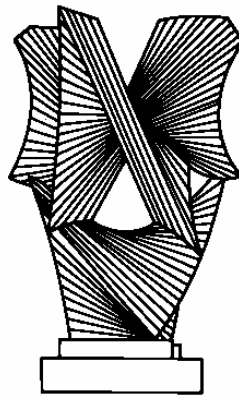


CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 90



ADMINISTRATIVE LAW GOES TO WAR

Cass R. Sunstein

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

May 2005

This paper can be downloaded without charge at the Public Law and Legal Theory Working Paper
Series: <http://www.law.uchicago.edu/academics/publiclaw/index.html> and
The Social Science Research Network Electronic Paper Collection:
http://ssrn.com/abstract_id=730025

Preliminary draft
All rights reserved
Forthcoming in revised form in the Harvard Law Review

Administrative Law Goes to War

Cass R. Sunstein *

Abstract

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

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

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

* Karl N. Llewellyn Distinguished Service Professor, Law School and Department of Political Science, University of Chicago. I am grateful to the Herbert Fried Fund for financial support. Thanks to Patrick Gudridge, Eric Posner, David Strauss, and Adrian Vermeule for valuable comments; special thanks to Vermeule for extended discussions.

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

Consider some illustrative problems:

1. The President initiates military action under the AUMF against Iraq in 2003, contending that the best evidence suggests that Saddam Hussein “aided the terrorist attacks that occurred on September 11, 2001.”
2. The President initiates military action against Iran in 2006, contending that the Central Intelligence Agency can show that its government has “harbored” members of Al Qaeda since 1999.
3. The President initiates military action against North Korea, contending that the Central Intelligence Agency can show that its government has been “assisting” Al Qaeda financially since 2003.
4. The President authorizes the use of force to arrest and to detain citizens of France, who are brought to the United States and imprisoned because they knowingly provided significant financial assistance to organizations that supported Al Qaeda in 2000.²
5. The President detains an American citizen captured at an American airport, contending that the citizen “aided the terrorist attacks that occurred on September 11, 2001.” He plans to detain the citizen indefinitely.
6. The President orders the killing of an American citizen at an American airport, contending that the citizen “aided the terrorist attacks that occurred on September 11, 2001.”

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

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

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

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

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

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

This framework is properly used both by reviewing courts (subject to any justiciability constraints⁷) and by members of the executive branch advising the President about the legality of proposed courses of action. Indeed, this framework furnishes the appropriate principles not only for understanding any authorization for the use of force,

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

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

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

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

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

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

I. Presidential Power in Chevron's Shadow

Chevron creates a two-step inquiry.⁹ The first question is whether Congress has directly decided the precise question at issue. The second is whether the agency's interpretation is reasonable. In the aftermath of *Chevron*, the Court has emphasized the need to ask another question, one that precedes application of the *Chevron* framework: Do *Chevron*'s deference principles apply at all¹⁰? Let us see how these ideas apply to the AUMF. The analysis is somewhat technical, but the conclusion is not: The President has broad authority to construe ambiguities as he sees fit.

A. Chevron Step Zero¹¹

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

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

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

⁹ 467 US at 842-44.

¹⁰ *US v. Mead Corporation*, 533 US 218 (2001)

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

¹² *Mead*, *supra*.

¹³ *Skidmore v. Swift & Co.*, 323 US 134 (1944).

¹⁴ *Mead*, 531 US at 221.

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

¹⁶ *Mead*, 533 US at 221.

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

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

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

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

¹⁸ *Id.* at 227.

¹⁹ See *Barnhart v. Walton*, 535 US 212, 222 (2002).

²⁰ See *Crandon v. US*, 494 US 152, 158 (1990).

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

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

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

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

B. Chevron Steps 1 and 2

If *Chevron* applies, the initial question is “whether Congress has directly spoken to the precise question at issue.”²⁶ As Bradley and Goldsmith emphasize, the President

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

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

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

²⁶ 467 US at 842.

could not use force against nations that cannot plausibly be connected with the attacks of September 11, 2001.²⁷ To be sure, the goal of the AUMF is to permit the President “to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”²⁸ But that goal is to be pursued through a particular means, which is the use of force against those connected with the attacks of September 11. Case (3) is therefore a difficult one, requiring the President to resort to complex arguments on behalf of the exercise of force.²⁹

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

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

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

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

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

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

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

II. Canons and Countercanons

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

A. The Presumption of Liberty

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

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

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

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

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

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

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

³⁷ 320 US 81 (1943).

