during the Cold War in return for promises that the Central Intelligence Agency would provide them with continuing financial support. The Court invoked the largely forgotten *Totten* precedent despite the significant individual interests asserted by the plaintiff. The Court quoted *Totten*'s holding that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential."[83]

2. Clear Statement Rules in Adjudication

The claim that presidential actions that implicate individual rights must be premised on a clear statutory statement of authority suffers similar infirmities. First, as a descriptive claim about legal doctrine, it is inaccurate. The Court does not require the President to point to a clearly stated authority even where the President's action threatens individual rights. In *Dames & Moore v. Regan*,[84] for example, the Court faced a claim that the President had violated the plaintiff's individual right to judicial process and its underlying property rights. In order to settle the Iran Hostage Crisis, the President issued an executive order expunging all attachments against the assets or property of Iran in United States courts. The order also dismissed all claims against Iran and transferred those claims for arbitration before the newly created Iran-U.S. Claims Tribunal in the Hague. There was no statutory basis for the latter action and the President cited none. Far from requiring an express statement of authority, the Court

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79. *Id.*

80. 542 U.S. 507 (2004).

81. *Id.* at 535–36 (emphasis in original).

82. *See* Tenet v. Doe, 544 U.S. 1 (2005) (reviving the rule established in Totten v. United States, 92 U.S. 105 (1875)).

83. *Id.* at 12 (quoting *Totten*, 92 U.S. at 107).

84. 453 U.S. 654 (1981).

read statutes in the area that did not grant such authority as nevertheless "implicitly approv[ing] the practice of claim settlement by executive agreement."[85]

More recently, the Court's opinions in *Hamdi v. Rumsfeld*[86] preeminently involved questions about individual rights. Yet, the opinions did not formulate a clear statement rule.[87] Justice O'Connor's plurality opinion regarded the AUMF to be a sufficient authorization to allow the President to detain enemy combatants. Justice Souter, joined in concurrence by Justice Ginsburg, would have required a clear statement of presidential authority to detain U.S. citizens as enemy combatants, but not because such a requirement is categorically applicable or because a categorical requirement would effectuate constitutional values relating to individual rights. They would have required such a clear statement as a way of giving "robust[]" effect to another statute, the Non-Detention Act.[88] Far from being based on free-standing individual rights concerns, the underlying premise is one of supporting constitutional structure, albeit in the factual context of a claim of individual rights. Congress has significant powers relating to military affairs and the conduct of war, as well as relating to the liberties of United States citizens. In recognition of Congress's central role in this setting, Justices Souter and Ginsburg sought to read the congressional enactment "robustly." Their opinion thus stands not for the proposition that individual rights concerns are somehow privileged over structural concerns, but rather for the proposition that statutes should be read in a way that recognizes Congress's role in the exercise of the war power and that does not diminish Congress's capacity to play its role effectively.[89]

From the standpoint of civil liberties, it is easy to see the allure of the clear statement rule. In fact, such a rule is at best of limited value as demonstrated in the

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85. *Id.* at 680. This twist of statutory construction is difficult to reconcile with the way the Court read the statutory background in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). *See* HAROLD KOH, THE NATIONAL SECURITY CONSTITUTION (1990).

86. 542 U.S. 507 (2004) (plurality opinion).

87. Professor Sunstein has made the case for reading *Hamdi* as establishing a clear statement rule:

> In his concurring opinion in *Hamdi v. Rumsfeld*, Justice Souter... emphasized 'the need for a clearly expressed congressional resolution of the competing claims.' Not having found any such 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....
>
> 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.

Sunstein, *supra* note 36, at 2670. The problem with this reading of *Hamdi* is that it fails to take account of the crucial impact that the Non-Detention Act, 18 U.S.C. § 4001 (2000), had on the reasoning of both Justice Souter's concurrence and Justice O'Connor's plurality opinions. These opinions did not look for legislative clarity to protect individual liberty concerns. Rather, these opinions demand a clear congressional statement in order to overcome an express statutory prohibition.

88. *Hamdi*, 542 U.S. at 545.

89. Of course, the constitutional structure of governmental power has as one of its purposes the protection of individual rights. This raises again the observation that attempts to distinguish the two settings will ultimately prove incoherent. *See supra* Part II.A.

Court's infamous opinion in *Korematsu v. United States*.[90] What is wrong with *Korematsu* is not that it failed to require a clear statement. Indeed, such a requirement would have been unavailing as Congress had clearly authorized forced relocations. Wbat is wrong with *Korematsu* is that the Court shrunk from its duty to enforce the constitutional rigbts of the Japanese-Americans who had been forced into the internment camps on the basis of nothing more than racist generalizations.

