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## The Canons of War

**ABSTRACT.** War powers hang in a delicate balance, with conflicting statutes overlying contrasting constitutional prerogatives. Because Congress has filled nearly every shadowy corner of Justice Jackson’s “zone of twilight” with its own imprimatur, war powers debates now hinge on traditional statutory interpretation, albeit in a unique context. This Note draws upon the complete set of judicial opinions assessing authorizations for the use of military force in order to propose context-specific canons for interpreting war powers statutes. These canons of war provide a principled way for courts to ascertain the limits of executive power and civil liberties in times of military conflict.

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**INTRODUCTION**

*Americans expect their government to do everything in its power under our laws and Constitution to protect them and their civil liberties. That is exactly what we are doing. And so far, we have been successful in preventing another attack on our soil.*<sup>1</sup>

In a May 13, 2006, radio address, President Bush claimed that it is the President's privilege and duty to exercise the full extent of his powers to protect the United States from another terrorist attack. A broad array of lawyers, academics, and retired judges has argued that the Bush Administration has pushed the envelope of executive war power,<sup>2</sup> and the Supreme Court has checked some of the administration's most expansive assertions of authority.<sup>3</sup> Nevertheless, the White House has continued to attract public criticism for taking broad domestic action,<sup>4</sup> even as it claims insulation from the checking functions of Congress,<sup>5</sup> the courts,<sup>6</sup> and even internal administrative oversight.<sup>7</sup>

The debate over the President's power to confront the threat of terrorism rests between clashing constitutional authorities. Scholars and commentators

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1. President George W. Bush, White House Radio Address (May 13, 2006), available at <http://www.whitehouse.gov/news/releases/2006/05/20060513.html>.
  2. See, e.g., Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213 (2005); Richard L. Abel et al., *Lawyers' Statement on Bush Administration's Torture Memos* (n.d.), available at <http://www.hrw.org/pub/2004/lawyers-statement.pdf>.
  3. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).
  4. See, e.g., Dan Eggen, *Bush Warned About Mail-Opening Authority*, WASH. POST, Jan. 5, 2007, at A3; Editorial, *More Domestic Spying*, WASH. POST, May 12, 2006, at A20.
  5. See, e.g., Thomas Ferraro, *Bush, Senate Head for Showdown on Domestic Spying*, REUTERS, June 21, 2007, available at <http://www.reuters.com/article/topNews/idUSN2138137520070621> (describing the administration's resistance to subpoenas issued by the Senate Judiciary committee concerning the National Security Agency (NSA) wiretapping program).
  6. See, e.g., Adam Liptak, *U.S. Appeals Court Upholds Dismissal of Abuse Suit Against C.I.A., Saying Secrets Are at Risk*, N.Y. TIMES, Mar. 3, 2007, at A6 (describing a successful assertion of the state secrets privilege despite "substantial evidence" that an innocent man had been rendered and tortured); see also Bernard Hibbits, *Judge Dismisses el-Masri CIA Rendition Suit on State Secrets Grounds*, JURIST, May 18, 2006, <http://jurist.law.pitt.edu/paperchase/2006/05/judge-dismisses-el-masri-cia-rendition.php> (noting that the executive invoked the state secrets privilege only four times between 1953—its judicial inception—and 1976 and more than twenty times since September 11, 2001).
  7. See Scott Shane, *With Access Denied, Justice Dept. Drops Spying Investigation*, N.Y. TIMES, May 11, 2006, at A34 (describing denial of security clearances necessary for the Department of Justice's ethics office to investigate the NSA's domestic wiretapping program).

have disputed the weight of First, Fourth, and Fifth Amendment protections as balanced against the President's executive powers, and the Justice Department finishes nearly every brief and legal memorandum concerning national security with the argument that the government's actions are, in any case, authorized under the President's power as Commander in Chief.<sup>8</sup>

Outside the confines of partisan absolutism, determining the scope of executive war power is a delicate balancing act. Contrasting constitutional prerogatives must be evaluated while integrating framework statutes, executive orders, and quasi-constitutional custom. The Supreme Court's preferred abacus is the elegant three-part framework described by Justice Jackson in his concurrence to *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>9</sup> When the President and Congress act in concert, the action harnesses the power of both branches and is unlikely to violate the principle of separation of powers. When Congress has failed either to authorize or to deny authority, the action lurks in a "zone of twilight" of questionable power. When the President and Congress act in opposition, the President's power is "at its lowest ebb," and the action raises conspicuous concerns over the separation of powers.<sup>10</sup>

Therein lies the rub. Justice Jackson wrote soon after the tremendous growth of the executive during the New Deal and World War II, but the scope of legislation expanded dramatically in subsequent decades. Congress waged a counteroffensive in the campaign over interbranch supremacy by legislating extensively in the fields of foreign relations and war powers. Particularly in the post-Watergate era, Congress filled nearly every shadowy corner of the zone of twilight with its own imprimatur.<sup>11</sup> That is not to say that Congress placed a relentless series of checks on the executive. Rather, Congress strove to establish ground rules, providing a limiting framework such as the War Powers Resolution<sup>12</sup> for each effusive authorization like the Patriot Act.<sup>13</sup> This leaves

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8. See, e.g., Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President 31-39 (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

9. 343 U.S. 579 (1952).

10. *Id.* at 635-38 (Jackson, J., concurring); see also *Dames & Moore v. Regan*, 453 U.S. 654, 668-69 (1981) (utilizing Justice Jackson's framework).

11. See generally RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 495 (5th ed. 2003) ("[A]t present federal law appears to be more primary than interstitial in numerous areas."); ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., THE WAR-MAKING POWERS OF THE PRESIDENT 116-46 (1982) (describing congressional enactments in the face of "uneasiness over the use of force abroad by American Presidents").

12. 50 U.S.C. §§ 1541-1548 (2000).

13. Pub. L. No. 107-56, 115 Stat. 274 (2001) (to be codified in scattered sections of 8, 12, 18, 21, 22, 28, 31, 47, and 50 U.S.C.).

Jackson's second category essentially a dead letter.<sup>14</sup> The most sensitive questions concerning the effective distribution of governmental powers and the range of permissible executive action are therefore problems of statutory interpretation. The question becomes more complicated still when successive Congresses act in apparent opposition. While recent executives have consistently pushed to expand their authority,<sup>15</sup> shifting patterns of political allegiance between Congress and the President yield a hodgepodge of mandates and restraints.<sup>16</sup> Whether an action falls into Jackson's first or third category requires one to parse the complete legislative scheme.

This question is most pointed in connection with the execution of authorized war powers. Presidential power in this area is simultaneously subject to enormously broad delegations and exacting statutory limitations, torn between clashing constitutional values regarding the proper balance between branches. On one side lie authorizations for the use of military force (AUMFs), statutes empowering the President to "introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated."<sup>17</sup> On the other side lie framework statutes, enactments defining the mechanisms and boundaries of the execution of those war powers. Nevertheless, when faced with a conflict between an authorization for the use of military force and a preexisting framework, the Supreme Court must determine the net authorization, synthesizing those statutes while effectuating the underlying constitutional, structural, and historical concerns.

The standard means for resolving statutory ambiguity and conflict is to invoke the canons of statutory interpretation, long-established rules of statutory construction. These "'off-the-rack,' gap-filling rules" provide a predictable means to transmute facially unclear statutory text into legal rules that can be applied to a case at bar.<sup>18</sup> In the realm of war powers, however, the traditional canons have played out to a stalemate, with multiple canons

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14. Even in cases where Congress has failed to act, congressional acquiescence to a long-standing executive practice has been deemed the equivalent of a first category scenario. See *Dames & Moore*, 453 U.S. at 686.

15. See Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 717-22 (2005) (describing the Office of Legal Counsel's client-driven impulse to argue against constraints); see also Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 522-23 (1993) (describing the consistency of executive interpretation of the law across Republican and Democratic administrations).

16. See generally DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-2002* (2d ed. 2005) (describing alternating patterns of lawmaking when Congress and the President are controlled by the same or different parties).

17. 50 U.S.C. § 1547(a) (2000).

18. William N. Eskridge, Jr., & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 67 (1994).

pointing toward opposite results. To break this deadlock, I will elaborate new, context-specific canons, rules of statutory construction that address the unique concerns of this field, including the exigencies of wartime and the institutional dynamics that play out as each branch attempts to play a role in managing armed conflict.<sup>19</sup> Such context-specific canons have been developed extensively in the field of Indian law,<sup>20</sup> but their usefulness in the wider field of statutory interpretation has not previously been recognized. This Note builds the “canons of war” on a foundation of past judicial challenges to the powers granted by AUMFs and supplements them with original arguments balancing a dynamic vision of congressional intent with the government’s shared desire for victory.

Part I demonstrates the inadequacy of the traditional canons by laying out a concrete and unresolved clash over AUMF interpretation: the debate over the legality of the National Security Agency’s (NSA) warrantless wiretap program. Part II explains how context-specific canons can integrate constitutional, structural, and historical concerns to resolve this deadlock and ensure predictable and constitutionally appropriate interpretation. This Part then lays out the set of past judicial decisions challenging authority under an AUMF, assessing trends and means of analysis. Part III builds on these decisions, synthesizing them along with the institutional dynamics that underpin war powers legislation, and develops a set of canons to guide the executive and judiciary and to allow legislative anticipation of an AUMF’s effect. This Part also applies the canons to the wiretapping controversy to demonstrate their real-world efficacy. Finally, Part IV applies the canons to a series of graduated

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19. This deadlock is not unique to war powers statutes, and context-specific canons might be applied to numerous other fields where statutory mandates clash over a foundation of constitutional imperatives. Nevertheless, war powers serve as an apt example because of both the richness of recent debates and the gravity of constitutional concerns.
  20. See, e.g., *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992) (noting the presumption that states cannot tax Indian land); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 173 (1989) (noting the presumption that states can tax activities within their borders, including Indian tribal activities); see also *Duro v. Reina*, 495 U.S. 676 (1990) (noting presumption against criminal jurisdiction by an Indian tribe over a nonmember); *Ala. Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918) (expressing the general rule that statutes “passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expression being resolved in favor of the Indians”). Professors James J. Brudney and Corey Ditslear have also shown that the statutory context of labor law affects the frequency with which specific judges invoke ostensibly neutral canons as well, but they attributed the resolution of these cases to ideology rather than underlying constitutional or structural concerns. James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005).

examples to demonstrate their value within and beyond the dispute over NSA wiretapping.

### I. WARRANTS, WIRETAPS, AND WAR POWERS: A TRADITIONAL STATUTORY ANALYSIS

On December 16, 2005, a front-page article in the *New York Times* began: “Months after the Sept. 11 attacks, President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying . . . .”<sup>21</sup> The story detailed a system under which the NSA monitored the phone calls of “up to 500 people in the United States at any given time” without warrants from the Foreign Intelligence Surveillance Court (FISC)<sup>22</sup> established under the Foreign Intelligence Surveillance Act (FISA).<sup>23</sup>

The story also laid out the skeleton of the Bush Administration’s legal argument that the President possessed the authority to carry out the program. According to Bush Administration lawyers, “the Congressional resolution on the campaign against terrorism provided ample authorization” for a broad monitoring system.<sup>24</sup> Moreover, the article referenced the government’s supplemental brief in *In re Sealed Case*, the only case to ever reach the Foreign Intelligence Surveillance Court of Review (FISCR), in which the Department of Justice asserted that “the Constitution vests in the President inherent authority to conduct warrantless intelligence surveillance (electronic or otherwise) of foreign powers or their agents, and Congress cannot by statute extinguish that constitutional authority.”<sup>25</sup>

The NSA program, sitting at the intersection of the September 11 AUMF and FISA, provides an ideal setting to analyze conflicts between authorizing

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21. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

22. *Id.*

23. 50 U.S.C. §§ 1801-1862 (2000). Under FISA, foreign intelligence surveillance ordinarily is conducted pursuant to a warrant application prepared by the Department of Justice, personally approved by the Attorney General, and signed by a judge of the FISC upon a determination that there is probable cause that the target of the surveillance is a foreign power or an agent of a foreign power. 50 U.S.C. §§ 1804-1805 (2000).

24. Risen & Lichtblau, *supra* note 21.

25. Supplemental Brief for the United States, *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002) (No. 02-001), available at <http://www.fas.org/irp/agency/doj/fisa/092502sup.html>. This backstop argument could only color the interpretation of FISA and urge avoidance; if it were accepted, the FISA Court of Review—a product of Congress’s attempt to regulate intelligence surveillance—would lack the authority to make the ruling at all.

and restricting war powers statutes. Arguments based on traditional statutory interpretation proliferate on both sides, but in this unique context each statutory presumption rests on deeper constitutional commitments. The AUMF/FISA case study fleshes out the array of canons that arise in the interpretation of war powers statutes and demonstrates the need for context-based interpretation to resolve the inevitable and intractable clash of traditional canons.