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

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

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

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

³⁸ Id at 300.

³⁹ Id at 302.

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

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

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

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

⁴⁴ Id at 723.

⁴⁵ Id.

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

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

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

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

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

⁴⁶ *Id.* at 2640.

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

⁴⁸ See *Hamdi*, 124 S Ct 2633 (Thomas, J., dissenting).

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

⁵⁰ *Hamdi*, 124 S Ct 2633, 2674 (2004).

⁵¹ *Id.*

Thomas might well have cited the Court’s decision in Ex Parte Quirin,⁵² where the Court upheld the use of military commissions to try German saboteurs captured during World War II. In that case, the President asked the Court to hold that as Commander in Chief, the President had inherent authority to create and to use military tribunals. The Court refused to accept this argument: “It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions.”⁵³ But where had Congress done so? The Court relied on Article 15 of the Articles of War⁵⁴; but Article 15 did not specifically authorize such commissions. Hence the Court’s ruling is best seen as motivated by a desire to avoid ruling on the President’s broad claims about his constitutional authority as Commander in Chief.

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

C. Canons at War

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

⁵² 317 US 1 (1942).

⁵³ Id at 39.

⁵⁴ See Quirin, 317 U.S. at 27.

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

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

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

Conclusion

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

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

Readers with comments should address them to:

Professor Cass Sunstein
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
csunstei@uchicago.edu

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

Chicago Working Papers in Law and Economics
(Second Series)

1. William M. Landes, Copyright Protection of Letters, Diaries and Other Unpublished Works: An Economic Approach (July 1991)
2. Richard A. Epstein, The Path to *The T.J. Hooper*: The Theory and History of Custom in the Law of Tort (August 1991)
3. Cass R. Sunstein, On Property and Constitutionalism (September 1991)
4. Richard A. Posner, Blackmail, Privacy, and Freedom of Contract (February 1992)
5. Randal C. Picker, Security Interests, Misbehavior, and Common Pools (February 1992)
6. Tomas J. Philipson & Richard A. Posner, Optimal Regulation of AIDS (April 1992)
7. Douglas G. Baird, Revisiting Auctions in Chapter 11 (April 1992)
8. William M. Landes, Sequential versus Unitary Trials: An Economic Analysis (July 1992)
9. William M. Landes & Richard A. Posner, The Influence of Economics on Law: A Quantitative Study (August 1992)
10. Alan O. Sykes, The Welfare Economics of Immigration Law: A Theoretical Survey With An Analysis of U.S. Policy (September 1992)
11. Douglas G. Baird, 1992 Katz Lecture: Reconstructing Contracts (November 1992)
12. Gary S. Becker, The Economic Way of Looking at Life (January 1993)
13. J. Mark Ramseyer, Credibly Committing to Efficiency Wages: Cotton Spinning Cartels in Imperial Japan (March 1993)
14. Cass R. Sunstein, Endogenous Preferences, Environmental Law (April 1993)
15. Richard A. Posner, What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does) (April 1993)
16. Lucian Arye Bebchuk and Randal C. Picker, Bankruptcy Rules, Managerial Entrenchment, and Firm-Specific Human Capital (August 1993)
17. J. Mark Ramseyer, Explicit Reasons for Implicit Contracts: The Legal Logic to the Japanese Main Bank System (August 1993)
18. William M. Landes and Richard A. Posner, The Economics of Anticipatory Adjudication (September 1993)
19. Kenneth W. Dam, The Economic Underpinnings of Patent Law (September 1993)
20. Alan O. Sykes, An Introduction to Regression Analysis (October 1993)
21. Richard A. Epstein, The Ubiquity of the Benefit Principle (March 1994)
22. Randal C. Picker, An Introduction to Game Theory and the Law (June 1994)
23. William M. Landes, Counterclaims: An Economic Analysis (June 1994)
24. J. Mark Ramseyer, The Market for Children: Evidence from Early Modern Japan (August 1994)
25. Robert H. Gertner and Geoffrey P. Miller, Settlement Escrows (August 1994)
26. Kenneth W. Dam, Some Economic Considerations in the Intellectual Property Protection of Software (August 1994)
27. Cass R. Sunstein, Rules and Rulelessness, (October 1994)
28. David Friedman, More Justice for Less Money: A Step Beyond *Cimino* (December 1994)
29. Daniel Shaviro, Budget Deficits and the Intergenerational Distribution of Lifetime Consumption (January 1995)
30. Douglas G. Baird, The Law and Economics of Contract Damages (February 1995)
31. Daniel Kessler, Thomas Meites, and Geoffrey P. Miller, Explaining Deviations from the Fifty Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation (March 1995)
32. Geoffrey P. Miller, Das Kapital: Solvency Regulation of the American Business Enterprise (April 1995)
33. Richard Craswell, Freedom of Contract (August 1995)
34. J. Mark Ramseyer, Public Choice (November 1995)
35. Kenneth W. Dam, Intellectual Property in an Age of Software and Biotechnology (November 1995)
36. Cass R. Sunstein, Social Norms and Social Roles (January 1996)