3. The Avoidance Canon

A better way of reading the doctrine in this area is to understand the cases as employing the avoidance canon—the Court should read statutes, where they are critically ambiguous, to avoid significant constitutional controversies.[91] This directs interpreters to a much narrower inquiry. First, the statute's meaning should be "grievously" ambiguous. This means that the interpreter faces two equally plausible constructions, not that the interpreter faces two threshold-plausible constructions one of which is more persuasive than the other. In other words, as Justice Breyer put it in the analogous context of the rule of lenity, the avoidance canon should be understood to apply "only if, after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended."[92] Second, the avoidance canon is appropriate only where invoking it actually avoids a *significant* constitutional controversy.[93] When limited in this way, the avoidance canon is a reasonable mechanism for resolving otherwise intractable statutory ambiguity.

If these predicates for avoidance are not carefully observed, the canon is subject to mischief.[94] The DOJ whitepaper on the NSA surveillance program illustrates the problems. Even though FISA prohibits warrantless NSA surveillance and the AUMF does not address the issue of warrants or surveillance, the Justice Department stretches to find ambiguity as to which statute should govern the situation. While there may be settings in wbich prohibiting the President from engaging in warrantless surveillance would be unconstitutional, neither the whitepaper nor any of the other Bush Administration's defenses of the program places the NSA program within such a setting.[95] Moreover, the mechanisms that preserve the President's capacity to act with dispatch move FISA even further away from conflicting with the President's constitutional powers. The DOJ whitepaper tendentiously raises the specter of a

90. 323 U.S. 214 (1944).

91. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

92. Muscarello v. United States, 524 U.S. 125, 138 (1998) (internal quotation marks omitted) (quoting United States v. Wells, 519 U.S. 482, 499 (1997)). Justice Scalia has also criticized the rule of lenity along with clear statement rules. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 27–29 (1997).

93. *See* Public Citizen v. Dep't of Justice, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring).

94. Professor Powell's contribution to this symposium shows just how pernicious the canon can be when employed by the executive branch itself, instead of by a court. *See* H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION (2002). His admonition against executive branch use of the avoidance canon is now powerfully illustrated by the misuse of the canon in the DOJ whitepaper.

95. *See supra* note 75 and accompanying text.

constitutional issue and uses that projection to rework the statutory overlay to the President's advantage.

D. The Complexity of Statutory Regimes

Much of the discussion of how to read the President's statutory war powers is highly artificial in that it tends to frame the inquiry as determining whether one specific statute either does or does not authorize the power that the President is asserting. This will only rarely be the case. Presidential action and assertions of power occur mostly in the context of a welter of statutes, some of which will be more or less authority-conferring and others more or less authority-prohibiting. It is the common, and difficult, job of an interpreter to harmonize this jumble of laws. In this setting, *Chevron* deference is a potential conclusion rather than a helpful starting principle, and this is the essence of the *Mead* inquiry.[96] Thus, the President is entitled to deference if Congress means for the President to enjoy it, but that is itself a difficult question of construction and one made more difficult by the potentially wide and discordant range of relevant congressional pronouncements.

Professor Sunstein has suggested that we look to ordinary principles of administrative law to find guiding principles for construing the President's power in the context of military and foreign affairs, and in particular under the AUMF.[97] Taking him up on this suggestion, an illuminating example can be found in the President's authority over federal procurement. The President enjoys constitutional authority bearing on this subject. As the repository of "the executive power" charged with "tak[ing] care that the laws be faithfully executed" the Constitution provides a basis on which the President might assert supervisory control of federal procurement.[98] In the context of military procurement, the President may add his authority as commander in chief. How far these powers alone extend is a largely uninteresting question as Congress has enacted a complex statutory regime regulating this area. The regime confers on the President extensive power over federal procurement. The Federal Property and Administrative Services Act (FPASA) authorizes the President to "prescribe policies and directives that the President considers necessary to carry out this subtitle."[99] This is an expansive articulation that yields a broad power. In general, the courts have understood this power to confer upon the President the authority to issue any rule that is designed to promote economy and efficiency in federal procurement. In determining whether the President has acted within this power, the courts have articulated a highly deferential test: the President is within his procurement power as long as there is a reasonable basis to believe that his procurement rule will promote economy and efficiency.[100]

Presidents have exercised this power in a broad range of settings and often have exercised the power in ways that seem designed more to promote policy goals quite

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96. *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984); Mead Corp. v. Tilley, 490 U.S. 714 (1989).

