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LEGISLATING CLEAR-STATEMENT REGIMES IN NATIONAL-SECURITY LAW

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ABSTRACT

Congress's national-security legislation will often require clear and specific congressional authorization before the executive can undertake certain actions. The War Powers Resolution, for example, prohibits any law from authorizing military hostilities unless it "specifically authorizes" them. And the Foreign Intelligence Surveillance Act of 1978 required laws to amend FISA or repeal its "exclusive means" provision before they could authorize warrantless electronic surveillance. But efforts to legislate clear-statement regimes in national-security law have failed to induce compliance. The Clinton Administration inferred congressional "authorization" for the 1999 Kosovo War from an appropriations statute that failed to specifically authorize the conflict. And the Bush Administration inferred congressional "authorization" for the NSA surveillance program from ambiguous language in the post-September 11th Authorization to Use Military Force. In both situations, executive-branch lawyers employed expansive theories of implied repeal and constitutional avoidance to evade the codified clear-statement requirements, and Congress and the courts acquiesced to the President's actions. Recent proposals to strengthen the clear-statement requirements in Congress's national-security framework legislation are unlikely to be effective without institutional mechanisms, such as points of order, that can deter future legislators from enacting vague or ambiguous legislation from which the executive might claim implicit congressional "authorization," and that can induce Congress to confront Presidents that act without specific congressional authorization. Simply enacting more narrow or explicit clear-statement requirements, or adding funding restrictions to Congress's framework legislation, fails to counter the aggressive interpretive doctrines that executives of both political parties have used to concoct congressional "authorization" from vague or ambiguous statutory language.

INTRODUCTION

Congress's national-security legislation will often require clear and specific congressional authorization before the executive can undertake certain actions. One example is section 8(a)(1) of the War Powers Resolution, which prohibits any statute from authorizing military hostilities unless it "specifically authorizes" such hostilities and "states that it is intended to constitute specific statutory authorization within the meaning

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of this joint resolution.”¹ If Congress fails to enact a statute with this specific language, the War Powers Resolution requires the President to “terminate” hostilities within 60 days.² The Foreign Intelligence Surveillance Act of 1978 (“FISA”) also contains a codified clear-statement requirement, which declares that FISA’s procedures are “the exclusive means” for conducting certain forms of electronic surveillance.³ This exclusivity requirement requires statutes to amend FISA or repeal the “exclusive means” provision before they can authorize electronic surveillance. And this establishes a clear-statement regime because the Supreme Court’s precedents disfavor implied repeals,⁴ and insist that “the intention of the legislature to repeal must be clear and manifest.”⁵ Congress continues to codify additional clear-statement requirements in its recently enacted national-security legislation. The McCain Amendment to the 2005 Detainee Treatment Act, for example, provides that its prohibition on certain forms of cruel, inhuman, or degrading treatment “shall not be superseded,” unless a provision of law “specifically repeals, modifies, or supersedes the provisions of this section.”⁶ And the FISA Amendments Act of 2008 states that “[o]nly an express statutory authorization for electronic surveillance” may authorize such activities outside of FISA’s strictures.⁷

These statutes attempt to establish legal answers to the unsettled institutional questions regarding the circumstances in which the President must seek explicit congressional authorization for his actions. They offer an alternative to regimes that allow judges to decide on a case-by-case basis whether to require specific congressional authorization,⁸ or that allow the executive to act whenever it can find a surface ambiguity in some statute.⁹ These framework statutes are legislatively-enacted “non-delegation canons,”¹⁰ designed to strengthen the bicameralism-and-presentment hurdles that the executive must surmount before it can claim legal authority to act.

¹ See 50 U.S.C. § 1547(a)(1).

² See 50 U.S.C. § 1544(b). The President may extend the 60-day window for up to an additional 30 days if he “determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.” *Id.*

³ See 18 U.S.C. § 2511(2)(f) (emphasis added).

⁴ See, e.g., *Morton v. Mancari*, 417 U.S. 535, 549 (1974); *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

⁵ *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). See also *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 381 (1996) (“The rarity with which we have discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an ‘irreconcilable conflict’ between the two federal statutes at issue.”) (citation omitted); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-457 (1945) (“Only a clear repugnancy between the old . . . and the new [law] results in the former giving way. . .”); *Wood v. United States*, 41 U.S. 342, 362-363 (1842) (stating that implied repeals occur only if there is a “positive repugnancy” between the old law and the new).

⁶ Detainee Treatment Act of 2005, Pub. L. 109-148, § 1003(c) (codified at 42 U.S.C. § 2000dd(c)).

⁷ FISA Amendments Act of 2008, Pub. L. 110-261, § 102(a).