37. J. Mark Ramseyer and Eric B. Rasmusen, Judicial Independence in Civil Law Regimes: Econometrics from Japan (January 1996)
38. Richard A. Epstein, Transaction Costs and Property Rights: Or Do Good Fences Make Good Neighbors? (March 1996)
39. Cass R. Sunstein, The Cost-Benefit State (May 1996)
40. William M. Landes and Richard A. Posner, The Economics of Legal Disputes Over the Ownership of Works of Art and Other Collectibles (July 1996)
41. John R. Lott, Jr. and David B. Mustard, Crime, Deterrence, and Right-to-Carry Concealed Handguns (August 1996)
42. Cass R. Sunstein, Health-Health Tradeoffs (September 1996)
43. G. Baird, The Hidden Virtues of Chapter 11: An Overview of the Law and Economics of Financially Distressed Firms (March 1997)
44. Richard A. Posner, Community, Wealth, and Equality (March 1997)
45. William M. Landes, The Art of Law and Economics: An Autobiographical Essay (March 1997)
46. Cass R. Sunstein, Behavioral Analysis of Law (April 1997)
47. John R. Lott, Jr. and Kermit Daniel, Term Limits and Electoral Competitiveness: Evidence from California's State Legislative Races (May 1997)
48. Randal C. Picker, Simple Games in a Complex World: A Generative Approach to the Adoption of Norms (June 1997)
49. Richard A. Epstein, Contracts Small and Contracts Large: Contract Law through the Lens of Laissez-Faire (August 1997)
50. Cass R. Sunstein, Daniel Kahneman, and David Schkade, Assessing Punitive Damages (with Notes on Cognition and Valuation in Law) (December 1997)
51. William M. Landes, Lawrence Lessig, and Michael E. Solimine, Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges (January 1998)
52. John R. Lott, Jr., A Simple Explanation for Why Campaign Expenditures are Increasing: The Government is Getting Bigger (February 1998)
53. Richard A. Posner, Values and Consequences: An Introduction to Economic Analysis of Law (March 1998)
54. Denise DiPasquale and Edward L. Glaeser, Incentives and Social Capital: Are Homeowners Better Citizens? (April 1998)
55. Christine Jolls, Cass R. Sunstein, and Richard Thaler, A Behavioral Approach to Law and Economics (May 1998)
56. John R. Lott, Jr., Does a Helping Hand Put Others At Risk?: Affirmative Action, Police Departments, and Crime (May 1998)
57. Cass R. Sunstein and Edna Ullmann-Margalit, Second-Order Decisions (June 1998)
58. Jonathan M. Karpoff and John R. Lott, Jr., Punitive Damages: Their Determinants, Effects on Firm Value, and the Impact of Supreme Court and Congressional Attempts to Limit Awards (July 1998)
59. Kenneth W. Dam, Self-Help in the Digital Jungle (August 1998)
60. John R. Lott, Jr., How Dramatically Did Women's Suffrage Change the Size and Scope of Government? (September 1998)
61. Kevin A. Kordana and Eric A. Posner, A Positive Theory of Chapter 11 (October 1998)
62. David A. Weisbach, Line Drawing, Doctrine, and Efficiency in the Tax Law (November 1998)
63. Jack L. Goldsmith and Eric A. Posner, A Theory of Customary International Law (November 1998)
64. John R. Lott, Jr., Public Schooling, Indoctrination, and Totalitarianism (December 1998)
65. Cass R. Sunstein, Private Broadcasters and the Public Interest: Notes Toward A "Third Way" (January 1999)
66. Richard A. Posner, An Economic Approach to the Law of Evidence (February 1999)
67. Yannis Bakos, Erik Brynjolfsson, Douglas Lichtman, Shared Information Goods (February 1999)
68. Kenneth W. Dam, Intellectual Property and the Academic Enterprise (February 1999)
69. Gertrud M. Fremling and Richard A. Posner, Status Signaling and the Law, with Particular Application to Sexual Harassment (March 1999)
70. Cass R. Sunstein, Must Formalism Be Defended Empirically? (March 1999)