97. *See* Sunstein, *supra* note 36.

98. U.S. CONST. art. II, § 3.

99. Federal Property and Administrative Services Act, 40 U.S.C. 121(a) (Supp. II 2002).

100. *See* AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir. 1979) (en banc).

apart from economy and efficiency.[101] These assertions of power have often implicated other statutory policies and commands, and the courts have struggled with how to harmonize the President's obviously broad FPASA power with completely separate statutory regimes. For example, during the inflation crisis of the 1970s, President Carter issued an executive order designed to mollify the inflationary pressures on the nation's economy by setting forth a system of voluntary wage and price controls. This system was voluntary because a statute, the Council on Wage and Price Stability Act (COWPSA) was understood to have forbidden the President to mandate controls.[102] President Carter's executive order mandated that covered federal contractors comply with the voluntary controls. The federal contractors and the labor unions whose members were employed by the contractors argued that the President's mandate violated the prohibition. The D.C. Circuit, sitting en banc, upheld the executive order on the ground that it did not actually mandate compliance, since federal contractors could forego contracts and so avoid submitting to wage and price controls.[103]

President Clinton invoked the FPASA power to issue an executive order prohibiting federal contractors from permanently replacing lawfully striking workers. This time the federal contractors claimed the order violated the National Labor Relations Act (NLRA), which permits employers to permanently replace strikers.[104] The D.C. Circuit ruled in their favor. First, it noted what a vast segment of the labor force is employed by federal contractors.[105] Then it refused to extend what it termed "*Chevron*-like deference" to the President's determination, as had the District Court.[106] The D.C. Circuit ruled that the President's order was preempted by federal labor law, even though the NLRA does not require that employers maintain the power to replace strikers.[107] This, according to the court, was because the NLRA enacts a policy that leaves such replacements acceptable. The President, according to the court, may not use his other powers in a way that erects a regulatory regime contrary to the policy of the NLRA. In other words, if the executive order had been proprietary—a mere contract provision—it would have been permissible. Because the order actually would

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101. For example, President Carter used his FPASA authority to respond to limit wage and price increases as part of an overall effort to limit inflationary pressures on the national economy. *See* Exec. Ord. No. 12,092, 43 Fed. Reg. 51,375 (Nov. 1, 1978). Moreover, various Presidents used the statutory procurement power to issue executive orders forbidding employment discrimination and mandating equal employment opportunities, even before the Civil Rights Act of 1964 made employment discrimination illegal. *See* Exec. Ord. No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965); Exec. Ord. No. 11,141, 29 Fed. Reg. 2,477 (Feb. 12, 1964); Exec. Ord. No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961); Exec. Ord. No. 10,557, 19 Fed. Reg. 5655 (Sept. 3, 1954); Exec. Ord. No. 10,479, 18 Fed. Reg. 4899 (Aug. 13, 1953).

102. Council on Wage and Price Stability Act, Pub. L. No. 93-387, 88 Stat. 750 (1974). Interestingly, the statute itself is not phrased as a prohibition. It only states that COWPSA does not authorize mandatory wage or price controls.

103. *Kahn*, 618 F.2d 784.

104. *See* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938).

105. As of 1993, federal contractors employed 22% of the nation's labor force. Chamber of Commerce of U.S. v. Reich, 74 F.3d 1322, 1324 (D.C. Cir. 1996).

106. *Id.*

107. An employer may agree, as part of a collective bargaining agreement for example, that it will not permanently replace lawfully striking employees.

have effects[108] on labor-management beyond the contractual relations of the contractor and the federal government, the court deemed it regulatory and therefore contrary to the NLRA.

More recently, the D.C. Circuit returned to the issue of conflict between the President's FPASA power and the NLRA in *UAW-Labor Employment Training Corp. v. Chao.*[109] There the court upheld an executive order issued by President Bush requiring federal contractors to post signs notifying employees that they cannot be compelled to join a union or to pay dues unrelated to a union's representational activities. This time the court found no conflict with the NLRA, but again did not employ principles of deference to reach this conclusion.