#### A. Statutory Arguments in Favor of the NSA Surveillance Program

The government issued its first legal response on December 22, only six days after the initial disclosure, in a letter from the Department of Justice (DOJ) to the chairmen and ranking members of the House and Senate Select Committees on Intelligence.<sup>26</sup> After stressing previous briefings to “Leaders of the Congress” and the necessity of the program, the DOJ letter leads with the Article II argument that the President possesses inherent authority to wiretap. Despite the simple appeal of that argument, the bulk of the letter is dedicated to the argument that Congress authorized the program as part of the post-September 11 AUMF, relying on numerous canon-based arguments to support its statutory construction. The validity of this argument turns on how to interpret the scope of the post-September 11 AUMF. The text of the authorization reads in relevant part:

That 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.<sup>27</sup>

The DOJ letter argues that the more recently enacted AUMF now governs the statutory field of wiretapping previously occupied by FISA. This assertion relies on the traditional argument that the latest expression of the sovereign will governs between enactments of equivalent weight: *lex posterior derogat legi*

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26. Letter from William E. Moschella, Assistant Att’y Gen., U.S. Dep’t of Justice, to Pat Roberts et al., Chairmen and Ranking Members, H. and S. Select Comms. on Intelligence (Dec. 22, 2005), available at <http://www.nationalreview.com/pdf/12%2022%2005%20NSA%20letter.pdf> [hereinafter DOJ Letter].

27. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. I 2001)).



*priori*.<sup>28</sup> Relying on a purely textualist argument, the letter asserts that “all necessary and appropriate force” surely includes wiretapping, without any congressional restriction on its execution.<sup>29</sup>

The DOJ letter next argues that the Supreme Court’s decision in *Hamdi v. Rumsfeld* buttresses this interpretation. *Hamdi* ruled that the AUMF authorized a “fundamental incident of waging war,”<sup>30</sup> but did not address the question of whether domestic wiretapping is an essential aspect of war making. However, the letter indirectly asserts that Congress is presumed to legislate with knowledge of the historical circumstances of similar actions taken under past declarations of war and AUMFs. This is an application of the *in pari materia* rule, whereby similar language enacted with a similar legislative purpose is interpreted to have a comparable meaning, even across statutes.<sup>31</sup> While not taken *in haec verba*—in identical words—from any past AUMF,<sup>32</sup> the language of the post-September 11 AUMF is, if anything, broader than past authorizations.<sup>33</sup>

Even if the AUMF did not rid the legislative field of FISA, the DOJ letter argues that the breadth of the implied authorization activates a specific override provision. FISA states that “[a] person is guilty of an offense if he intentionally engages in electronic surveillance under color of law *except as authorized by statute*.”<sup>34</sup> According to the DOJ, the post-September 11 AUMF is a statute that,

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28. See, e.g., *Patterson v. Indep. Sch. Dist.*, 742 F.2d 465 (8th Cir. 1984); Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2791 (2003); cf. *Edye v. Robertson* (Head Money Cases), 112 U.S. 580 (1884) (declaring that a congressional statute must prevail over an earlier ratified treaty).
  29. DOJ Letter, *supra* note 26, at 2-3. For further discussion and historical background to this argument, see U.S. Dep’t of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006), <http://www.fas.org/irp/nsa/dojo11906.pdf> [hereinafter DOJ Whitepaper]. For a fuller discussion of this whitepaper, see *infra* text accompanying note 38.
  30. 542 U.S. 507, 518-19 (2004).
  31. See, e.g., *Cartledge v. Miller*, 457 F. Supp. 1146 (S.D.N.Y. 1978).
  32. Cf. Authorization for Use of Military Force Against Iraq Resolution, Pub L. No. 102-1, 105 Stat. 3 (1991) (“The President is authorized . . . to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677.”).
  33. See Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 252 (2002) (“[The AUMF] is an extraordinarily broad delegation—arguably the broadest congressional delegation of war power in our nation’s history.”).
  34. 50 U.S.C. § 1809(a)(1) (2000) (emphasis added).

if understood to permit wiretaps, conforms with FISA's structure without requiring repeal.<sup>35</sup>

Finally, the DOJ letter stakes out the position that the complete statutory scheme—FISA and the AUMF—must be construed not to conflict with the President's inherent authority to wiretap under the Commander-in-Chief Clause.<sup>36</sup> This argument utilizes the constitutional avoidance canon, which requires that “when an Act of Congress raises ‘a serious doubt’ as to its constitutionality, ‘[a] [c]ourt will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.’”<sup>37</sup> This argument, of course, circles back to the initial claim that the President possesses some inherent authority to wiretap.

The DOJ letter was followed on January 19, 2006, by a formal whitepaper that presents a few additional arguments that merit discussion, along with a fuller explanation of the previous arguments.<sup>38</sup> First, the whitepaper contends that principles of statutory construction dictate that “congressional enactments are to be broadly construed where they indicate support for authority long asserted and exercised by the Executive Branch.”<sup>39</sup> Such logic would expand further on *Dames & Moore v. Regan's* placement of congressional acquiescence in the first *Youngstown* category<sup>40</sup> and would require the hefty assumption that Congress legislates with knowledge of the statutory landscape and integrates

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35. DOJ Letter, *supra* note 26, at 3-4; *see also* DOJ Whitepaper, *supra* note 29, at 1394-1402 (elaborating on this argument); *cf.* *Branch v. Smith*, 538 U.S. 254 (2003) (striving to avoid an implicit repeal of any part of multiple federal savings provisions for the establishment of congressional districts); *Morton v. Mancari*, 417 U.S. 535 (1974) (describing the canon against implied repeals).
  36. DOJ Letter, *supra* note 26, at 4; *see also* DOJ Whitepaper, *supra* note 29, at 1402-10 (elaborating on this argument and particularly distinguishing *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).
  37. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).
  38. DOJ Whitepaper, *supra* note 29. The whitepaper remains the most complete enunciation of the administration's legal justification for the program. *See The Terrorist Surveillance Program and the Foreign Intelligence Surveillance Act (FISA): Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 3 (2007) (statement of Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, Department of Justice), *available at* [http://www.fas.org/irp/congress/2007\\_hr/060707bradbury.pdf](http://www.fas.org/irp/congress/2007_hr/060707bradbury.pdf).
  39. DOJ Whitepaper, *supra* note 29, at 1384 (citing *Haig v. Agee*, 453 U.S. 280, 293-303 (1981); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543-45 (1950)).
  40. *See supra* note 14.

past interpretations when it reauthorizes a statute.<sup>41</sup> Finally, the whitepaper suggests that when Congress delegates authority to the President, the delegation ought to be read as broadly as possible in order to maximize executive flexibility.<sup>42</sup> Given the broad authority and flexibility presumed to be held by a military commander, this deference argument can be viewed as an elaboration on constitutional avoidance of the Commander in Chief authority.

*B. Statutory Arguments Against the NSA Surveillance Program*

Opponents of the program launched their first legal salvo in an open letter to congressional leaders and the chief judge of the FISC on January 9, 2006.<sup>43</sup> Signed by fourteen scholars of constitutional law and former government officials, including conservatives such as Curtis Bradley and Richard Epstein, the experts' letter lays out a formal refutation of the DOJ's December 22 letter. After the release of the January 19 whitepaper, a response came from an even more surprising source: David S. Kris, a former associate deputy attorney general who oversaw national security issues—including FISA—from 2000 to 2003, released a refutation of the Justice Department's detailed position.<sup>44</sup> The Kris memorandum primarily elaborates a forceful textual analysis, looking to the exact terms of FISA as they have been applied by the Justice Department since the Act's passage. Those arguments are less relevant here, as they address the intricacies of FISA rather than its interaction with the AUMF.

The experts' letter dedicates half of its text to refuting the applicability of the canons cited by the Justice Department and half to advancing new statutory arguments. The first and most important argument demands that the specific words of a framework statute must govern over the general authorization

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41. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940). See generally William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988) (expressing skepticism toward such arguments).
  42. DOJ Whitepaper, *supra* note 29, at 1386 (“[E]ven in normal times . . . ‘Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take.’” (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981))).
  43. Letter from Curtis A. Bradley, Professor, Duke Univ., et al., to Bill Frist, Majority Leader, U.S. Senate, et al. (Jan. 9, 2006), available at <http://www.cdt.org/security/20060109legalexpertsanalysis.pdf> [hereinafter Experts' Letter].
  44. Memorandum from David Kris (Jan. 25, 2006), available at <http://www.washingtonpost.com/wp-srv/nation/documents/NSAProgramQuestions.pdf> [hereinafter Kris Memorandum]; see also Dan Eggen & Walter Pincus, *Ex-Justice Lawyer Rips Case for Spying*, WASH. POST, Mar. 9, 2006, at A3. Kris was later called before Congress to testify, and he submitted a modified memorandum for the record. See *NSA III: Wartime Executive Powers and the FISA Court: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of David S. Kris, Senior Vice President, Time Warner, Inc.), available at [http://www.judiciary.senate.gov/testimony.cfm?id=1825&wit\\_id=944](http://www.judiciary.senate.gov/testimony.cfm?id=1825&wit_id=944).

found in an AUMF, regardless of the relative date of passage.<sup>45</sup> This comports with the general canon that the specific governs the general or, in other words, that “[s]pecific provisions targeting a particular issue apply instead of provisions more generally covering the issue.”<sup>46</sup> In this case, the canon suggests that FISA’s series of specific pronouncements—in particular the provision governing which laws may authorize wiretaps<sup>47</sup>—remain in force over the AUMF’s exceedingly vague authorization. Moreover, the experts claim that the proviso allowing electronic surveillance without a warrant for fifteen days following a declaration of war<sup>48</sup> governs any subsequent AUMF, since the provision anticipates precisely such authorizations. Thus this canon runs counter to the canon favoring the most recent enactment, the *lex posterior* canon described above.

Second, the experts’ letter stresses that interpreting an AUMF to overcome framework statutes designed to cabin executive power would implicitly repeal the prior congressional enactment, *sub silentio*.<sup>49</sup> The Supreme Court has had a long-standing policy strongly disfavoring such repeals by implication,<sup>50</sup> and in recent cases has required absolute irreconcilability.<sup>51</sup> Thus, the scholars would discount the relevance of historical powers accompanying an AUMF when Congress has moved specifically and comprehensively to regulate the field; the canon against implied repeals clashes directly with *in pari materia* interpretation of successive AUMFs whose dates of passage bracket the passage of a specific regulation.<sup>52</sup>

Finally, the experts argue that the canon in favor of constitutional avoidance cuts against, rather than in favor of, the program’s legality. The experts assert that, rather than infringing on the President’s power as Commander in Chief, the NSA wiretap program comes too close to violating the Fourth Amendment.<sup>53</sup> Therefore the statutes at play should be interpreted to avoid the difficult constitutional question, holding that Congress at no time authorized the surveillance. Constitutional avoidance concerning individual

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45. Experts’ Letter, *supra* note 43, at 3.

46. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 324 (1994) (citing *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524-25 (1989); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987)).

47. 18 U.S.C. § 2511(2)(f) (2000).

48. 50 U.S.C. § 1811 (2000).

49. Experts’ Letter, *supra* note 43, at 4.

50. See *Morton v. Mancari*, 417 U.S. 535, 549-51 (1974).

51. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996); see also Kris Memorandum, *supra* note 44, at 4 (describing the clear statement rule governing implied repeals).

52. See Experts’ Letter, *supra* note 43, at 4.

53. *Id.* at 8-9.

rights is a complex tool for the interpretation of AUMFs. Different framework statutes protect different constitutional interests,<sup>54</sup> and the power of the canon will vary depending on whether it is used to prevent a true constitutional collision or simply to avoid answering a constitutional question.

The Kris memorandum presents one last canon-based argument. In refuting the government's argument that the "other statute" escape clause in FISA's criminal penalties provision allows electronic surveillance to be authorized by any subsequent statute, Kris describes in all but name the canon that provisos—qualifications, conditions, and loopholes—should be interpreted narrowly.<sup>55</sup> Such escape clauses will be particularly important in interpreting AUMFs, as arguments for authority will often utilize them as hooks to secure exceptions.<sup>56</sup> In contrast to the government's aim to read AUMFs reasonably to anticipate provisos, Kris would narrow both the scope of the proviso and the range of statutes that might trigger it.

As this controversy demonstrates, traditional canons fail to resolve the clash over the NSA's authority to execute the warrantless wiretap program. Congress has been unable to enact a permanent legislative fix,<sup>57</sup> leaving the controversy unresolved after nearly two years of public scrutiny.<sup>58</sup> Thus there is a

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54. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 690 (1981) (Powell, J., concurring in part and dissenting in part) (finding a taking under the Fifth Amendment, despite rejecting petitioners' argument that presidential action violated both the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (Supp. III 1976), and the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 (1976)); *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 313 (1972) ("National security cases, moreover, often reflect a convergence of First and Fourth Amendment values . . .").
  55. Kris Memorandum, *supra* note 44, at 4; see also ESKRIDGE, *supra* note 46, at 324 (citing *Comm'r v. Clark*, 489 U.S. 726, 739 (1989)) (describing the canon).
  56. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 540 (2004) (describing an exception to the Non-Detention Act of 1971, 18 U.S.C. § 4001(a) (2000), which allows imprisonment of a citizen "pursuant to an Act of Congress").
  57. See Protect America Act, Pub. L. No. 110-55, 121 Stat. 552, 557 (2007) (temporarily authorizing warrantless wiretapping for a six-month period pending further legislative deliberation).
  58. See, e.g., *Oversight Hearing on the Constitutional Limitations on Domestic Surveillance: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 4-5 (2007) (statement of Jameel Jaffer, Director, National Security Project of the American Civil Liberties Union), available at [http://www.fas.org/irp/congress/2007\\_hr/060707jaffer.pdf](http://www.fas.org/irp/congress/2007_hr/060707jaffer.pdf). But see Bradbury, *supra* note 38, at 3, 7 (asserting that a FISC judge's approval of a variation of the program has resolved the controversy). While one recent hearing on the controversy was entitled "Constitutional Limitations on Domestic Surveillance," those testifying inevitably launched into statutory arguments. See, e.g., *Constitutional Limitations on Domestic Surveillance: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 4-5

demonstrable need for a new tool to determine the proper interpretation of the governing statutory regime. The context-specific canons of statutory interpretation elaborated below will allow those interpreting war powers legislation to resolve statutory conflicts and will provide a clearer understanding of the powers granted or withheld by future legislation.