71. Jonathan M. Karpoff, John R. Lott, Jr., and Graeme Rankine, Environmental Violations, Legal Penalties, and Reputation Costs (March 1999)
72. Matthew D. Adler and Eric A. Posner, Rethinking Cost-Benefit Analysis (April 1999)
73. John R. Lott, Jr. and William M. Landes, Multiple Victim Public Shooting, Bombings, and Right-to-Carry Concealed Handgun Laws: Contrasting Private and Public Law Enforcement (April 1999)
74. Lisa Bernstein, The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study (May 1999)
75. Richard A. Epstein, Deconstructing Privacy: and Putting It Back Together Again (May 1999)
76. William M. Landes, Winning the Art Lottery: The Economic Returns to the Ganz Collection (May 1999)
77. Cass R. Sunstein, David Schkade, and Daniel Kahneman, Do People Want Optimal Deterrence? (June 1999)
78. Tomas J. Philipson and Richard A. Posner, The Long-Run Growth in Obesity as a Function of Technological Change (June 1999)
79. David A. Weisbach, Ironing Out the Flat Tax (August 1999)
80. Eric A. Posner, A Theory of Contract Law under Conditions of Radical Judicial Error (August 1999)
81. David Schkade, Cass R. Sunstein, and Daniel Kahneman, Are Juries Less Erratic than Individuals? Deliberation, Polarization, and Punitive Damages (September 1999)
82. Cass R. Sunstein, Nondelegation Canons (September 1999)
83. Richard A. Posner, The Theory and Practice of Citations Analysis, with Special Reference to Law and Economics (September 1999)
84. Randal C. Picker, Regulating Network Industries: A Look at *Intel* (October 1999)
85. Cass R. Sunstein, Cognition and Cost-Benefit Analysis (October 1999)
86. Douglas G. Baird and Edward R. Morrison, Optimal Timing and Legal Decisionmaking: The Case of the Liquidation Decision in Bankruptcy (October 1999)
87. Gertrud M. Fremling and Richard A. Posner, Market Signaling of Personal Characteristics (November 1999)
88. Matthew D. Adler and Eric A. Posner, Implementing Cost-Benefit Analysis When Preferences Are Distorted (November 1999)
89. Richard A. Posner, Orwell versus Huxley: Economics, Technology, Privacy, and Satire (November 1999)
90. David A. Weisbach, Should the Tax Law Require Current Accrual of Interest on Derivative Financial Instruments? (December 1999)
91. Cass R. Sunstein, The Law of Group Polarization (December 1999)
92. Eric A. Posner, Agency Models in Law and Economics (January 2000)
93. Karen Eggleston, Eric A. Posner, and Richard Zeckhauser, Simplicity and Complexity in Contracts (January 2000)
94. Douglas G. Baird and Robert K. Rasmussen, Boyd's Legacy and Blackstone's Ghost (February 2000)
95. David Schkade, Cass R. Sunstein, Daniel Kahneman, Deliberating about Dollars: The Severity Shift (February 2000)
96. Richard A. Posner and Eric B. Rasmusen, Creating and Enforcing Norms, with Special Reference to Sanctions (March 2000)
97. Douglas Lichtman, Property Rights in Emerging Platform Technologies (April 2000)
98. Cass R. Sunstein and Edna Ullmann-Margalit, Solidarity in Consumption (May 2000)
99. David A. Weisbach, An Economic Analysis of Anti-Tax Avoidance Laws (May 2000, revised May 2002)
100. Cass R. Sunstein, Human Behavior and the Law of Work (June 2000)
101. William M. Landes and Richard A. Posner, Harmless Error (June 2000)
102. Robert H. Frank and Cass R. Sunstein, Cost-Benefit Analysis and Relative Position (August 2000)
103. Eric A. Posner, Law and the Emotions (September 2000)
104. Cass R. Sunstein, Cost-Benefit Default Principles (October 2000)