I will not attempt to reconcile these cases.[110] What is interesting about these cases, for our purposes, is that they show that the courts do not in fact apply deference in determining the scope of the President's statutory power, even in the context of a statute that grants such power broadly by its terms. In fact, the President's power under FPASA would appear to be a prime candidate for *Chevron* deference. It is broadly worded, seemingly enough so as to satisfy the *Mead* inquiry. Moreover, it operates in an area that is fraught with policy considerations and where legal principles of decision are lacking. Finally, it is an area where courts lack substantive expertise to second-guess the President. The involvement of courts in these cases is aimed at preserving not its own role so much as preserving Congress's. Congress enacted the NLRA and COWPSA. Applying *Chevron* deference to the President's determination that these statutes do not diminish his FPASA power could undermine the vitality of these other laws.

The D.C. Circuit has recently faced a complicated statutory regime that relates specifically to the President's military and foreign affairs powers. In *Acree v. Republic of Iraq*, a group of American personnel held as prisoners of war during the first Gulf War sued the Republic of Iraq for injuries suffered from torture inflicted upon them by the regime of Saddam Hussein.[111] Their suit was brought under the Alien Tort Claims Act[112] and the torture exception to the Foreign Sovereign Immunity Act.[113] In the wake of the current Iraq War, Congress enacted the Emergency Wartime Supplemental Appropriations Act (EWSAA) of 2003, which authorized the President to suspend any

108. Here the court was engaged in speculation as the executive order was enjoined before it ever had a chance to have any impact on the economy or on labor-management relations.

109. 325 F.3d 360 (D.C. Cir. 2003).

110. I offer two reasons for refraining. First, the doctrinal law of labor-management relations is not relevant to this discussion. Second, I do not believe the cases can be reconciled. Take *Kahn* and *Reich*, for example. These cases cannot be reconciled on the ground that one is meant to operate only within the area of federal procurement (*Kahn*) and the other is meant to operate as an economy-wide regulation (*Reich*). In fact, the economy and efficiency rationale that President Carter offered was founded on the consequences for the overall economy. As a result of President Carter's order, the federal government rejected many of the lowest bids (because of noncompliance with the price controls) in favor of higher bids (that did comply). President Carter's rationale was that compliance with the control system would reduce inflation in the overall economy and thus would yield lower prices to the government in the long run.

111. Acree v. Republic of Iraq, 370 F.3d 41 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1928 (2005).

112. Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

113. Foreign Sovereign Immunity Act, 28 U.S.C. § 1330 (2000).

law relating to Iraq as a sponsor of terrorism.[114] Under this authority, the President suspended the American POWs' lawsuit. In reconciling these conflicting statutes, the D.C. Circuit did not defer to the President's interpretation of his authority under the EWSAA, even though the court upheld the President's assertion of power.[115]

These cases help shed light on the Court's approach in *Hamdi v. Rumsfeld*.[116] There the Court faced the same statutory setting: a broadly worded grant of power to the President and a statute that at least called into question whether the President could apply that broad power to designate and detain, as enemy combatants, United States citizens. The AUMF did not speak of detention or enemy combatants at all, let alone of how these concepts might apply to United States citizens. Countervailing against the President's AUMF authority was the Non-Detention Act (NDA).[117] *Hamdi* required the Court to consider the interaction of these two statutes. Significantly, none of the six justices in the majority applied deference to the President's interpretation that his statutory power under the AUMF was undiminished by the NDA. Moreover, neither opinion demanded a clear statement because the President's order implicated individual rights. Rather, Justice Souter's concurring opinion looked for a clear statement of authority in order to overcome the NDA.

E. Early Judicial Treatment of the Issues

The interpretive issues raised by statutes that bear on the President's authority as commander in chief were raised early in the tenure of Chief Justice John Marshall in connection with what is often referred to as the "Quasi-War with France." The Marshall Court held that Congress had authorized a war even though it had not formally made a declaration.[118] The Marshall Court set forth three precepts for the conduct of that war. First, the President is bound by the limits enacted by Congress.[119] Second, the statutes authorizing and limiting the President's power would be interpreted, insofar as possible, to render them consistent with the obligations of international law.[120] Third, the President's interpretation of his own authority was not entitled to deference and was to be given no weight in construing a statute.[121]

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114. Emergency Wartime Supplemental Appropriations Act, Pub. L. No. 108-11, §§ 1502–03, 117 Stat. 559 (2003).