## II. FRAMEWORKS AND AUTHORIZATIONS: A JURISPRUDENTIAL ANALYSIS

The struggle over warrantless wiretaps is merely a recent example in a history of conflicts between the statutory limitations and authorizations governing war powers. Whether the purported limitation on the President's power derives from a framework statute or from a condition of the AUMF itself, statutory conflicts concerning the scope of war powers date back to the earliest days of the Republic.<sup>59</sup> This Part analyzes these decisions in numerical terms before Part III looks at the logic underlying the decisions. The resulting combination of jurisprudential and institutional analysis will provide the foundation for context-specific canons for the interpretation of AUMFs and other war powers legislation. By synthesizing this case law, the canons of war will allow members of Congress and the executive properly to anticipate the meaning of a complete statutory framework, promoting both informed legislation and executive adherence to the rule of law.

### A. *Why Context-Specific Canons?*

In the war powers context, traditional canons gird unique underlying principles—constitutional, structural, and historical.<sup>60</sup> When those principles are in tension, context-specific canons are necessary to resolve the resulting conflicts. While courts have long encountered the difficulty that canons of construction frequently counter one another when interpreting ordinary

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(2007) (statement of Louis Fisher), available at [http://www.fas.org/irp/congress/2007\\_hr/060707fisher.pdf](http://www.fas.org/irp/congress/2007_hr/060707fisher.pdf).

59. See, e.g., *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).
60. Each default rule will emphasize a power, institution, or traditional role. For example, the canon that provisos must be interpreted narrowly effectively restrains the President's customary flexibility. See, e.g., GEORGE SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* 76 (1919) (describing Congress's duty to delegate "every power which will aid in the successful prosecution of the war"). At the same time, it underscores Congress's powers to make rules concerning capture and the regulation of the armed forces. See U.S. CONST. art. I, § 8, cls. 11, 14. While canons have similar effects in other areas of statutory interpretation, in the war powers arena the powers are more explicitly laid out in the Constitution and the stakes are undoubtedly higher.

statutes,<sup>61</sup> here the stakes are higher and the values are consistently deeper. For example, while the *in pari materia* canon normally would merely aid a court in interpreting a statute by looking to the similar enactments by an earlier Congress or another state,<sup>62</sup> in the war powers context, parallel interpretation raises the full history of presidential war making. Moreover, the Supreme Court has employed canons and presumptions as a “way to enforce ‘underenforced’ constitutional norms,”<sup>63</sup> such as federalism and nondelegation, on the broader universe of statutes.<sup>64</sup> When force is authorized, the Commander-in-Chief Clause power, Congress’s enumerated authority concerning war, and individuals’ core civil liberties all hang in the balance, and no simple instruction to avoid constitutional questions will untie the statutory knot.

A potential solution is to apply context-specific canons of statutory interpretation, canons that apply only in a particular field and trump or resolve the standard canons. The most prominent examples of these context-specific canons exist in the field of American Indian law.<sup>65</sup> Standard canons of statutory interpretation have been modified to reflect “the unique trust relationship between the United States and the Indians”<sup>66</sup> and “a backdrop positing the tribes as political entities distinct from the United States.”<sup>67</sup> As a result, the Supreme Court has plainly stated that “the standard principles of statutory construction do not have their usual force in cases involving Indian law.”<sup>68</sup>

The Court recently brought the resultant context-specific canons into focus in *Chickasaw Nation v. United States*, in which the Court determined that a gaming tax exemption for states did not apply to Indian tribes.<sup>69</sup> The canon against surplusage—“that ‘every clause and word of a statute’ should, ‘if

61. See, e.g., Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950).

62. See, e.g., *Lorillard v. Pons*, 434 U.S. 575 (1978); *Zerbe v. State*, 578 P.2d 597 (Ala. 1978).

63. ESKRIDGE, *supra* note 46, at 286. See generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

64. *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (state sovereign immunity); *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (nondelegation). See generally WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 850–51 (3d ed. 2001) (listing numerous substantive canons). Whether a particular norm is underenforced is, of course, a distinct question.

65. See *supra* note 20.

66. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

67. Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of Marbury v. Madison to Tribal Courts’ Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77, 101 (2004).

68. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

69. 534 U.S. 84, 93–95 (2001).

possible,' be given 'effect'"<sup>70</sup>—and the broad canon of construction in favor of native tribes—"that 'statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit'"<sup>71</sup> favored the tribes. The canon requiring a clear statement to establish a tax exemption<sup>72</sup> and the hoary (and rarely evoked) canon that a court may "reject words 'as surplusage' if 'inadvertently inserted or if repugnant to the rest of the statute'"<sup>73</sup> favored the government. The Court developed a unique standard integrating these presumptions: the tribe's preferred construction must be a "fairly capable" reading of the statutory text to allow the canon favoring American Indians to trump the canon against implied exemptions to federal taxation.<sup>74</sup> The Court cautioned that the nuances underpinning these canons cannot allow for a simple trump; rather these contextual canons balance a principle-laden field.<sup>75</sup>

While the trusteeship relationship with American Indians underpins the canons of American Indian law, the principles that clash beneath war powers statutes provide an even stronger basis for context-specific canons. The President's constitutional powers are vague—which may make them all the more powerful—resting on the Commander-in-Chief Clause and the Executive Vesting Clause.<sup>76</sup> The Constitution does not leave Congress without a voice in governing armed conflict, however; five clauses of Article I, Section 8 enumerate legislative authority over war powers.<sup>77</sup> The structural conflict is also clear, with the President's first-mover advantage and central leadership in times of crisis threatening to overpower Congress's long-term commitment to the rule of law.<sup>78</sup> Finally, the historical association of particular powers with each branch, typified by extreme incidents such as President Truman's unilateral use of atomic weapons against Japan and Congress's termination of appropriations for the Vietnam War, support presumptions of appropriate realms in which one branch may trump the other.

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70. *Id.* at 93 (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)).

71. *Id.* at 93-94 (quoting *Blackfeet Tribe*, 471 U.S. at 766).

72. *Id.* at 95 (citing, inter alia, *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988)).

73. *Id.* at 94 (quoting KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 525 (1960)).

74. *Id.* (citing *Blackfeet Tribe*, 471 U.S. at 766).

75. See *id.* at 95 ("This Court's earlier cases are too individualized, involving too many different kinds of legal circumstances, to warrant any such assessment about the two canons' relative strength.").

76. U.S. CONST. art. II, § 1, cl. 1; *id.* § 2, cl. 1.

77. *Id.* art. I, § 8, cls. 11-14, 16.

78. See Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 *YALE L.J.* 1255, 1274 (1988).



Much of the normative groundwork for the development of specific canons has been laid by decades of executive power scholarship.<sup>79</sup> Yet no scholar has thoroughly analyzed judicial opinions challenging the President's authority to act purely based on an AUMF. By linking these cases with prior studies of structure and constitutional principle, this Note distills and refines canons that will allow presidents to understand the extent of the power delegated to them, Congresses to know what power they are delegating, and judges to interpret complicated questions of wartime authority in a manner that is both principled and predictable.<sup>80</sup>

### B. *The War Powers Cases*

This review of past decisions uses the complete set of federal cases that challenge the executive's authority to act based *solely* on an AUMF. In sum, there have been twenty-one cases interpreting nine AUMFs or declarations of war.<sup>81</sup> This collection of precedents results from electronic database searches

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79. See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* (2d ed. 1996); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990); SUTHERLAND, *supra* note 60; JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005).

80. See generally John F. Manning, *Legal Realism and the Canons' Revival*, 5 GREEN BAG 2D 283, 290-95 (2002) (describing the canons' usefulness). While some recent legal scholarship has argued that predictability is a detriment, as ambiguity may force warring parties—here rival branches of government—to negotiate a compromise in order to avoid uncertainty, see, e.g., Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1675-85 (2003), the application of war powers provides too many opportunities for the executive to act unilaterally and in secret, avoiding beneficial conciliation. See, e.g., Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1.

81. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (to be codified at 50 U.S.C. § 1541 note); To Authorize the Use of U.S. Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, 115 Stat. 224 (2001) (to be codified at 50 U.S.C. § 1541 note); To Authorize the Use of U.S. Armed Forces Pursuant to U.N. Security Council Resolution 678 with respect to Iraq, Pub. L. No. 102-1, 105 Stat. 3 (1991) (codified at 50 U.S.C. § 1541 note); Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, 97 Stat. 805 (1983) (codified at 50 U.S.C. § 1541 note); Joint Resolution To Promote the Maintenance of International Peace and Security in Southeast Asia (Gulf of Tonkin Resolution), Pub. L. No. 88-408, 78 Stat. 384 (1964); Joint Resolution To Promote Peace and Stability in the Middle East, Pub. L. No. 85-7, 71 Stat. 5 (1957) (authorizing use of force to stabilize Egypt after the Suez Crisis); Joint Resolution Authorizing the President To Employ the Armed Forces of the United States for Protecting the Security of Formosa, the Pescadores, and Related Positions and Territories of That Area, Pub. L. No. 84-4, 69 Stat. 7

for all cases that have applied any of the eleven declarations of war and the eleven broad AUMFs ever issued by the U.S. Congress.<sup>82</sup>

What is *not* included? First, the search did not include cases interpreting every congressional enactment that might arguably authorize force. Several acts listed in Curtis Bradley and Jack Goldsmith's study of the President's powers after September 11<sup>83</sup> might only questionably be considered AUMFs; the authorized action could be carried out merely through customs or law

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(1955); Joint Resolution Declaring that a State of War Exists Between the Government of Rumania and the Government and the People of the United States and Making Provisions To Prosecute the Same, Pub. L. No. 77-565, 56 Stat. 307 (1942); Joint Resolution Declaring that a State of War Exists Between the Government of Hungary and the Government and the People of the United States and Making Provisions To Prosecute the Same, Pub. L. No. 77-564, 56 Stat. 307 (1942); Joint Resolution Declaring that a State of War Exists Between the Government of Bulgaria and the Government and the People of the United States and Making Provisions To Prosecute the Same, Pub. L. No. 77-563, 56 Stat. 307 (1942); Joint Resolution Declaring that a State of War Exists Between the Government of Italy and the Government and the People of the United States and Making Provision To Prosecute the Same, Pub. L. No. 332, 55 Stat. 797 (1941); Joint Resolution Declaring that a State of War Exists Between the Government of Germany and the Government and the People of the United States and Making Provision To Prosecute the Same, Pub. L. No. 331, 55 Stat. 796 (1941); Joint Resolution Declaring that a State of War Exists Between the Imperial Government of Japan and the Government and the People of the United States and Making Provisions To Prosecute the Same, Pub. L. No. 328, 55 Stat. 795 (1941); Joint Resolution Declaring that a State of War Exists Between the Imperial and Royal Austro-Hungarian Government and the Government and the People of the United States and Making Provision To Prosecute the Same, Pub. L. No. 17, 40 Stat. 429 (1917); Joint Resolution Declaring that a State of War Exists Between the Imperial German Government and the Government and the People of the United States and Making Provision To Prosecute the Same, Pub. L. No. 1, 40 Stat. 1 (1917); An Act Declaring that War Exists Between the United States of America and the Kingdom of Spain, ch. 189, 30 Stat. 364 (1898); An Act Providing for the Prosecution of the Existing War Between the United States and the Republic of Mexico, ch. XVI, 9 Stat. 9 (1846); An Act for the Protection of the Commerce of the United States Against the Algerine Cruisers, ch. XC, 3 Stat. 230 (1815); An Act Declaring War Between the United Kingdom of Great Britain and Ireland and the Dependencies thereof, and the United States of America and Their Territories, ch. CII, 2 Stat. 755 (1812); An Act for the Protection of the Commerce and Seamen of the United States, Against the Tripolitan Cruisers, ch. IV, 2 Stat. 129 (1802); An Act Further To Protect the Commerce of the United States, ch. LXVIII, 1 Stat. 578 (1798) (authorizing use of offensive force in the Quasi War with France); An Act More Effectually To Protect the Commerce and Coasts of the United States, ch. XLVIII, 1 Stat. 561 (1798) (authorizing use of defensive force in the Quasi War with France).

82. Cases were located by searching databases of federal cases in both LexisNexis and Westlaw for both the AUMF's citation in Statutes at Large and either the Public Law Number (when available) or the informal name of the enactment.
83. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2073-74 nn.112-16 (2005).

enforcement.<sup>84</sup> Moreover, no cases in the collection concern the American Civil War or the Korean War. As famously noted in *The Prize Cases*, the Civil War was initiated under the President's power as Commander in Chief to respond to armed attack, and therefore neither utilized nor required congressional authorization.<sup>85</sup> The Korean War received no general authorization from Congress, which instead merely enacted the Defense Production Act of 1950<sup>86</sup> to mobilize industrial production in support of the United Nations-sponsored police action.<sup>87</sup> While these cases surely represent important executive power precedents, they are simply not relevant to the special legal challenges posed by exercises of executive power pursuant to congressional legislation. Finally, the search did not include cases relying on appropriations for military operations. Presidents have strenuously argued that appropriations signal congressional authorization of, or at least acquiescence to, military action,<sup>88</sup> and Chief Justice John Roberts has stated, in his prior role as a judge of the D.C. Circuit, that they may implicitly repeal framework statutes.<sup>89</sup> Nevertheless, the War Powers Resolution explicitly directs that authorization should not be inferred from appropriations,<sup>90</sup> so they are not included.