105. Jack Goldsmith and Alan Sykes, *The Dormant Commerce Clause and the Internet* (November 2000)
106. Richard A. Posner, *Antitrust in the New Economy* (November 2000)
107. Douglas Lichtman, Scott Baker, and Kate Kraus, *Strategic Disclosure in the Patent System* (November 2000)
108. Jack L. Goldsmith and Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective* (November 2000)
109. William Meadow and Cass R. Sunstein, *Statistics, Not Experts* (December 2000)
110. Saul Levmore, *Conjunction and Aggregation* (December 2000)
111. Saul Levmore, *Puzzling Stock Options and Compensation Norms* (December 2000)
112. Richard A. Epstein and Alan O. Sykes, *The Assault on Managed Care: Vicarious Liability, Class Actions and the Patient's Bill of Rights* (December 2000)
113. William M. Landes, *Copyright, Borrowed Images and Appropriation Art: An Economic Approach* (December 2000)
114. Cass R. Sunstein, *Switching the Default Rule* (January 2001)
115. George G. Triantis, *Financial Contract Design in the World of Venture Capital* (January 2001)
116. Jack Goldsmith, *Statutory Foreign Affairs Preemption* (February 2001)
117. Richard Hynes and Eric A. Posner, *The Law and Economics of Consumer Finance* (February 2001)
118. Cass R. Sunstein, *Academic Fads and Fashions (with Special Reference to Law)* (March 2001)
119. Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective* (April 2001)
120. Douglas G. Baird, *Does Bogart Still Get Scale? Rights of Publicity in the Digital Age* (April 2001)
121. Douglas G. Baird and Robert K. Rasmussen, *Control Rights, Priority Rights and the Conceptual Foundations of Corporate Reorganization* (April 2001)
122. David A. Weisbach, *Ten Truths about Tax Shelters* (May 2001)
123. William M. Landes, *What Has the Visual Arts Rights Act of 1990 Accomplished?* (May 2001)
124. Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa* (May 2001)
125. Christopher Avery, Christine Jolls, Richard A. Posner, and Alvin E. Roth, *The Market for Federal Judicial Law Clerks* (June 2001)
126. Douglas G. Baird and Edward R. Morrison, *Bankruptcy Decision Making* (June 2001)
127. Cass R. Sunstein, *Regulating Risks after ATA* (June 2001)
128. Cass R. Sunstein, *The Laws of Fear* (June 2001)
129. Richard A. Epstein, *In and Out of Public Solution: The Hidden Perils of Property Transfer* (July 2001)
130. Randal C. Picker, *Pursuing a Remedy in Microsoft: The Declining Need for Centralized Coordination in a Networked World* (July 2001)
131. Cass R. Sunstein, Daniel Kahneman, David Schkade, and Ilana Ritov, *Predictably Incoherent Judgments* (July 2001)
132. Eric A. Posner, *Courts Should Not Enforce Government Contracts* (August 2001)
133. Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions* (August 2001)
134. Richard A. Epstein, *The Allocation of the Commons: Parking and Stopping on the Commons* (August 2001)
135. Cass R. Sunstein, *The Arithmetic of Arsenic* (September 2001)
136. Eric A. Posner, Richard Hynes, and Anup Malani, *The Political Economy of Property Exemption Laws* (September 2001)
137. Eric A. Posner and George G. Triantis, *Covenants Not to Compete from an Incomplete Contracts Perspective* (September 2001)
138. Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law* (November 2001)
139. Randall S. Kroszner and Philip E. Strahan, *Throwing Good Money after Bad? Board Connections and Conflicts in Bank Lending* (December 2001)
140. Alan O. Sykes, *TRIPs, Pharmaceuticals, Developing Countries, and the Doha "Solution"* (February 2002)