115. Then-Judge John Roberts wrote a separate concurring opinion. In his opinion, he included a footnote addressing the question of deference to the President. The footnote begins with a citation to *Chamber of Commerce v. Reich* (for a related discussion see *supra* note 74 and accompanying text) for the proposition that the issue of whether the President is entitled to deference is an open one. He then offers that "it is interesting to note that this would be an easy case had the EWSAA provided that, say, the Secretary of State may exercise the authority conferred under Section 1503. It is puzzling why the case should be so much harder when the authority is given to the Secretary's boss." *Acree*, 370 F.3d at 63 n.2. Other than noting the seeming irony, Judge Roberts's concurring opinion does not explore the question further.

116. 542 U.S. 507 (2004).

117. Non-Detention Act, 18 U.S.C. § 4001(a) (2000).

118. Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801).

119. Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

120. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

121. *Talbot*, 5 U.S. at 10 (refusing to admit the President's interpretation of his statutory power); *Charming Betsy*, 6 U.S. at 78 n.†.

The first of these precepts was set forth in Little v. Barreme. Congress had authorized the President to intercept any American ship bound for a French port. President Adams issued an order directing naval officers to intercept any suspected American ship bound to or from a French port, regarding the statutory limitation to ships bound for a French port as undermining the central purpose of preventing trading with the enemy. Captain Little captured the Danish-flagged Flying Fish as it traveled from the French port of Jeremie to the Danish port of St. Thomas. The issue in Little was whether Captain Little owed damages for wrongfully seizing the Flying Fish. Chief Justice Marshall ruled that the capture was not authorized by statute and could not be authorized by the President attempting alone to overcome the statutory limitation (even though in the absence of a statute, the President might have had such authority).[122] "[T]he [President's] instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass."[123] Thus, Captain Little was liable for damages even though he was carrying out the President's order as to how to conduct the naval war against France.

The second principle was established in Murray v. Schooner Charming Betsy. The Charming Betsy was owned by Jared Shattuck, who was born in Connecticut, but lived in St. Thomas as a Danish subject and may thus have renounced his United States citizenship. While the Charming Betsy was sailing from St. Thomas to Guadaloupe under a Danish flag, it was captured by a French frigate. Several days later, the USS Constellation captured the Charming Betsy from the French and Captain Murray sent the Charming Betsy to Philadelphia as a lawful prize. The Court limited the scope of the Nonintercourse Act so as to exclude commerce by neutrals:

> [A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.[124]

Finally, deference to the President's construction of his authority in the conduct of war was rejected most prominently in *Talbot v. Seeman*, but the rejection was reiterated in *Charming Betsy*. In *Talbot*, the Court faced the question of whether a capture, this time by the famed USS *Constitution*, was lawful. The first question was whether a state of war existed between the United States and France. The Court held that Congress need not formally declare war in order to create a state of war, and congressional enactments amounted to a declaration of war with France. The Court then went on to consider what authority Congress had vested in the Navy to re-capture American vessels. On this question, lawyers representing Captain Talbot sought to introduce the instructions that President Adams had issued to naval officers. Specifically, Talbot's lawyer argued for deference to the President's judgment: "My reasons for wishing to read [the instructions] were, because the opinion of learned men, and men of science, will always have some weight with other learned men. And the

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122. *Little*, 6 U.S. at 179; *see also* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952) (relying on *Little* to construe narrowly the President's authority to act *contra legem*).

123. *Little*, 6 U.S. at 179.

124. *Charming Betsy*, 6 U.S. at 118.

court would consider well the opinion of the executive before they would decide contrary to it."[125] Justices Cbase and Paterson objected most strenuously. As Justice Paterson put it: "The instructions can only be evidence of the opinion of the executive, which is not binding upon us."[126] Chief Justice Marshall harbored "no objection to hearing [the instructions], but they will have no influence on my opinion."[127] The position of Justices Chase and Paterson prevailed, and the Court refused to hear President Adams's instructions.[128]

In *Charming Betsy*, Captain Murray's lawyers fared only a little better. The Court allowed President Adams's instructions to be read, but only after Justice Chase renewed his objection from *Talbot*: "[H]e was always against reading the instructions of the executive; because if they go no further than the law, they are unnecessary; if they exceed it, they are not warranted."[129] The Court's opinion showed no deference to the President's instructions or the legal interpretation on which they were based. Indeed, the opinion is remarkable for the absence of any deference to executive power even for its factual determinations. Under the Court's holding in *Talbot*, Captain Murray was entitled to salvage the *Charming Betsy* only if the ship was "in a condition to annoy American commerce,"[130] which is to say that it was sufficiently armed for offensive use. Chief Justice Marshall allowed that this is a question of degree and may often be difficult. Nevertheless, he concluded that Captain Murray was wrong in believing that the *Charming Betsy* was sufficiently equipped to menace American commerce. "[T]here was on board but one musket, a few ounces of powder and a few balls. . . . The capacity of this vessel for offence appears not sufficient to wurrant the capture of her as an armed vessel."[131]