Second, the set of cases does not include every decision that cites an AUMF or declaration of war. Many cases reference an AUMF merely to provide factual

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84. See, e.g., An Act To Provide for the Protection of the Salmon Fisheries of Alaska, ch. 415, § 3, 25 Stat. 1009, 1010 (1889) (“[H]e shall also cause one or more vessels of the United States to diligently cruise said waters and arrest all persons, and seize all vessels found to be, or to have been, engaged in any violation of the laws of the United States therein.”).
85. *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 670 (1862); see also An Act To Provide for the Payment of the Militia and Volunteers Called into the Service of the United States from the Time They Were Called into Service to the Thirtieth Day of June, Eighteen Hundred and Sixty-One, ch. 2, 12 Stat. 255 (1861) (appropriating funds retroactively to pay for volunteer units soon after the initiation of hostilities).
86. 50 U.S.C. app. §§ 2061-2171 (2000).
87. See DAVID M. ACKERMAN & RICHARD F. GRIMMETT, *DECLARATIONS OF WAR* 38 (Ernest V. Klun ed., 2002).
88. See, e.g., Memorandum from Randolph D. Moss, Assistant Att’y Gen., to Janet Reno, Att’y Gen. (Dec. 19, 2000), available at <http://www.usdoj.gov/olc/final.htm> (describing continued authorization for military operations in Kosovo under a supplemental appropriations bill).
89. See, e.g., *Acree v. Republic of Iraq*, 370 F.3d 41, 60 (D.C. Cir. 2004) (Roberts, J., concurring) (finding that the Emergency Wartime Supplemental Appropriations Act, Pub. L. No. 108-11, 117 Stat. 559, 579 (2003), implicitly repealed the provision in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7) (2000), maintaining liability for prior acts undertaken while a state sponsor of terrorism, even if the state is subsequently restored to good status).
90. 50 U.S.C. § 1547(a)(1) (2000).

background to a controversy<sup>91</sup> or to note the foundation of a more specific congressional enactment.<sup>92</sup> I included only cases that address the executive's authority to act pursuant to an AUMF alone, as would be dictated by the *Youngstown* framework. In addition, the set includes only the highest appeal of a particular case, both to exclude overturned cases and to avoid stacking affirmed cases.<sup>93</sup>

While the recent wave of public litigation over presidential power might lead one to expect a large number of decisions, the search returned only twenty cases. Ten of the cases relate to conflicts from the Quasi War with France to the Spanish-American War, and ten relate to clashes from World War I to the current war on terror. Most of the early cases involve seizure of naval vessels and the executive's authority to establish or collect duties on goods imported or exported from an occupied territory. World War I saw a great collaboration between the legislative and executive branches, possibly due to the restricted view of delegation prevalent at the time.<sup>94</sup> As a result, few cases challenging the President relied exclusively on the declaration of war.<sup>95</sup> Where cases from the twentieth and twenty-first centuries do arise, they involve criminal sanctions on the home front and the standards for detention of enemy combatants, reflecting both the decline of admiralty and the increasing role of public-

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91. See, e.g., *Rasul v. Bush*, 542 U.S. 466, 470 (2004); *Anderson v. United States*, 273 F. 2d, 22 (8th Cir. 1921).

92. See, e.g., *Highland v. Russell Car & Snow Plow Co.*, 279 U.S. 253 (1929). The Japanese internment cases that specifically rely on a declaration of war, however, are included. Although courts deemed the executive order establishing the internment to have been "ratified" by a subsequent statute that criminalized violation of the executive order, the criminal statute recognized, rather than granted, the authority to carry out the internments. See *Ex parte Endo*, 323 U.S. 283, 297 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 89-90 (1943).

93. The set does not include *American Civil Liberties Union v. National Security Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *rev'd* 493 F.3d 644 (6th Cir. 2007), which challenged the NSA warrantless wiretapping program. Although the district court ruled directly on the question of whether the President had the authority to pursue the program under the post-September 11 AUMF, *id.* at 779-80, the circuit court vacated the district court's decision on the grounds that the plaintiffs lacked standing. *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 493 F.3d 644, 648 (6th Cir. 2007). Since the highest appeal of the case did not address the issue on the merits, it is excluded from the set of cases.

94. As one court noted, "This situation, in the judgment of Congress, required much legislation." *United States v. Hicks*, 256 F. 707, 709 (W.D. Ky. 1919).

95. See, e.g., *N. Pac. Ry. Co. v. North Dakota*, 250 U.S. 135, 142 (1919) (describing a supplemental grant of authority to seize control of all systems of transportation inside the United States for such purposes "connected with the emergency as may be needful or desirable").

interest impact litigation.<sup>96</sup> Only two cases substantively ruled on the extent of permissible military action, loosely defined to include intelligence-gathering;<sup>97</sup> the courts avoided most other challenges via the political question doctrine or other judicial escape hatches.<sup>98</sup> Nevertheless, there has been a dramatic spike in frequency of cases under the current AUMF, as Congress has largely refrained from either providing specific authorizations or permanently loosening the restrictive enactments of the post-Vietnam era, with the Military Commissions Act being a notable exception.<sup>99</sup> Simultaneously, the President has relied solely on the post-September 11 AUMF and his constitutional powers as Commander in Chief to pursue a global and unconventional war.<sup>100</sup> Of course, the growth of civil liberties organizations specializing in impact litigation<sup>101</sup> and the pressure on law firms to participate in pro bono work<sup>102</sup> undoubtedly have contributed to the recent challenges.<sup>103</sup>

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96. See generally ANTHONY D. ROMERO & DINA TEMPLE-RASTON, *IN DEFENSE OF OUR AMERICA: THE FIGHT FOR CIVIL LIBERTIES IN THE AGE OF TERROR* (2007) (describing the breadth of modern impact litigation).
97. *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971); *United States v. Smith*, 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16,342).
98. See, e.g., *American Civil Liberties Union*, 493 F.3d at 648; *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003); *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006).
99. Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10 U.S.C.); see also Protect America Act of 2007, Pub. L. No. 110-55, §§ 2, 6(c), 121 Stat. 552, 552-57 (to be codified at 50 U.S.C. §§ 1803, 1805) (providing authorization for warrantless wiretaps while simultaneously limiting the authorization to six months).
100. This has been the result of both a Congress divided over the extent of powers it is willing to grant in the quasi-military context of the war on terror and an administration willing to test the outer limits of the President's inherent authority under the Commander-in-Chief Clause. See *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 9 (2006) (statement of Sen. Patrick J. Leahy) ("You, Mr. Attorney General, said the administration did not ask for legislation authorizing warrantless wiretapping of Americans, and did not think such legislation would pass."); see also *U.S. Senate Judiciary Committee Holds a Hearing on Wartime Executive Power and the NSA's Surveillance Authority*, WASHINGTONPOST.COM, Feb. 6, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/06/AR2006020600931.html> (providing transcript of the hearing).
101. See, e.g., Ctr. for Constitutional Rights, September 11th, [http://www.ccr-ny.org/v2/legal/september\\_11th/september\\_11th.asp](http://www.ccr-ny.org/v2/legal/september_11th/september_11th.asp) (last visited Oct. 14, 2007) (describing twenty-four cases brought against the administration or its allies concerning executive power after September 11).
102. See generally *THE LAW FIRM AND THE PUBLIC GOOD* (Robert A. Katzmann ed., 1995) (describing the emergence and structure of pro bono work by large, traditional law firms).
103. Overall, the executive won two cases and lost eight cases in the nineteenth century. In the twentieth and twenty-first centuries, the executive has won five cases and lost four. Thus, in total, the executive has won seven cases and lost thirteen.

One clear pattern emerges from this basic assessment: as the number of cases brought to challenge action pursuant to a given AUMF increases, the likelihood of presidential victory decreases substantially. Of the seven cases that the executive won, six were the first case to be litigated under a particular AUMF. Moreover, in the one case remaining, *Padilla v. Hanft*,<sup>104</sup> the executive avoided Supreme Court review of a victory in the Fourth Circuit by filing criminal charges against Jose Padilla, effectively mooting the case.<sup>105</sup>

This “one free pass” jurisprudence is noteworthy in itself, and its consistency is dangerous in both directions.<sup>106</sup> In early cases, the judiciary shows a distressing willingness to follow the Commander in Chief’s marching orders, disregarding the constitutional distribution of war powers. As more time passes since the emergency that precipitated the use of force, however, courts cease to share the executive’s crisis mentality.<sup>107</sup> In some cases the crisis that precipitated the use of force will have ended, and the court may—in a time of peace—side against the perceived excesses of war. While the turn against permissive statutory interpretation may help restore the rule of law, overly consistent decisions limiting executive authority may also unreasonably limit the interpretation of similar language in the next AUMF. Nevertheless, this pattern persists, and the harsh check on the executive issued in *Hamdan v. Rumsfeld* suggests a developing judicial trend against executive overreach in the ongoing conflict with al Qaeda.<sup>108</sup>

Cases that have determined the President’s power under an AUMF rarely speak in terms of the canons of statutory interpretation. Nevertheless, their decisions fit closely into the same canon-based arguments used by both sides of the NSA wiretap dispute. In Table 2, each case has been coded with at least one canon, and some have been tagged with as many as three. The cases are neither

104. 423 F.3d 386 (4th Cir. 2005).

105. This manipulation earned the consternation of the judge who authored the *Padilla* opinion. See *Padilla v. Hanft*, 432 F.3d 582, 587 (4th Cir. 2005) (Luttig, J.) (denying the government’s motions for vacatur and transfer, which were presumably to prevent review by the Supreme Court, and warning that “these impressions have been left, we fear, at what may ultimately prove to be substantial cost to the government’s credibility before the courts”).

106. This pattern cannot be described as a canon of statutory interpretation in the traditional sense, as it does not reflect consistent construction of statutory text. Rather, it inserts a temporal dimension into an AUMF, giving the same statute different meanings at different times.

107. See Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2358 (2006) (describing the executive’s self-perceived “duty to break eggs” and “duty to respond when eggs are broken”); Michael J. Sniffen, *Ex-Surveillance Judge Criticizes Warrantless Taps*, WASH. POST, June 24, 2007, at A7 (“The executive has to fight and win the war at all costs. But judges understand the war has to be fought, but it can’t be at all costs.” (internal quotations marks omitted) (quoting Judge Royce Lamberth)).

108. 126 S. Ct. 2749, 2753 (2006).

numerous nor consistent enough to provide definitive rules for the interpretation of an AUMF. Relative tallies of generic canons and chronological trends therefore serve only as a starting point to synthesize a composite assessment of the context-based rules by which war powers statutes should be interpreted. Part III will build on outcomes of cases broken down in Table 2 by examining the underlying institutions that are delegating and implementing war powers and, ultimately, by describing how these conflicts might be resolved in the war powers context.

TABLE 1.  
CANONS USED TO INTERPRET AUMFS<sup>109</sup>

CANON	19TH CENTURY	20TH & 21ST CENTURIES	TOTAL
LAST IN TIME	1	2	3
SPECIFIC OVER GENERAL	4	4	8
<i>IN PARI MATERIA</i>	0	2	2
AGAINST IMPLICIT REPEALS	1	1	2
FULFILL PROVISOS	0	3	3
PROVISOS INTERPRETED NARROWLY	0	0	0
AVOID COMMANDER IN CHIEF	1	2	3
AVOID FOURTH AMENDMENT	1	0	1
AVOID FIFTH AMENDMENT TAKING	2	0	2
AVOID FIFTH AMENDMENT LIBERTY	0	2	2
AVOID SIXTH AMENDMENT	0	1	1
AVOID INTERNATIONAL LAW	5	0	5

### III. THE CANONS OF WAR

This Part presents five canons for the interpretation of war powers legislation. These canons aim to resolve conflicts between traditional canons in a manner that does the least violence both to the statutes at issue and to the

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109. The dates in this Table refer to the AUMFs rather than the adjudications.

Constitution. Each Section lays out one of five context-specific canons, drawing initially from an empirical account of judicial precedents engaging with challenges to the President's authority under an AUMF. I will supplement this descriptive baseline with a prescriptive analysis of the desirability and workability of each proposed canon. Finally, I will apply these context-specific canons to the controversy over NSA wiretaps, where relevant. These synthetic, context-specific canons provide a much-needed tool for both regularity and principled decision making in this contentious field.