141. Edna Ullmann-Margalit and Cass R. Sunstein, Inequality and Indignation (February 2002)
142. Daniel N. Shaviro and David A. Weisbach, The Fifth Circuit Gets It Wrong in *Compaq v. Commissioner* (February 2002) (Published in *Tax Notes*, January 28, 2002)
143. Warren F. Schwartz and Alan O. Sykes, The Economic Structure of Renegotiation and Dispute Resolution in the WTO/GATT System (March 2002, *Journal of Legal Studies* 2002)
144. Richard A. Epstein, HIPAA on Privacy: Its Unintended and Intended Consequences (March 2002, forthcoming *Cato Journal*, summer 2002)
145. David A. Weisbach, Thinking Outside the Little Boxes (March 2002, *Texas Law Review*)
146. Eric A. Posner, Economic Analysis of Contract Law after Three Decades: Success or Failure (March 2002)
147. Randal C. Picker, Copyright as Entry Policy: The Case of Digital Distribution (April 2002, *The Antitrust Bulletin*)
148. David A. Weisbach, Taxes and Torts in the Redistribution of Income (April 2002, Coase Lecture February 2002)
149. Cass R. Sunstein, Beyond the Precautionary Principle (April 2002)
150. Robert W. Hahn and Cass R. Sunstein, A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis (April 2002)
151. Douglas Lichtman, Copyright as a Rule of Evidence (May 2002, updated January 2003)
152. Richard A. Epstein, Steady the Course: Property Rights in Genetic Material (May 2002; revised March 2003)
153. Jack Goldsmith and Cass R. Sunstein, Military Tribunals and Legal Culture: What a Difference Sixty Years Makes (June 2002)
154. William M. Landes and Richard A. Posner, Indefinitely Renewable Copyright (July 2002)
155. Anne Gron and Alan O. Sykes, Terrorism and Insurance Markets: A Role for the Government as Insurer? (July 2002)
156. Cass R. Sunstein and Adrian Vermeule, Interpretation and Institutions (July 2002)
157. Cass R. Sunstein, The Rights of Animals: A Very Short Primer (August 2002)
158. Cass R. Sunstein, Avoiding Absurdity? A New Canon in Regulatory Law (with Notes on Interpretive Theory) (August 2002)
159. Randal C. Picker, From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertyization of Copyright (September 2002)
160. Eric A. Posner, A Theory of the Laws of War (September 2002)
161. Eric A. Posner, Probability Errors: Some Positive and Normative Implications for Tort and Contract Law (September 2002)
162. Lior Jacob Strahilevitz, Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks (September 2002)
163. David A. Weisbach, Does the X-Tax Mark the Spot? (September 2002)
164. Cass R. Sunstein, Conformity and Dissent (September 2002)
165. Cass R. Sunstein, Hazardous Heuristics (October 2002)
166. Douglas Lichtman, Uncertainty and the Standard for Preliminary Relief (October 2002)
167. Edward T. Swaine, Rational Custom (November 2002)
168. Julie Roin, Truth in Government: Beyond the Tax Expenditure Budget (November 2002)
169. Avraham D. Tabbach, Criminal Behavior: Sanctions and Income Taxation: An Economic Analysis (November 2002)
170. Richard A. Epstein, In Defense of "Old" Public Health: The Legal Framework for the Regulation of Public Health (December 2002)
171. Richard A. Epstein, Animals as Objects, or Subjects, of Rights (December 2002)
172. David A. Weisbach, Taxation and Risk-Taking with Multiple Tax Rates (December 2002)
173. Douglas G. Baird and Robert K. Rasmussen, The End of Bankruptcy (December 2002)
174. Richard A. Epstein, Into the Frying Pan: Standing and Privity under the Telecommunications Act of 1996 and Beyond (December 2002)
175. Douglas G. Baird, In Coase's Footsteps (January 2003)