F. International Law and the Charming Betsy *Principle*

The President's statutory power is construed against the background of international law. For example, the plurality in *Hamdi* held that the AUMF authorizes the President to detain enemy combatants captured in the Afghanistan War. To determine the scopc of this authority the Court looked to international law, concluding that the President could detain enemy combatants only for the duration of the hostilities in Afghanistan—as opposed to the duration of the War on Terror—and only for the purpose of preventing the detainees from returning to the battlefield, but not for the purpose of interrogation.[132]

Not only does the Court use international law as context for understanding the scope of presidential power, it also interprets statutes to conform with intcrnational law

125. Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 10 n.† (1801).

126. *Id.*

127. *Id.*

128. *Id.* at 10.

129. *Charming Betsy*, 6 U.S. at 78 n.†.

130. *Id.* at 121.

131. *Id.*

132. Bradley and Goldsmith accept that international law may provide context that demonstrates a grant or the existence of presidential power, but they question whether international law can be taken to prohibit presidential power under the AUMF. Bradley & Goldsmith, *supra* note 36, at 2097. The *Hamdi* plurality seems a clear counter-example.

unless the statute clearly states its intention to contravene international law. Professors Bradley and Goldsmith have asserted that under this interpretive rule, known as the *Charming Betsy* principle, the President's interpretation of international law is entitled to deference.[133] If so, this would mean that the President is entitled to deference when he determines that a limit found in international law does not apply to him and thus does not limit his powers. Were this true, the President would be entitled to deference for his determination that United States law cannot be understood to prohibit him from ordering the use of torture to interrogate enemy combatants. The fact that this would place the United States in violation of international law—in fact in violation of the Convention Against Torture, to which the United States is a signatory[134]—would be rendered irrelevant to the analysis. The President will have determined that international law cannot apply to his order to use torture, for to do so would violate the United States Constitution.[135]

The case for deference rests upon a limited conceptualization of the *Charming Betsy* principle as being designed to restrain unelected, inexpert courts from reading statutes in a way that places the nation in violation of international law.[136] This is at best a modern gloss on the precedent. In deciding the *Charming Betsy*, Chief Justice John Marshall accorded no deference whatsoever to executive branch legal interpretations. The Chief Justice not only failed to defer to the factual assessment of the Navy officer who seized the Charming Betsy, he openly second-guessed that officer's factual determination, in the context of the statutorily authorized naval war with France.

The Supreme Court, in the *Charming Betsy*, was concerned about the nation standing in violation of international law, but it nowhere indicates the institutional concern that the courts might exercise their interpretive power to erroneously and inexpertly place us in violation of international law. On the contrary, absent from the Court's opinion is any sense of concern that the Court is institutionally incompetent, or even less competent than the other branches. Rather, the Court seems to have regarded international law as an important component of the rule of law and announced its interpretive rule as a way of enforcing this value.[137]

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133. *Id.* at 2096–100.

134. Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, *adopted and opened for signature* December 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/708 (1984) (entered into force June 26, 1987, reprinted in 23 I.L.M. 1027 (1984), modified in 24 I.L.M. 535 (1985)), *available at* http://www.ohchr.org/english/law/cat.htm.

135. I say "will have" because this necessarily will have been the case in order for the premise to this not-so-hypothetical to occur, *see* Bybee Memo, http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf (last visited Feb. 9, 2006), and not because it is in any sense inevitable that the President or his lawyers will come to this conclusion.

136. For this reason, Professors Bradley and Goldsmith go so far as to suggest that the principle does not apply to executive actions. Bradley & Goldsmith, *supra* note 36, at 2097–98. But this contention cannot be squared with the *Charming Betsy* itself, which involved executive branch action.

137. 6 U.S. (2 Cranch) 64, 118 (1804). This concern is more expressly set forth in Judge Peters's opinion for the district court. *Id.* at 68–69.