*A. Canon I: An AUMF Does Not Supersede Specific Legal Frameworks Absent Specific Legislative Instructions*

The traditional canons most frequently applied to war powers statutes are the rules that the “specific governs the general” and that the “last statute in time governs.”<sup>110</sup> The conflict between an earlier specific statute and a later general statute is obvious and inevitable. When faced with this conflict, in nine of twelve cases the courts found that a specific framework statute trumps a more recent AUMF. Although the Supreme Court's decision in *Hamdi* and the Fourth Circuit's decision in *Padilla* both found that the post-September 11 AUMF implicitly overcame the specific mandate of the Non-Detention Act that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress,”<sup>111</sup> the *Hamdan* Court's statement on the issue is both more recent and deliberately definitive:

[W]hile we assume that the AUMF activated the President's war powers and that those powers include the authority to convene military commissions in appropriate circumstances, there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ.<sup>112</sup>

The Court is willing to look, but if it does not find specific evidence, it will not eliminate framework statutes based on a more recent AUMF. Thus the first context-specific canon: an AUMF does not supersede specific legal frameworks absent specific legislative instructions.

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110. See *supra* Table 1.

111. 18 U.S.C. § 4001(a) (2000); see *Hamdi v. Rumsfeld*, 542 U.S. 507, 517-22 (2004); *Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005) (upholding the detention of a U.S. citizen without referring to the Non-Detention Act of 1971, 18 U.S.C. § 4001(a) (2000)).

112. *Hamdan*, 126 S. Ct. at 2775 (citations omitted). See generally Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169, 1195-96 (2006) (concluding that joint legislative-executive decision making should be preferred to a deferential nod to the executive).



The impulse of *Hamdi* and *Padilla*—to supersede a precise statute in order to maximize presidential authority—is not entirely without merit. AUMFs are issued in times of crisis, when the country is about to engage in armed conflict at the loss of blood and treasure. Congress’s imperative is to authorize the President to respond to the use or threatened use of force with the maximum degree of flexibility.<sup>113</sup> Even at its most frantic, legislation is slow and deliberative compared to executive action. By this logic, Congress should be permitted simply to delegate the necessary authority to carry out its clear objective of succeeding in whatever conflict requires the use of force, and should not be forced to check a number of statutory boxes that grant specific powers and eliminate past restrictions.

But Congress itself set up those boxes by earlier passing restrictive framework statutes. While Congress generally cannot forbid its future incarnations from granting the executive broad authority or superseding past legislation,<sup>114</sup> it *can* speed or slow their progress. By legislating specifically, Congress can force future legislators to pass statutes specifically addressing the issue,<sup>115</sup> or it may provide a clear avenue to authorize executive action.<sup>116</sup> In the case of FISA, Congress underwent extensive deliberation concerning the limits of presidential power, even in times of war.<sup>117</sup> If it desired to allow the executive to wiretap outside of FISA’s strictures, it could have simply noted that FISA does not apply to this specific conflict.<sup>118</sup>

Einer Elhauge has written that the best methods of statutory interpretation will elicit Congress’s true preference, even if the initial judicial decision is contrary to both the enacting Congress’s and the current Congress’s respective

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113. See *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971) (describing the rapid action and flexibility necessary to carry out armed conflict).

114. See, e.g., *United States v. Winstar Corp.*, 518 U.S. 839, 872–74 (1996). But see Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002) (asserting that there is no constitutional or normative bar to entrenchment).

115. See, e.g., 10 U.S.C. § 836(a) (2000) (requiring that procedures for military courts conform to rules set by Congress in the Uniform Code of Military Justice, effectively requiring specific congressional action to change such procedures).

116. See, e.g., 18 U.S.C. § 4001(a) (2000) (providing a broad “Act of Congress” standard to authorize military detention).

117. See, e.g., Foreign Intelligence Surveillance Act § 111, 50 U.S.C. § 1811 (2000) (authorizing the President to circumvent FISA following a declaration of war, but only for fifteen calendar days).

118. Cf. Authorization of the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, § 2(b), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. I 2001)) (explicitly fulfilling the requirements of the War Powers Resolution).

intentions.<sup>119</sup> So even if the first judicial decision does not comport with congressional intent, it may yield a legislative correction, promoting both clarity and deliberation. Thus, Elhaug's "preference eliciting statutory default rules" promote not only interpretation in compliance with legislative intent, but also the construction most susceptible to legislative override.<sup>120</sup>

Elhaug's first criterion—compliance with legislative intent—recognizes that certain political environments are more conducive to thoughtful lawmaking, meaning that statutes arising from particular legislative climates are more likely to reflect a clear congressional intent. Therefore the statutory output of such a period should be given greater credence when interpreting conflicting statutes, thereby privileging deliberation over alacrity. For example, the period after the Vietnam War may have reflected a historic level of distrust in the executive, but the framework statutes of the era reflect broad legislative coalitions, sensitive to the concerns of the party occupying the White House and careful to incorporate allowances for executive flexibility.<sup>121</sup>

During times of war, however, legislators clamoring for careful deliberation are unlikely to prevail. When a foreign policy crisis mounts, the President almost always gains both popular and congressional support, particularly if the crisis is severe and well-reported and the President has room to improve in the polls.<sup>122</sup> In particular, President Bush's approval ratings underwent a historic spike following the terrorist attacks of September 11, 2001, rising from about fifty percent between August 28 and 30 to about eighty percent between September 14 and 16.<sup>123</sup> Thus, a tendency for Congress to enact sweeping authorizations that favor a popular President is understandable, if not inevitable. While a canon favoring a broad AUMF because it is the last in time might best capture the political climate of the moment, it forces action upon Congress at times of severe institutional weakness, when the people look uniquely to the executive for decisive leadership. Thus, a canon refusing to supersede more specific enactments implicitly preserves Congress's war powers

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119. Einer Elhaug, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2168 (2002).

120. *Id.* at 2162, 2173-79.

121. See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 144-48 (2d rev. ed. 2004) (describing the coalition necessary to overcome President Nixon's veto of the War Powers Resolution as well as congressional recognition of the President's authority to defend the nation without authorization during "extraordinary and emergency circumstances").

122. William D. Baker & John R. Oneal, *Patriotism or Opinion Leadership?: The Nature and Origins of the "Rally 'Round the Flag" Effect*, 45 J. CONFLICT RESOL. 661 (2001).

123. See PollingReport.com, *President Bush: Job Ratings 1* (2007) <http://www.pollingreport.com/BushJob1.htm> (last visited Oct. 8, 2007) (collecting data from numerous polls). By late September 2003, President Bush's ratings had fallen back to fifty percent. *Id.*

without overt constitutional argument. Leaving the legislative framework in place may ultimately force Congress to act again and with greater specificity. The context-specific canon will have bought valuable time, however, for passions to subside and debate to occur. When Congress truly wishes to grant extensive executive powers, political support will make further authorization an easy task.

Fulfilling Elhauge's second criterion, Congress should be able to overcome judicial refusals to supersede specific legislation if it deems the ruling contrary to its present intent, and the priority given to national security ensures that legislative inertia is unlikely to prevent correction. The aftermath of *Hamdan* demonstrates this perfectly. In the summer of 2006, the Supreme Court ruled that the post-September 11 AUMF did not authorize the use of military commissions, and that the restrictions of the Uniform Code of Military Justice (UCMJ) remained in place.<sup>124</sup> Within four months of the decision, Congress granted the President the power to establish military commissions under regulations distinct from the UCMJ.<sup>125</sup> Of course, this legislative decision does not prove the Supreme Court wrong. Rather, it demonstrates that the *Hamdan* framework—judicial demand for specific legislation to supersede a framework statute—is workable. However, if the Court had ruled in the President's favor and Congress had wished to restrict his authority, then Congress would have been hard-pressed to overcome a veto.<sup>126</sup> Critically, when the executive loses, the government nearly always receives a stay of the injunction,<sup>127</sup> allowing Congress to establish its intent definitively before any damage to the war effort occurs.

A difficult side effect of Elhauge's preference-eliciting statutory default rules is that actions taken prior to legislative correction that conform with congressional intent may still be ruled contrary to the law as it existed at the time of the act. If courts construe AUMFs narrowly, consistent with Canon I, then soldiers and policymakers might be exposed to criminal liability under the specific limitations of the War Crimes Act, which criminalizes violations of the

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124. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2754 (2006).

125. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified at 10 U.S.C. §§ 948a-950p); see also *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 11-12 (D.D.C. 2006) (applying a limitation on petitions for habeas corpus retroactively).

126. Cf. Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1255 (2007) (describing the ratchet effect caused by the confluence of deference to the executive and the veto power).

127. See, e.g., *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 467 F.3d 590 (6th Cir. 2006) (granting a stay of the district court's injunction against the NSA surveillance program). Even if the government were to lose only in a final appeal, enforcement may still be stayed, pending potential legislative modification.

Geneva Conventions.<sup>128</sup> This interpretive gap period could deter action at the fringe of legality that has the potential to save lives. Fortunately, just as Congress can intervene to reverse a judicial construction that limits presidential power, it can retrospectively eliminate criminal liability in extreme cases for a broad class of acts later determined to be necessary to save lives.<sup>129</sup> In the most extreme case, the President may of course pardon an individual who breaks the law truly to save a life, further easing the pressure on statutory interpretation.<sup>130</sup> But correction only works in one direction; if courts were to favor the more recent, broader authorization, legislative correction in the criminal context would be barred by the constitutional ban on *ex post facto* laws.

The first canon applies neatly to the NSA surveillance program. While the post-September 11 AUMF is arguably more specific in terms of the particular conflict, in the field of wiretapping, FISA is the more specific statute. Moreover, the text and legislative history of the AUMF contain no references to wiretapping.<sup>131</sup> Therefore, FISA still governs.

*B. Canon II: AUMFs Empower the “Fundamental Incidents of Waging War”  
but Do Not Otherwise Repeal Framework Statutes*

Courts have at times interpreted AUMFs by applying traditional powers triggered by an AUMF, effectively repealing a specific framework statute.

128. See, e.g., Rosa Brooks, Op-Ed., *The Geneva Convention ‘Catch,’* L.A. TIMES, June 30, 2006, at B13; see also Adam Liptak, *The Court Enters the War, Loudly,* N.Y. TIMES, July 2, 2006, § 4, at 1 (“What the court is doing is attempting to suppress creative thinking . . . .” (quoting John Yoo)).
129. See generally Comment, *Today’s Law and Yesterday’s Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. PA. L. REV. 120 (1972) (describing the common law doctrine of abatement, whereby the elimination of criminal liability may be applied retroactively). But see Bruce Fein, *The Pardon Pander: Congress Blatantly Oversteps Its Power for the Sake of Two Border Patrol Agents*, SLATE, July 26, 2007, <http://www.slate.com/id/2171209> (arguing that congressional action to bar enforcement of generally applicable laws against particular individuals infringes on the President’s unique pardon power).
130. As a practical matter, an individual pardon might not even be necessary. See Colin Freeze, *What Would Jack Bauer Do?*, GLOBE & MAIL (Toronto), June 16, 2007, at A9 (quoting Justice Scalia as proclaiming, “Jack Bauer saved Los Angeles. . . . He saved hundreds of thousands of lives. . . . Is any jury going to convict Jack Bauer? I don’t think so.”).
131. See *NSA III: Wartime Executive Powers and the FISA Court: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Sen. Patrick Leahy), available at [http://fas.org/irp/congress/2006\\_hr/032806leahy.html](http://fas.org/irp/congress/2006_hr/032806leahy.html) (“The AUMF says nothing about FISA or about domestic wiretaps. And no members of Congress I have spoken to understood themselves to be partially repealing FISA’s warrant requirement when they voted for the AUMF.”).

Courts shy away from discussion of explicit repeal, leaving only four cases that use this drastic mode of interpretation. In the first two modern cases, both dealing with the detention of American citizens under the post-September 11 AUMF, courts ruled for the executive.<sup>132</sup> While plainly not a large enough batch to present a persuasive trend, the inner logic of these cases demonstrates a willingness on the part of the judiciary to eliminate statutes that tread too closely to traditionally recognized powers during a time of authorized conflict. Thus, without explicitly relying on the Constitution in their statutory arguments, courts empower the President to effectuate the powers of the Commander in Chief based upon only an implicit congressional blessing.<sup>133</sup> *Hamdan* again presents a convincing counterpoint, specifically quoting *Ex parte Yerger* for the notion that “[r]epeals by implication are not favored.”<sup>134</sup> An appropriate context-specific canon must reconcile the case law’s conflicting principles.

Curtis Bradley and Jack Goldsmith have argued persuasively that past executive practice, paired with congressional acquiescence, helps determine the breadth of presidential power under an AUMF.<sup>135</sup> Given the higher likelihood of congressional regulation in past conflicts,<sup>136</sup> conduct previously deemed authorized by an AUMF alone should be considered similarly authorized by a new authorization. This variation on the *in pari materia* canon infers from the similar *purpose* of different AUMFs that Congress intended the later statute to be interpreted in a manner similar to its historical antecedents. Nevertheless, no AUMF before the post-September 11 AUMF had used the *language* seized upon by many of the Bush Administration’s supporters: “all necessary and appropriate force.”<sup>137</sup> For example, the World War II declaration of war with Germany “authorized and directed [the President] to employ the entire naval and military forces of the United States and the resources of the Government to

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132. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (effectively repealing the Non-Detention Act of 1971, 18 U.S.C. § 4001(a) (2000)); *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005) (same).

133. See *Padilla*, 423 F.3d at 396 (“[T]he detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.” (quoting *Ex parte Quirin*, 317 U.S. 1, 25 (1942))).

134. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775 (quoting *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1868)).