176. David A. Weisbach, Measurement and Tax Depreciation Policy: The Case of Short-Term Assets (January 2003)
177. Randal C. Picker, Understanding Statutory Bundles: Does the Sherman Act Come with the 1996 Telecommunications Act? (January 2003)
178. Douglas Lichtman and Randal C. Picker, Entry Policy in Local Telecommunications: *Iowa Utilities* and *Verizon* (January 2003)
179. William Landes and Douglas Lichtman, Indirect Liability for Copyright Infringement: An Economic Perspective (February 2003)
180. Cass R. Sunstein, Moral Heuristics (March 2003)
181. Amitai Aviram, Regulation by Networks (March 2003)
182. Richard A. Epstein, Class Actions: Aggregation, Amplification *and* Distortion (April 2003)
183. Richard A. Epstein, The “Necessary” History of Property and Liberty (April 2003)
184. Eric A. Posner, Transfer Regulations and Cost-Effectiveness Analysis (April 2003)
185. Cass R. Sunstein and Richard H. Thaler, Libertarian Paternalism Is Not an Oxymoron (May 2003)
186. Alan O. Sykes, The Economics of WTO Rules on Subsidies and Countervailing Measures (May 2003)
187. Alan O. Sykes, The Safeguards Mess: A Critique of WTO Jurisprudence (May 2003)
188. Alan O. Sykes, International Trade and Human Rights: An Economic Perspective (May 2003)
189. Saul Levmore and Kyle Logue, Insuring against Terrorism—and Crime (June 2003)
190. Richard A. Epstein, Trade Secrets as Private Property: Their Constitutional Protection (June 2003)
191. Cass R. Sunstein, Lives, Life-Years, and Willingness to Pay (June 2003)
192. Amitai Aviram, The Paradox of Spontaneous Formation of Private Legal Systems (July 2003)
193. Robert Cooter and Ariel Porat, Decreasing Liability Contracts (July 2003)
194. David A. Weisbach and Jacob Nussim, The Integration of Tax and Spending Programs (September 2003)
195. William L. Meadow, Anthony Bell, and Cass R. Sunstein, Statistics, Not Memories: What Was the Standard of Care for Administering Antenatal Steroids to Women in Preterm Labor between 1985 and 2000? (September 2003)
196. Cass R. Sunstein, What Did *Lawrence* Hold? Of Autonomy, Desuetude, Sexuality, and Marriage (September 2003)
197. Randal C. Picker, The Digital Video Recorder: Unbundling Advertising and Content (September 2003)
198. Cass R. Sunstein, David Schkade, and Lisa Michelle Ellman, Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation (September 2003)
199. Avraham D. Tabbach, The Effects of Taxation on Income Producing Crimes with Variable Leisure Time (October 2003)
200. Douglas Lichtman, Rethinking Prosecution History Estoppel (October 2003)
201. Douglas G. Baird and Robert K. Rasmussen, Chapter 11 at Twilight (October 2003)
202. David A. Weisbach, Corporate Tax Avoidance (January 2004)
203. David A. Weisbach, The (Non)Taxation of Risk (January 2004)
204. Richard A. Epstein, Liberty versus Property? Cracks in the Foundations of Copyright Law (April 2004)
205. Lior Jacob Strahilevitz, The Right to Destroy (January 2004)
206. Eric A. Posner and John C. Yoo, A Theory of International Adjudication (February 2004)
207. Cass R. Sunstein, Are Poor People Worth Less Than Rich People? Disaggregating the Value of Statistical Lives (February 2004)
208. Richard A. Epstein, Disparities and Discrimination in Health Care Coverage; A Critique of the Institute of Medicine Study (March 2004)
209. Richard A. Epstein and Bruce N. Kuhlik, Navigating the Anticommons for Pharmaceutical Patents: Steady the Course on Hatch-Waxman (March 2004)
210. Richard A. Epstein, The Optimal Complexity of Legal Rules (April 2004)
211. Eric A. Posner and Alan O. Sykes, Optimal War and *Jus Ad Bellum* (April 2004)
212. Alan O. Sykes, The Persistent Puzzles of Safeguards: Lessons from the Steel Dispute (May 2004)