The *Charming Betsy* principle can also be understood as enforcing the Constitution's basic structure. Because the Court did not defer to the executive branch's determinations, it preserved Congress's role in foreign and military affairs. The Constitution specifically grants Congress the power to "define and punish . . . offenses against the law of nations"[138] and "to make rules for the regulation and government of the land and naval forces."[139] The Constitution's structure thus affords Congress a central role in determiming whether the nation should deviate from the law of nations. The *Charming Betsy* stands for the proposition that the courts should not readily accept unilateral executive action that places the U.S. at odds with international law. Rather, the Court should act so as to preserve Congress's crucial role in determining whether and to what extent the nation should deviate from international law.[140]

G. Deference and Executive Branch Legal Interpretation

Whatever purchase the case for deference might have in the context of judicial interpretation, it has little relevance to internal executive branch interpretation. Legal interpretation is not an abstract exercise;[141] it typically involves the construction of one or more provisions of law in the context of a (more or less) specific set of facts. As with judicial interpretation, it is appropriate for executive branch lawyers to defer to the factual findings of others, including the President, within the executive branch. With respect to matters of law, however, it would be nonsensical to claim that the executive branch should defer to its own interpretation of the law.

Those who urge deference seem to be advocating judicial deference. But the distinction between executive branch interpretation and judicial interpretation is not made explicit, and this can contribute to an important problem. It may lead executive branch lawyers to view their role as making whatever argument may plausibly be available to support the assertion of power that the President wishes to make. This is one conception of how OLC operated in rendering the Torture Memo.[142] The competing conception is that executive branch lawyers—particularly when they act as ex ante counselors rather than ex post litigators—should follow their best understanding of what the law demands and forbids. Where the executive branch follows the latter model, the case for deference to its legal interpretations is at least coherent. Where it follows the former model, claims of deference not only are incoherent—there is no actual legal determination for the judiciary to defer to—the application of deference would undermine the rule of law because the executive branch

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138. U.S. CONST. art. I, § 8, cl. 10.

139. U.S. CONST. art. I, § 8, cl. 14.

140. Historical developments have favored presidential action, but have not resolved many of the pressing legal questions about the allocation of power between Congress and the President. For an excellent treatment of this issue, see POWELL, *supra* note 94.

141. One of the most glaring weaknesses of the Torture Memo is its attempt to answer an ahstract question without reference to a factual context. The Memo undertakes to identify the permissible standards of conduct under 18 U.S.C. §§ 2340–2340A. *See* Torture Memo, *supra* note 7, at 1. It does not examine whether specified interrogation techniques are permissible.

142. In fact, this is sometimes offered as a defense of OLC. *See* Posner & Vermeule, *supra* note 29.

would no longer be bound by legal constraints, only by the limits of its lawyers' imaginations.

III. PRESCRIPTIONS FOR STATUTORY CONSTRUCTION: PONDERING THE IMPONDERABLES

Statutory interpretation should proceed from a fulsome understanding of the way in which the Constitution structures government power and of the role that each branch is designed to play within that structure. The first constitutional protection for liberty is not individual rights, but the system of checks and balances. To operate effectively, each branch must be able to act as a check on the others.[143] An approach to statutory interpretation that privileges some aspects of the constitutional structure over others is bound to distort and undermine the effectiveness of the constitutional architecture.

The rights/structure dichotomy threatens to work precisely this distortion. It would privilege the role and power of the presidency as well as individual rights. These are surely constitutional values of the first rank, but they are not alone. The role of Congress as an institutional check on presidential aggrandizement is vital. Moreover, the fundamental constitutional commitment to republican self-government can be largely located in Congress. The structure of Congress itself and its interaction with the President are designed to create an environment in which meaningful deliberation on the nation's interest might take place. Congress is thus not only meant to be a vehicle for dampening the influence of faction;[144] it is also designed to improve the quality of government decision making by introducing a variety of occasions for deliberation. Finally, Congress is constitutionally designed to introduce openness to governmental decision making.[145] This openness, along with other aspects of Congress's structure,[146] enhances public accountability and participation in the process of government decision making.

These abstract structures play out in concrete circumstances. For example, in the controversy over the treatment of enemy prisoners, one military officer declared:

> Congress should have oversight of treatment of prisoners. That is the way; the Army should not take it upon itself to determine what is acceptable for America to do in regards to treatment of prisoners. That's a value . . . that's more than just a military decision, that's a values decision, and therefore Congress needs to know about it, and therefore the American people need to have an honest representation of what's going on presented to them so that they can have a say in that.[147]

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143. *See* THE FEDERALIST NOS. 47, 48, 51 (James Madison).

144. *See, e.g.*, THE FEDERALIST NO. 51 (James Madison or Alexander Hamilton).

145. The Journal Clause embodies the constitutional presumption that congressional proceedings will be public, or at least a matter of public record. U.S. CONST. art. I, § 5, cl. 3.