135. See Bradley & Goldsmith, *supra* note 83, at 2083-88.

136. See *supra* text accompanying note 94.

137. Authorization of the Use of U.S. Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. I. 2001)).

carry on war against the Government of Germany.”<sup>138</sup> Similarly, some authorizations have been conditionally granted<sup>139</sup> and some have severely limited the situations in which force could be used.<sup>140</sup> “Necessary and appropriate” leaves the executive with a heretofore unseen amount of discretion, rhetorically akin to Congress’s “necessary and proper” lawmaking authority, making any power previously allowed *solely* by an AUMF within the reasonable ambit of the current authorization.<sup>141</sup>

At a minimum, despite the extensive field of framework statutes, an AUMF must authorize some substantive authority that constitutes “force.” With permission to utilize the armed forces necessarily comes discretion in targeting, the ability to recognize and reconnoiter the enemy, and the authority to capture rather than kill an enemy subdued on the battlefield, as required by international law.<sup>142</sup> The Supreme Court’s decision in *Hamdi v. Rumsfeld* laid down the standard for a core power of the authorized Commander in Chief. Actions that are “fundamental and accepted . . . incident[s] to war”<sup>143</sup> are the content of authorized “force,” and these minimal activities must supersede framework statutes in order to effectuate the AUMF.<sup>144</sup> Thus if the two statutes are at loggerheads, the framework statute must yield to an implicit, if temporary, repeal until the cessation of hostilities or the passage of another statute. Without this context-specific trump over the canon against implied

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138. Joint Resolution Declaring that a State of War Exists Between the Government of Germany and the Government and the People of the United States and Making Provision To Prosecute the Same, Pub. L. No. 331, 55 Stat. 796 (1941).

139. See, e.g., Joint Resolution To Authorize the Use of United States Armed Forces Pursuant to United Nations Security Council Resolution 678, Pub. L. No. 102-1, 105 Stat. 3 (1991) (requiring that the President certify that “the United States has used all appropriate diplomatic and other peaceful means” prior to military force).

140. See, e.g., An Act More Effectually To Protect the Commerce and Coasts of the United States, ch. 48, 1 Stat. 561 (1798); see also *Cushing v. United States*, 22 Ct. Cl. 1, 39-41 (1886) (noting that this AUMF did not include the authority to commit reprisals). *Cushing* and its companion cases were not included in the dataset because the actions actually challenged were French seizures that the American government had indemnified. See Convention Between the French Republic and the United States of America, U.S.-Fr., Sept. 30, 1800, 8 Stat. 178.

141. Limitations or authorizations in the explicit text of an AUMF do not fit into this historical vein of interpretation, which is meant to give substance only to the vague notion of “force” at the core of an AUMF.

142. See Geneva Convention Relative to the Treatment of Prisoners of War arts. 3(1)(a), 13, Aug. 12, 1949, 6 U.S.T. 3114, 3518, 75 U.N.T.S. 135, 136.

143. 542 U.S. 507, 518 (2004).

144. This is an argument of legal necessity, not a fiction of congressional knowledge or acquiescence. Cf. Eskridge, *supra* note 41, at 108-13 (arguing that acquiescence cases are more reasonably understood as relying on a presumption than on actual knowledge).

repeals, judges are driven to undermine the logic of clear statement rules in order to confer sufficient power to carry out a task jointly approved by both of the political branches.<sup>145</sup> On the other hand, *Hamdan*'s caution to limit implied repeals should not be ignored, and if the powers demanded by the executive extend beyond the core of war making, even a full declaration of war will not repeal a framework statute.<sup>146</sup> These opposing principles in the case law yield a context-specific canon: an AUMF empowers the "fundamental incidents of waging war" but does not otherwise repeal framework statutes.

The question that remains is how to define "fundamental." The case law, sparse as it may be, suggests a division between broad powers and the means by which they may be executed. The President's power to try war criminals provides a useful example. As Justice Thomas's *Hamdan* dissent made clear, *Hamdi* recognized that "the 'capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'"<sup>147</sup> But to grant a power is not to grant full authority over the means by which it is to be executed.<sup>148</sup> The President may try enemy soldiers accused of war crimes under the AUMF after *Hamdan*. But he must play by Congress's rules: the Uniform Code of Military Justice, as supplemented by the Military Commissions Act.<sup>149</sup>

The NSA wiretapping program most likely exceeds the core power authorized as "force." True, the DOJ whitepaper provides extensive historical evidence that past Presidents carried out domestic reconnaissance under AUMFs, providing a persuasive case that surveillance constitutes a "fundamental and accepted incident to war," by acquiescence if not affirmation.<sup>150</sup> Careful analysis of the historical support, however,

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145. See, e.g., *Padilla v. Hanft*, 423 F.3d 386, 396 (4th Cir. 2005) ("Of course, even were a clear statement by Congress required, the AUMF constitutes such a clear statement according to the Supreme Court.").

146. See *Fleming v. Page*, 50 U.S. 603, 615 (1850) ("[The President's] conquests do not . . . extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power."). This distinction requires careful analysis of historical practice and military necessity and will not silence all argument.

147. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2824 (2006) (Thomas, J., dissenting) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004)).

148. See U.S. CONST. art. I, § 8, cl. 14 ("The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces."); see also *Hamdan*, 126 S. Ct. at 2774 ("[T]he *Quirin* Court recognized that Congress had simply preserved what power . . . the President had had before 1916 to convene military commissions—with the express condition that the President and those under his command comply with the law of war.").

149. Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2000); Military Commissions Act, 10 U.S.C. §§ 948a-950w (Supp. VI 2006).

150. See DOJ Whitepaper, *supra* note 29, at 1386-90.

demonstrates that the breadth of the current program is beyond the powers provided under prior AUMFs. Rather than merely reconnoitering targets or intercepting communications between known combatants, or even between combatants and their sympathizers, the current program merely requires a reasonable basis to believe that “one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda.”<sup>151</sup> Technological advancements that make broad-based, computer-filtered surveillance possible also facilitate the program’s breadth and allow a quantity of targets inconceivable to prior Congresses. Improvements in technology should help further the purpose of an AUMF, but the executive cannot reasonably rely on George Washington’s practice of covertly opening British mail pouches to assert that Congress undoubtedly authorized the monitoring of hundreds of individuals suspected of affiliation with an individual suspected of affiliation with the enemy.<sup>152</sup> Moreover, Cold War wiretapping—not even addressed by the DOJ whitepaper—cannot support the modern program. The widespread wiretaps of the Kennedy, Johnson, and Nixon Administrations were not carried out pursuant to an AUMF, and that era’s unchecked wiretapping has been roundly criticized since it came to the attention of the other branches of government.<sup>153</sup> Thus, the President may conduct reconnaissance under the AUMF. But if he wishes to conduct electronic surveillance on Americans, he must abide by Congress’s regulations: the Foreign Intelligence Surveillance Act.

### C. Canon III: An AUMF Should Be Read To Anticipate and Fulfill Provisos

It is a general canon of statutory interpretation that provisos are interpreted narrowly in order to preserve the general purpose of the statute. Nevertheless, in all four cases addressing whether an AUMF triggers a proviso, courts read the AUMF to fit neatly into a gap in a previously enacted framework statute, thereby suggesting a third context-specific canon: an AUMF should be read to anticipate and fulfill provisos.

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151. Alberto Gonzales, Att’y Gen., Press Briefing on NSA Authorization (Dec. 19, 2005), available at <http://www.fas.org/irp/news/2005/12/ag121905.html>.

152. Cf. DOJ Whitepaper, *supra* note 29, at 1388 (“In fact, Washington himself proposed that one of his Generals ‘contrive a means of opening [British letters] without breaking the seals, take copies of the contents, and then let them go on.’” (quoting CENT. INTELLIGENCE AGENCY, INTELLIGENCE IN THE WAR OF INDEPENDENCE 31, 32 (1997))).

153. See *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297 (1972); SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES: INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS: BOOK II, S. REP. NO. 94-755, at 14-15 (1976).



Why the context-specific reversal? Reservations to a general framework statute serve two purposes: to restrict the triggering mechanisms to a statutory exception *and* to alert future Congresses and interpreting judges of the enacting Congress's awareness that exceptions may be necessary in future conflicts. Many framework statutes are not meant to hamstring the President, but rather to force consultation and cooperation with Congress.<sup>154</sup> In order to receive sufficient legislative support, reservations both allow and anticipate emergency executive action.

And what type of crisis calls for an exception to a framework statute more strongly than those requiring the use of military force? If a framework statute bears an exception, the resultant question is what standard of legislative expression should be required to activate it. Past practice indicates that once a proviso has been enacted, a clear statement is not required; an AUMF will implicitly satisfy broad conditions.<sup>155</sup> As described above, some AUMFs have contained internal limitations, and the presence of a proviso reverses the burden, requiring Congress to exclude the related power explicitly. Rather than eliminating particular actions from the tools of war, statutes with broad provisos can be understood as taking executive detentions and military tribunals out of the sole discretion of the President and establishing a system by which some minimal authorization is required prior to military measures.

This logic explains the trend seen in modern cases. The triggering mechanism of the Non-Detention Act overcome in *Hamdi* required that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”<sup>156</sup> While “Act of Congress” *must* include federal criminal statutes, the context of the Non-Detention Act’s passage involved the repeal of a statute that granted the President the power to detain U.S. citizens during executive-declared emergencies.<sup>157</sup> Rather than eliminating

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154. See, e.g., 50 U.S.C. § 1542 (2000) (requiring consultation with Congress before introducing the U.S. armed forces into active or imminent hostilities).

155. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004) (interpreting the post-September 11 AUMF to fulfill the proviso contained within the Non-Detention Act of 1971, 18 U.S.C. § 4001(a) (2000)); *Wells v. United States*, 257 F. 605 (9th Cir. 1919) (interpreting the Joint Resolution Declaring that a State of War Exists Between the Government of Germany and the Government and the People of the United States and Making Provision to Prosecute the Same, Pub. L. No. 331, 55 Stat. 796 (1941), to fulfill the limitation that conspiracy may only be charged against an individual who conspires to violate “a law,” despite its failure to conform with the procedures of Article I, Section 7 of the Constitution).

156. *Hamdi*, 542 U.S. at 517 (internal quotation marks omitted) (quoting 18 U.S.C. § 4001(a) (2000)).

157. See *id.* (describing repeal of the Emergency Detention Act of 1950, 50 U.S.C. § 811 (1950), repealed by Pub. L. No. 92-128, 85 Stat. 347 (1971)); see also 50 U.S.C. § 812 (1950) (describing presidential declarations of an “internal security emergency” under the Emergency Detention Act), repealed by Pub. L. No. 92-128, 85 Stat. 347, 348 (1971).

the possibility of the detention of U.S. citizens from the range of war powers, Congress in the Non-Detention Act instead required a legislatively declared emergency—necessitating the consensus of both political branches—before detention of U.S. citizens could be authorized. Therefore the *Hamdi* plurality simply acknowledged that the post-September 11 AUMF is precisely the sort of legislative authorization concerning “individuals in [a] narrow category” envisioned by the drafters of the Non-Detention Act.<sup>158</sup>

Nevertheless, experience provides a strong argument against overenthusiastic application of this permissive statutory default. Prior to the passage of the post-September 11 AUMF, congressional leaders took the time to modify President Bush’s proposed authorization to insert language fulfilling the requirements of the War Powers Resolution.<sup>159</sup> In anticipation of future emergencies, Congress could maintain a list of similar provisions to trigger in order to tailor the breadth of authorized force. Then provisos could be explicitly triggered based on the inclusion of boilerplate language ready for use in AUMFs. Congress does not legislate blindly, and aggressive use of a canon favoring the anticipation and fulfillment of provisos supported by an unwillingness to legislate explicitly allows vague statutes to overcome hard-fought compromises, undermining valuable deliberation.

Turning again to the NSA wiretapping program, FISA recognizes that declarations of war arrive in tumultuous times, and those times may require wiretaps without the protection of the FISC. FISA anticipates this, however, and allows “the President, through the Attorney General,” to “authorize electronic surveillance without a court order . . . for a period not to exceed fifteen calendar days following a declaration of war by the Congress.”<sup>160</sup> This broad proviso forms an archetypal application of the third canon. Formal declarations of war are now anachronistic, and an AUMF should be read to trigger the fifteen-day provision. Nevertheless, the limitation of the proviso to a fifteen-day period makes clear that even the greatest emergencies should not eviscerate FISA. While the proviso should be read broadly, no judicial decision counsels that the triggered effects should be read liberally as well. According to legislative history, this fifteen-day barrier aimed only to “allow time for *consideration* of any amendment to this act that may be appropriate during a wartime emergency.”<sup>161</sup> Therefore, after fifteen days the proviso expires, and absent any amendment, FISA returns to effect. Importantly, FISA procedures

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158. *Hamdi*, 542 U.S. at 517.

159. RICHARD F. GRIMMETT, CONG. RESEARCH SERV., CONGRESSIONAL USE OF FUNDING CUTOFFS SINCE 1970 INVOLVING U.S. MILITARY FORCES AND OVERSEAS DEPLOYMENTS 5-6 (2001), available at <http://www.fas.org/man/crs/RS20775.pdf>.

160. 50 U.S.C. § 1811 (2000).