213. Luis Garicano and Thomas N. Hubbard, Specialization, Firms, and Markets: The Division of Labor within and between Law Firms (April 2004)
214. Luis Garicano and Thomas N. Hubbard, Hierarchies, Specialization, and the Utilization of Knowledge: Theory and Evidence from the Legal Services Industry (April 2004)
215. James C. Spindler, Conflict or Credibility: Analyst Conflicts of Interest and the Market for Underwriting Business (July 2004)
216. Alan O. Sykes, The Economics of Public International Law (July 2004)
217. Douglas Lichtman and Eric Posner, Holding Internet Service Providers Accountable (July 2004)
218. Shlomo Benartzi, Richard H. Thaler, Stephen P. Utkus, and Cass R. Sunstein, Company Stock, Market Rationality, and Legal Reform (July 2004)
219. Cass R. Sunstein, Group Judgments: Deliberation, Statistical Means, and Information Markets (August 2004, revised October 2004)
220. Cass R. Sunstein, Precautions against What? The Availability Heuristic and Cross-Cultural Risk Perceptions (August 2004)
221. M. Todd Henderson and James C. Spindler, Corporate Heroin: A Defense of Perks (August 2004)
222. Eric A. Posner and Cass R. Sunstein, Dollars and Death (August 2004)
223. Randal C. Picker, Cyber Security: Of Heterogeneity and Autarky (August 2004)
224. Randal C. Picker, Unbundling Scope-of-Permission Goods: When Should We Invest in Reducing Entry Barriers? (September 2004)
225. Christine Jolls and Cass R. Sunstein, Debiasing through Law (September 2004)
226. Richard A. Posner, An Economic Analysis of the Use of Citations in the Law (2000)
227. Cass R. Sunstein, Cost-Benefit Analysis and the Environment (October 2004)
228. Kenneth W. Dam, Cordell Hull, the Reciprocal Trade Agreement Act, and the WTO (October 2004)
229. Richard A. Posner, The Law and Economics of Contract Interpretation (November 2004)
230. Lior Jacob Strahilevitz, A Social Networks Theory of Privacy (December 2004)
231. Cass R. Sunstein, Minimalism at War (December 2004)
232. Douglas Lichtman, How the Law Responds to Self-Help (December 2004)
233. Eric A. Posner, The Decline of the International Court of Justice (December 2004)
234. Eric A. Posner, Is the International Court of Justice Biased? (December 2004)
235. Alan O. Sykes, Public vs. Private Enforcement of International Economic Law: Of Standing and Remedy (February 2005)
236. Douglas G. Baird and Edward R. Morrison, Serial Entrepreneurs and Small Business Bankruptcies (March 2005)
237. Eric A. Posner, There Are No Penalty Default Rules in Contract Law (March 2005)
238. Randal C. Picker, Copyright and the DMCA: Market Locks and Technological Contracts (March 2005)
239. Cass R. Sunstein and Adrian Vermeule, Is Capital Punishment Morally Required? The Relevance of Life-Life Tradeoffs (March 2005)
240. Alan O. Sykes, Trade Remedy Laws (March 2005)
241. Randal C. Picker, Rewinding *Sony*: The Evolving Product, Phoning Home, and the Duty of Ongoing Design (March 2005)
242. Cass R. Sunstein, Irreversible and Catastrophic (April 2005)
243. James C. Spindler, IPO Liability and Entrepreneurial Response (May 2005)
244. Douglas Lichtman, Substitutes for the Doctrine of Equivalents: A Response to Meurer and Nard (May 2005)
245. Cass R. Sunstein, A New Progressivism (May 2005)
246. Douglas G. Baird, Property, Natural Monopoly, and the Uneasy Legacy of *INS v. AP* (May 2005)
247. Douglas G. Baird and Robert K. Rasmussen, Private Debt and the Missing Lever of Corporate Governance (May 2005)
248. Cass R. Sunstein, Administrative Law Goes to War (May 2005)