146. The primary mechanism of accountability is the direct and frequent election of the House of Representatives. The Seventeenth Amendment, of course, expanded direct election to the United States Senate. This direct accountability and the resulting public participation in elections, campaigns, and the ongoing conduct of representatives in office is further buttressed by the First Amendment's right of petition.

147. HUMAN RIGHTS WATCH, LEADERSHIP FAILURE: FIRSTHAND ACCOUNTS OF TORTURE OF IRAQI DETAINEES BY THE U.S. ARMY'S 82ND AIRBORNE DIVISION, Part IV (2005), *available at* http://hrw.org/reports/2005/us0905/.

The contrast between decision making by the executive alone and joint executive-legislative decision making is also illustrated in the current controversy over the NSA surveillance program. That program was devised in secret within the executive branch and for years was operated with no effective knowledge or oversight by, let alone meaningful input from, Congress.[148] As a result, the public had no input as to the program. It is sometimes said that in the context of the array of threats to national security that are referred to as the War on Terror, there is a trade-off to be made between liberty and security. That may be so, but the Constitution counsels that this is precisely the sort of fundamental decision that is to be made through deliberation by accountable governmental process.

The specific statutory question raised by the NSA surveillance program is whether the surveillance must comply with the warrant procedures of FISA, or whether the AUMF creates an exception to FISA. The rights/structure dichotomy might come out either way.[149] The NSA surveillance program implicates individual rights, yet the AUMF does not contain anything like a clear statement authorizing the executive branch to engage in warrantless wiretapping even of international communications. On the other hand, deference to the President's interpretation of his own power supports the validity of the program—or at least counsels interpretive restraint against declaring the program to be illegal. The rights/structure dichotomy's war with itself ought to serve as a strong caution against it. But there is a deeper problem. Whether one comes down on the side of individual rights or on the side of presidential power, an approach that focuses only on individual rights and presidential power simply overlooks the role of Congress and all the important values that role supports. Thus, it may be that the public supports warrantless surveillance as a reasonable liberty trade-off, but that is beside the point.[150] Reading a statute to allow the President to make the decision alone and in secret, without the participation of Congress, conflicts with the fundamental commitments of our constitutional structure. These commitments are missing from the rights/structure dichotomy.

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148. A small group of congressional leaders was personally briefed about the highly classified program, but they were not allowed to discuss it with anyone, including their own staffs. Senator Jay Rockefeller was left to handwrite a note to the President expressing his concerns, for want of the benefit of staff research or even secretarial assistance.

149. As, in fact, have its proponents. Professor Curtis Bradley signed a letter by prominent scholars and former executive officials challenging the validity of the NSA surveillance program. *See* Beth Nolan et al., *On NSA Spying: A Letter to Congress*, N.Y. REV. BOOKS (Feb. 9, 2006), *available at* http://www.nybooks.com/articles/18650. Professor Sunstein, on the other hand, has defended the program. *See* Postings of Cass Sunstein, Presidential Wiretapping, to The Faculty Blog, http://uchicagolaw.typepad.com/faculty/2005/12/presidential_wi.html#more (Dec. 19, 2005, 14:52 EST).

150. Current data on this issue presents a mixed picture. *See* Adam Nagourney & Janet Elder, *New Poll Finds Mixed Support for Wiretaps*, N.Y. TIMES, Jan. 27, 2006, at A1, *available at* http://www.nytimes.com/2006/01/27/politics/27poll.html?hp&ex=1138338000&en=34b99413dcd9a25e&ei=5094&partner=homepage.

CONCLUSION

It is tempting to say, particularly in the statutory realm, that if Congress means to constrain the President, it should say so specifically rather than relying on the Court to craft (or concoct, to use a more pejorative label) limits. It is neither possible nor desirable for Congress to legislate more specifically. Imagine the situation facing Congress on September 18, 2001. We knew very little, yet the need to authorize the President was great and the importance of not tying the President's hands was obvious. It is possible to read the statute as therefore giving the President whatever he wants; it is also possible to regard it as authorizing broad latitude in the response to the specific events of September 11th and its immediate aftermath, leaving the further elaboration of scope and limits to later development by the legal process. The courts are an important actor but they are only one. The approach to interpretation should leave room for each branch meaningfully to play its role in this process. Deference prevents this process from developing and leaves all power in the President. Scrutiny, on the other hand, introduces the courts and allows them to safeguard our civil rights and liberties, yet it also allows the political branches together to play the primary role of setting and pursuing policy.