161. H.R. REP. NO. 95-1720, at 34 (1978) (Conf. Rep.) (emphasis added).

were still utilized in the immediate aftermath of the September 11 attacks,<sup>162</sup> so this proviso cannot be used to claim authorization even for the early days of the NSA surveillance program. The recently passed Protect America Act similarly legalizes the NSA surveillance program,<sup>163</sup> but only for a six-month period while further legislation can be considered.<sup>164</sup>

A superficial application of this canon suggests that the AUMF should be read to anticipate and fulfill the FISA proviso that limits criminal liability under that statutory framework to those individuals who “engage[] in electronic surveillance under color of law except as authorized by statute.”<sup>165</sup> But as David Kris deftly noted, this proviso eliminates only *criminal liability* for surveillance.<sup>166</sup> The provision concerning the authority to *conduct* surveillance in the first place—the so-called exclusivity provision—contains no proviso at all.<sup>167</sup> Accordingly, domestic electronic surveillance may only be conducted pursuant to the procedures of FISA or Title III of the Omnibus Crime Control and Safe Streets Act of 1968, unless that specific provision is modified. FISA as a whole therefore does not anticipate modification of its general rule by a broad AUMF.

However, there is an additional difficulty. Because the exclusivity provision lists the statutes capable of authorizing surveillance, new AUMFs that do not specifically modify FISA do not fill the “surveillance authorized by statute” proviso for criminal liability. The criminal liability proviso should therefore be understood as shorthand for statutes listed in the exclusivity provision, rather than an anticipation of additional authorization absent modification of the exclusivity provision itself. The government tried to use this logic to reach the opposite result, arguing that the AUMF first negates criminal liability and therefore must also generally authorize surveillance.<sup>168</sup> This argument would not only flout the central limitation of the framework statute, but it would also allow a derivative purpose of FISA—criminal punishment of individuals who conduct warrantless wiretaps—to trump the primary purpose of regulating the circumstances under which the executive may engage in electronic

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162. See Sniffen, *supra* note 107 (describing applications for FISA warrants on September 11, 2001, and in the days following).

163. Protect America Act, Pub. L. No. 110-55, § 2, 121 Stat. 552, 552-55 (2007).

164. *Id.* § 6(c), 121 Stat. at 557; see also Joby Warrick & Walter Pincus, *How the Fight for Vast, New Spying Powers Was Won*, WASH. POST, Aug. 12, 2007, at A1 (describing House Speaker Nancy Pelosi’s declaration that work on a permanent fix would begin promptly).

165. 50 U.S.C. § 1809(a)(1) (2000).

166. See Kris Memorandum, *supra* note 44, at 4.

167. See 18 U.S.C. § 2511(2)(f) (2000); see also Kris Memorandum, *supra* note 44, at 2.

168. DOJ Whitepaper, *supra* note 29, at 1393-1401; see also Kris Memorandum, *supra* note 44, at 4 (dubbing this the government’s “transitive argument”).

surveillance.<sup>169</sup> At most, the “authorized by statute” proviso protects government officers from criminal sanction while the tap remains *ultra vires*. The upshot is that an assessment of FISA as a whole renders the scope of the “surveillance authorized by statute” proviso unambiguous, and so makes application of the canon to FISA unnecessary to interpret that provision.

*D. Canon IV: An AUMF Should Be Interpreted Both To Avoid Infringing on the President’s Authority To Dictate the Tactical Essence of War and To Distinguish Between Actions Against Protected and Nonprotected Classes*

Use of government powers during armed conflict inevitably butts against core civil liberties. But in times of war, the Constitution deliberately provides the government’s greatest powers, ranging from the command of military forces to the ability to suspend habeas corpus,<sup>170</sup> and an AUMF activates this central well of authority.<sup>171</sup> Given the vague nature of most AUMFs, they are susceptible to saving constructions, allowing constitutional avoidance to shoulder the work explicit constitutional adjudication would do in other scenarios. In many cases, constitutional avoidance should be lauded as a remedy to plain unconstitutionality; this conclusion does not require separate analysis. The more difficult case is what Adrian Vermeule has termed modern avoidance: when a court merely avoids constitutional difficulty or doubt.<sup>172</sup> Courts have interpreted AUMFs both to avoid interfering with the Commander-in-Chief Clause and to avoid infringing on the Bill of Rights. In three cases, courts have ruled that an AUMF must be interpreted in order to avoid infringing on the President’s power, while in five cases other constitutional values have explicitly shaped statutory interpretation.<sup>173</sup> The question is what principled distinction divides these cases.

The three cases relating to the President’s power as Commander in Chief all defer to the executive on the question of defining the scope of the conflict and the identity of the enemy.<sup>174</sup> For example, *Orlando v. Laird* counsels that once Congress has authorized armed conflict, the judiciary should not interfere

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169. See Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783, 1783 (labeling the bill “An Act To Authorize Electronic Surveillance To Obtain Foreign Intelligence Information”).

170. See U.S. CONST. art. I, § 9; *id.* art. II, § 2.

171. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775 (2006) (describing the post-September 11 AUMF as having “activated the President’s war powers”).

172. Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997).

173. See *supra* Table 1.

174. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971); *The Alexander*, 1 F. Cas. 357 (C.C.D. Mass. 1813) (No. 169).

with the “highly complex considerations of diplomacy, foreign policy and military strategy” effectively carried out by the executive.<sup>175</sup> Thus, avoidance of infringing on the Commander in Chief power leaves the President to dictate the “tactical essence of war.”<sup>176</sup>

On the other hand, avoidance of infringing on civil liberties prominently divides protected and unprotected classes in an armed conflict. The laws of war privilege lawful combatants above unlawful combatants and privilege nonbelligerents above all.<sup>177</sup> Moreover, the placement of detainees into particular judicial processes will imbue them with constitutional rights not possessed by detainees merely held to prevent a return to the battlefield.<sup>178</sup> The Fourth Circuit’s split between *Padilla v. Hanft*<sup>179</sup> and *Al-Marri v. Wright*<sup>180</sup> provides the glaring example. In *Padilla*, the individual declared an enemy combatant had allegedly carried firearms on the battlefield against the United States. The Fourth Circuit placed Padilla squarely under the mantle of illegal enemy combatant, despite his American citizenship, and ruled that he could be held for the duration of hostilities under the post-September 11 AUMF.<sup>181</sup> By comparison, in *Al-Marri*, the Fourth Circuit found that an individual who had not borne arms on a battlefield remained a nonbelligerent. Despite being a Qatari national, al-Marri’s privileged status brought into consideration a Fifth Amendment right against arbitrary detention acquired through residence in the

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175. 443 F.2d at 1043 (internal quotation marks omitted); see also *Hirabayashi*, 320 U.S. at 85-86 (construing the Joint Resolution Declaring that a State of War Exists Between the Imperial Government of Japan and the Government and the People of the United States and Making Provisions To Prosecute the Same, Pub. L. No. 328, 55 Stat. 795 (1941), to conform with the President’s power as Commander in Chief to declare certain areas within the United States to be military areas from which Japanese-Americans might be excluded).

176. Noah Feldman & Samuel Issacharoff, *Declarative Sentences*, SLATE, Mar. 5, 2007, <http://www.slate.com/id/2161172>.

177. See AM. BAR ASS’N TASK FORCE ON ENEMY COMBATANTS, REPORT TO THE HOUSE OF DELEGATES 3-7 (2002), available at <http://news.findlaw.com/hdocs/docs/aba/abatskforce103rpt.pdf>; see also William Glaberson, *Military Judges Dismiss Charges for 2 Detainees*, N.Y. TIMES, June 5, 2007, at A1 (describing ruling by military judges at Guantanamo Bay that their jurisdiction extends only to *illegal* enemy combatants).

178. See *United States v. Moussaoui*, 365 F.3d 292, 312 (4th Cir. 2004) (holding, in light of a criminal defendant’s Sixth Amendment rights, that the AUMF does not provide authority to withhold access to enemy combatant witnesses); see also *id.* at 321 (Williams, J., concurring in part and dissenting in part) (describing the post-September 11 AUMF’s grant of “executive power over enemy aliens, undelayed and unhampered by litigation” (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 774 (1950))).

179. 423 F.3d 386 (4th Cir. 2005).

180. 487 F.3d 160 (4th Cir. 2007).

181. 423 F.3d at 392.

United States. Thus the Fourth Circuit held that the AUMF did not imbue the executive with the authority to detain al-Marri without criminal charges.<sup>182</sup>

A context-specific canon can narrow the scope of potential conflicts, even if it does not eliminate all overlap: an AUMF should be interpreted both to avoid infringing on the President's authority to dictate the tactical essence of war and to distinguish between actions against protected and nonprotected classes. In other words, when Congress has authorized the President to achieve a particular objective by the use of force, courts should presume that Congress intended to provide flexibility concerning the choices of a military commander, including determining the identity of the enemy and distributing forces. But once enemies have been targeted, the scope of authorized military action against them is cabined by membership in a constitutionally protected class, such as citizens, permanent residents, or persons with "sufficient connection" with the United States to be considered a part of the "national community."<sup>183</sup>

Notably, no past case grants *Chevron*-type deference to the executive when interpreting vague authorizations. Such deference—which would effectively implement Justice Thomas's lone dissent in *Hamdi*<sup>184</sup>—would provide perverse incentives for Congress to limit executive flexibility in wartime. If courts were to defer to interpretations that would inevitably maximize executive authority, Congress could retain control over war powers only by legislating with cumbersome specificity; any other approach might effectively authorize unbridled executive power as presidential rulemaking outstrips Congress's ability to shape the conduct of war.<sup>185</sup> Moreover, as described above, legislative corrections aimed to curtail executive power must overcome a presidential veto, making them nearly impossible in the context of a military crisis.<sup>186</sup> The result would be a tremendous rise in interbranch conflicts and a substantial reduction in the role of Congress in the political branches' joint military venture.

Again, we apply these principles to the NSA surveillance program. As in many other cases, constitutional avoidance cuts in both directions. However, the avoidance canon's usefulness is not in assessing the general conflict, as

182. 487 F.3d at 177-78.

183. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

184. But see Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2672 (2005) (arguing for *Chevron* deference to executive interpretation concerning war powers); see also Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1197 (2007) (asserting that AUMFs "fall comfortably within the basic framework of *Chevron*").

185. See Koh, *supra* note 78, at 1292 (noting that the President's "decisionmaking processes can take on degrees of speed, secrecy, flexibility, and efficiency that no other governmental institution can match").

186. See *supra* Section III.A.

avoidance of one constitutional question will merely magnify the other. For example, if an individual raised an equal protection challenge based on the use of donations to banned Muslim charities as a criterion, then the Commander-in-Chief Clause might be invoked to delegate such decision-making authority to the President, despite statutory limitations.<sup>187</sup> Neither side should claim that constitutional avoidance is sufficient to resolve the conflict over the warrantless wiretap program as a whole. Instead, constitutional avoidance provides a powerful tool when assessing challenges to particular wiretaps, which will raise constitutional questions more or less strongly. Thus courts should distinguish between, for example, wiretap claims raised by American callers and those raised by foreign recipients.

*E. Canon V: An AUMF Is Limited by International Law Integrated into Framework Statutes*

Interpretation to avoid violations of international law provides a unique but related issue. Five cases have interpreted nineteenth-century AUMFs to avoid conflicts with international law.<sup>188</sup> Yet as domestic perception of international law has evolved from being “part of our law”<sup>189</sup> to a patchwork of ambitious declarations<sup>190</sup> and treaties riddled with reservations,<sup>191</sup> courts ceased to constrain the breadth of AUMFs by reference to international law.<sup>192</sup> To the extent that it once governed the interpretation of AUMFs, avoidance of international law – independent of domestic implementation – has not affected interpretation of an AUMF in a hundred years. As one recent commentator stated, the debate over the applicability of international law to essential

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187. See, e.g., Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2000).

188. *Macleod v. United States*, 229 U.S. 416 (1913); *The Paquete Habana*, 175 U.S. 677 (1900); *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458 (1805); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804); *United States v. Smith*, 27 F. Cas. 1192 (C.C.D.N.Y. 1806).

189. *The Paquete Habana*, 175 U.S. at 700.

190. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

191. See Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L L. 347, 347-48 (2000).

192. See *Al-Marri v. Wright*, 487 F.3d 160, 178 (4th Cir. 2007) (“[W]e note that American courts have often been reluctant to follow international law in resolving domestic disputes.”). See generally Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293 (2005) (describing the *Hamdi* Court’s failure to take international law into account sufficiently).

exercises of government power “has been almost entirely eclipsed by events on the ground.”<sup>193</sup>

Justice Stevens’s application of the Geneva Conventions in *Hamdan* demonstrates the modern compromise between international legalism and advocates of sovereignty. Rather than ruling on the strength of the Geneva Conventions alone, the Stevens majority found that the Uniform Code of Military Justice “conditions the President’s use of military commissions on compliance not only with the American common law of war, but also with . . . the four Geneva Conventions signed in 1949.”<sup>194</sup> The Fourth Circuit adopted this same technique in *Al-Marri* but went one step further. Rather than holding that a framework statute had integrated the standards of international law, the court ruled that the AUMF itself integrated the standards of the laws of war.<sup>195</sup> This can be seen as a particularly far-reaching application of the general *Hamdan* principle and of the final canon of war: an AUMF is limited by international law integrated into framework statutes.

This canon demonstrates that international law still plays a role in war powers law, albeit perhaps a more limited one than was envisioned by those who wrote that “[t]reaties . . . shall be the supreme Law of the Land.”<sup>196</sup> Where Congress has expressly codified treaty requirements, it provides an effective signal to other nations of the rules to which the United States has *fully* committed.<sup>197</sup> Moreover, Congress has been willing to pass domestic legislation implementing treaties when the international commitments conform to strong domestic norms.<sup>198</sup> Although not at issue in recent cases, the same logic of effective signaling and concrete legislative commitment could apply to the rare incident where the Senate ratifies a treaty that is explicitly

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193. Laura Moranchek Hussain, Note, *Protecting and Enforcing the Treaty Rights of Aliens*, 117 YALE L.J. (forthcoming 2007).

194. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2786 (2006); see also *id.* at 2802 (Kennedy, J., concurring) (using the same means to integrate the Uniform Code of Military Justice into domestic law).

195. *Al-Marri*, 487 F.3d at 184-86. By requiring that any AUMF integrate the laws of war by implication, the decision performs an end-run around the problem of self-execution that the Supreme Court narrowly avoided in *Hamdan*.

196. U.S. CONST. art. VI, cl. 2.

197. Cf. Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 931-32 (2007) (suggesting that the unwritten norms of customary international law must be explicitly codified to take effect in *all* contexts).

198. See, e.g., 18 U.S.C. §§ 2340-2340A (2000) (providing for limited implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (Dec. 10, 1984)).



self-executing on its face without a reservation—in other words, a treaty that creates binding obligations without supplemental legislation.

In practice, this regime adds an extra step to the avoidance regime laid out in *Charming Betsy*.<sup>199</sup> Justice Marshall famously instructed that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>200</sup> Thus, a court must first determine the substance of international law, then determine if international and domestic law appear to be in conflict. If such a conflict might exist under one of several possible interpretations, the court must interpret the domestic statute to avoid a conflict. Under the *Hamdan* rule, the Court has inserted an additional step. Once a conflict has been discovered, first an avoidance analysis is applied to international law. If the international law provision is not clearly enforceable—either through integration in a statute or express self-execution—then international law yields. However, if international law is domestically implemented or clearly self-executing, then the AUMF should not overrule it, an analysis similar to Canon I above. This would allow for additional flexibility when the core interests of the sovereign are at stake, while still maintaining the vital protections of international law. Moreover, although limitations on international law are most widely advocated by proponents of executive flexibility,<sup>201</sup> this modern implementation provides a further bulwark to Congress’s enumerated powers. Domestic legislation, unlike treaty making, gives a role to both houses of Congress and places Congress, rather than the executive, in the role of principal drafter.

#### IV. THE CANONS APPLIED

The canons can be applied to concrete cases beyond the NSA surveillance program. Applying the context-specific canons to a series of graduated scenarios best demonstrates their efficacy; the application results in conclusive statutory construction. Just as importantly, these context-specific canons ensure that the norms underpinning war powers legislation are not lost in the process of interpretation.

Consider three examples.

The NSA taps a radical American imam’s phone within ten days of the passage of the post-September 11th AUMF, without attempting to obtain a warrant. The imam’s conversations with non-Americans in Algeria reference a

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199. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

200. *Id.* at 118.

201. See, e.g., YOO, *supra* note 79, at 182-214 (advocating a limited role for international law in restraining the executive branch).

plot to attack Washington within seventy-two hours. The President sends FBI agents to the imam's home where they engage in heated but not physically coercive interrogation.

The NSA taps an American businessman's phone five weeks after the passage of the post-September 11 AUMF, without attempting to obtain a warrant. The NSA records the businessman's conversations with non-Americans in North Korea, nuclear scientists who might one day sell technology to al Qaeda. As a preventative measure, the President freezes cash transfers to the scientists.

The NSA taps an American attorney's phone six years after the passage of the post-September 11 AUMF, without attempting to obtain a warrant. The NSA records the attorney's conversations with a non-American client recently released from Guantanamo Bay after being given "No Longer Enemy Combatant" status. The client—now living outside the United States and unwilling to assist the government that detained him—is believed to have useful information but remains cleared of any affiliation with or material support for al Qaeda. FBI officials seize the attorney's son and mock-execute him in front of the attorney in an attempt to learn the client's whereabouts.

At a visceral level, one would expect scenario one to be legal and scenario three to be illegal. This is largely how the canons play out. In scenario one, the warrantless wiretap does not fall directly into FISA's exception for wiretaps for fifteen days following a declaration of war. Nevertheless, Canon III instructs that provisos to framework statutes should be interpreted under a relaxed standard, and an AUMF—the modern variant of a declaration of war—can anticipate and fulfill the proviso. Similarly, under Canon V violations of the Geneva Conventions are impermissible, as the War Crimes Act provides an express implementation of international law,<sup>202</sup> and the Geneva Conventions bar even excessive threats as a form of cruel, inhuman, or degrading treatment.<sup>203</sup> Mere heated threats, however, are unlikely to exceed this protective standard, and no reasonable prosecutor would bring charges in this scenario. Moreover, if agents were convicted for conduct deemed necessary or even laudatory, Congress could retroactively alleviate criminal liability for "verbal threats" while appeals were pending.

On the other hand, the third scenario contains three pointed legal mishaps. First, the wiretap violates FISA, as described by the first three canons

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202. 18 U.S.C. § 2441 (2000).

203. *Id.* § 2441(c)(1) (2000); see also Human Rights Educ. Ass'n, Torture, Inhuman or Degrading Treatment, <http://www.hrea.org/learn/guides/torture.html> (2003) ("[T]orture is not limited to acts causing physical pain or injury. It includes acts that cause mental suffering, such as through threats against family or loved ones.").

elaborated above.<sup>204</sup> Canon I instructs that the later AUMF does not supersede the more specific Act. As broad domestic surveillance does not fall within the fundamental incidents of waging war, Canon II shows that the AUMF did not repeal FISA. Additionally, while Canon III eases the friction in fitting an AUMF with a proviso in a framework statute, the canon does not counsel the elimination of express limitations to the proviso itself. Since the “authorized by statute” proviso only applies to FISA’s criminal enforcement provision, the AUMF cannot be read to authorize taps in light of the exclusivity provision, which itself has no proviso.

Second, the subject of the wiretap falls outside of a reasonable interpretation of the AUMF’s delegation to the President to use force against “those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”<sup>205</sup> While the language directs the President to make the determination regarding the connection to the attack, it also provides an enumerated list of targets, which the President has plainly exceeded. Therefore, even in the core military function of determining targets, the extent of the authorization draws a firm border; under Canon IV the President’s Commander-in-Chief authority does not trump this clear statement.<sup>206</sup>

Third, as laid out in the argument related to Canon V above, the War Crimes Act bars torture such as mock-execution, and Canon I indicates that the bar persists even under a broad AUMF.

In the middle lies the most difficult scenario. While a court might be less likely to contest executive action taken so early in a conflict, Canons I, II, and III all demonstrate that the wiretap is illegal once outside the safe-harbor of FISA’s fifteen-day proviso, as described in reference to the third scenario. A court might withhold liability under a liberal reading of the proviso to FISA’s criminal provision, as dictated by Canon III, but the tap itself would undoubtedly be *ultra vires*. The targeting of an individual who might assist al Qaeda in the future also provides a difficult question. While the AUMF delegates the targeting decision to the President, a delegation that dovetails with the authority of the Commander in Chief, even individuals connected with a rogue state do not fall within the plain limitations of the statute. The AUMF is drafted in the past tense—referring to those who “planned,

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204. For more extensive discussion, see *supra* Sections III.A-C.

205. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. I 2001)).

206. While this limitation runs against the core functions that Canon II protects, it is still a valid one. Congress’s initial authorization cannot repeal itself, so this original determination of the scope of the authorized conflict remains in force. To demand otherwise would place an unreasonable degree of discretion in the hands of the President and would disincentivize authorization, as Congress would be forced into an all-or-nothing choice.

authorized, committed, or aided” the September 11 attack.<sup>207</sup> On the other hand, if the President believed at the time that the North Koreans had provided any form of support to al Qaeda, the court would undoubtedly defer to him, interpreting the AUMF to allow maximum flexibility and avoid conflict with the Commander-in-Chief Clause.

Even if a court were to find that the wiretap was impermissible or the AUMF did not apply to the scientists, however, the President would still have the power to halt asset transfers preventatively in light of concerns over the proliferation of weapons of mass destruction. Under the International Emergency Economic Powers Act, the President has the authority to regulate payments to a foreign national in response to a presidentially declared emergency.<sup>208</sup> A state of emergency has persisted with regard to proliferation since 1994, with the ongoing consent of Congress, giving the President precisely the authority exercised here.<sup>209</sup> Canon IV is the only rule with any potential applicability. While the American transferor’s property has been seized, raising Fifth Amendment concerns, his interest is limited posttransfer, and a challenge to the IEEPA framework would undoubtedly fail. In this case, Congress and the President have worked in harmony to provide powers deemed necessary to the national defense, and the courts should not undo their clear, joint action.

## CONCLUSION

The *Youngstown* framework calls for judges to decide if a statutory scheme places Congress’s authority in support of or in opposition to the President’s executive powers; the answer inevitably depends on statutory interpretation. AUMFs are at their core statutes, and their meaning—when interpreted in conjunction with framework statutes—constitutes the difference between *Youngstown*’s first and third categories. In the first category, the President nearly always wins. In the third, the President nearly always loses. The interpretation of AUMFs and the framework of war powers statutes is thus the

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207. To Authorize the Use of U.S. Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. I 2001)).

208. 50 U.S.C. § 1702(a)(1)(A)(ii) (2000).

209. See Exec. Order No. 13,382, 3 C.F.R. 170 (2005) (specifically authorizing action against persons who “pose a risk of materially contributing to[] the proliferation of weapons of mass destruction”); Exec. Order No. 12,938, 59 Fed. Reg. 59,099 (Nov. 14, 1994) (declaring emergency concerning proliferation). Congress must review any ongoing national emergency every six months and may terminate any national emergency by joint resolution. 50 U.S.C. § 1622(a)(1), (b) (2000).

linchpin of the key legal question of our day: what is the extent of the President's power in the war on terror?

When these important statutes clash, the traditional canons of statutory interpretation have proven insufficient to resolve the conflict. Context-specific canons provide principled resolution to these otherwise intractable or dissatisfying debates, determining which statutes govern in particular types of statutory collisions. Established rules that yield consistent results will allow the executive to act within the bounds of law, Congress to delegate without fear of subordination, and the constitutional, structural, and historical considerations that underlie war powers statutes to be fully effectuated.

The need for executive flexibility, in order to achieve the goals set forth by Congress at a minimal loss of blood and treasure, is undoubtedly great, yet so is the threat that the essential rights that make our nation worth fighting for will be lost in the fray. If the United States has entered an intractable conflict with an enemy defined by little more than unflinching ideology, it must understand the scope of the authorization governing that war. With unique statutes governing armed conflict, the courts need unique interpretive guidelines: the canons of war.

## APPENDIX

TABLE 2.  
CASES ADDRESSING PRESIDENTIAL AUTHORITY UNDER AN AUMF<sup>210</sup>

CASE	CANON(S) APPLIED
HAMDAN V. RUMSFELD, 126 S. CT. 2749 (2006).	5, 6
HAMDI V. RUMSFELD, 542 U.S. 507 (2004).	1, 2, 3
EX PARTE ENDO, 323 U.S. 283 (1944).	10
HIRABAYASHI V. UNITED STATES, 320 U.S. 81 (1943).	4
MACLEOD V. UNITED STATES, 229 U.S. 416 (1913).	5, 12
THE PAQUETE HABANA, 175 U.S. 677 (1900).	12
FLEMING V. PAGE, 50 U.S. (9 HOW.) 603 (1850).	6
BROWN V. UNITED STATES, 12 U.S. (8 CRANCH) 110 (1814).	5, 10
MALEY V. SHATTUCK, 7 U.S. (3 CRANCH) 458 (1806).	8, 10, 12
MURRAY V. THE SCHOONER CHARMING BETSY, 6 U.S. (2 CRANCH) 64 (1804).	12
AL-MARRI V. WRIGHT, 487 F.3D 160 (4TH CIR. 2007).	5, 9
PADILLA V. HANFT, 423 F.3D 386 (4TH CIR. 2005).	1, 2, 3
UNITED STATES V. MOUSSAOUI, 365 F.3D 292 (4TH CIR. 2004).	5, 11
ORLANDO V. LAIRD, 443 F.2D 1039 (2D CIR. 1971).	4
WELLS V. UNITED STATES, 257 F. 605 (9TH CIR. 1919).	3
THE JOSEPH, 13 F. CAS. 1126 (C.C.D. MASS. 1813) (NO. 7533).	5
THE ALEXANDER, 1 F. CAS. 357 (C.C.D. MASS. 1813) (NO. 169).	4

210. Key to canons: (1) last in time, (2) *in pari materia*, (3) anticipate provisos, (4) constitutional avoidance (commander in chief power), (5) specific governs the general, (6) against implicit repeals, (7) provisos construed narrowly, (8) constitutional avoidance (Fourth Amendment), (9) constitutional avoidance (Fifth Amendment: liberty), (10) constitutional avoidance (Fifth Amendment: takings), (11) constitutional avoidance (Sixth Amendment), and (12) avoid conflicts with international law.

CASE	CANON(S) APPLIED
UNITED STATES V. SMITH, 27 F. CAS. 1192 (C.C.D.N.Y. 1806) (NO. 16,342).	5, 12
AL-ODAH V. UNITED STATES, 346 F. SUPP. 2D 1 (D.D.C. 2004).	5
KENNEDY V. RICKER, 14 F. CAS. 318 (D.C.D.N.H. 1801) (NO. 7705).	1