⁸ See, e.g., Samuel Issacharoff and Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 *Theoretical Inq. L.* 1 (2004); Cass R. Sunstein, *Administrative Law Goes to War*, 118 *Harv. L. Rev.* 2663 (2005).

⁹ See, e.g., Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Liberty, Security, and the Courts* 48-49 (2006); Adrian Vermeule, *Judging under Uncertainty* 183 (2006).

¹⁰ See Cass R. Sunstein, *Nondelegation Canons*, 67 *U. Chi. L. Rev.* 315 (2000).

But efforts to legislate clear-statement regimes in national-security law have failed to induce the political branches to comply with codified clear-statement requirements. During the Kosovo War, the Clinton Administration asserted that Congress had authorized the President to continue the Kosovo War beyond the 60-day limit in the War Powers Resolution. But it inferred this congressional “authorization” from a 1999 appropriations statute that neither mentioned the War Powers Resolution nor specifically authorized the conflict.¹¹ The statute simply appropriated \$5 billion for a fund used to finance overseas military operations, and provided an additional \$300 million for military technology needed for the Kosovo campaign.¹² The Clinton Administration’s Office of Legal Counsel deployed two tenuous legal arguments to escape the clear-statement regime codified in section 8(a)(1) of the War Powers Resolution. First, it maintained that section 8(a)(1)’s clear-statement requirement would unconstitutionally “bind a later Congress” if it required statutes specifically to reference the War Powers Resolution as a precondition to authorizing military hostilities.¹³ Second, the Clinton Administration insisted that the 1999 Emergency Supplemental Appropriations Act implicitly repealed section 8(a)(1)’s clear-statement requirement, and allowed President Clinton to continue the war without a statute that specifically authorized the hostilities.¹⁴ Litigants challenged the Clinton Administration’s argument, but the courts dismissed the case as nonjusticiable.¹⁵ And Congress, rather than enforcing section 8(a)(1)’s clear-statement regime by cutting off funds for the Kosovo War or threatening impeachment, quietly facilitated President Clinton’s actions by appropriating funds that he could use to continue the bombing campaign, even as legislators refused to enact the specific authorization that the War Powers Resolution required.¹⁶

A similar pattern of events occurred during the NSA surveillance controversy. The Bush Administration claimed that the post-9/11 Authorization for Use of Military Force (“AUMF”) authorized the NSA’s warrantless surveillance program, even though the statute never mentioned FISA or wiretapping and merely authorized the President to use “all necessary and appropriate force” against the 9/11 perpetrators.¹⁷ The Bush Administration relied on the same arguments that the Clinton Administration used to establish congressional authorization for the Kosovo War. First, it maintained that FISA’s exclusivity requirement would “tie the hands”¹⁸ of future Congresses if it required specific language in statutes that authorize warrantless electronic surveillance. Then it argued that the AUMF implicitly repealed FISA’s restrictions.¹⁹ Once again, a

¹¹ See 1999 Emergency Supplemental Appropriations Act, Pub. L. 106-31.

¹² See Pub. L. No. 106-31, chapter 3.

¹³ See *Authorization for Continuing Hostilities in Kosovo*, 2000 WL 33716980, *9 (O.L.C.).

¹⁴ *Id.* at *10, *25.

¹⁵ See, e.g., *Campbell v. Clinton*, 203 F.3d 19, 20-24 (D.C. Cir. 2000); *Campbell v. Clinton*, 52 F. Supp. 2d 34, 43 (D.D.C. 1999).

¹⁶ See 1999 Emergency Supplemental Appropriations Act, Pub. L. 106-31, chapter 3.

¹⁷ See *Authorization for Use of Military Force*, Pub. L. No. 107-40 (2001).

¹⁸ U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (2006), available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf> [hereinafter DOJ White Paper] at 22.

¹⁹ *Id.* at 36 n. 21.

court dismissed a lawsuit challenging the Administration’s legal argument,²⁰ leaving the executive free to act without the specific authorization that Congress’s earlier-enacted statutes required. And Congress enabled President Bush to continue the NSA surveillance program by acquiescing and funding the intelligence agencies, even as it failed to enact legislation that specifically authorized the program until 2007.

The executive branch’s interpretive theories were far reaching, and its approach to constitutional avoidance and implied repeal were irreconcilable with the Supreme Court’s precedents. But they provided some political cover for the President by giving his actions a veneer of legality, and may even have protected executive-branch employees from the fear of criminal liability or political reprisals.²¹ To prevent the executive from continuing to evade Congress’s codified clear-statement requirements in this manner, many proposals have sought to provide more narrow and explicit clear-statement requirements in Congress’s framework legislation as well as provisions that withhold funding from activities that Congress has not specifically authorized. For example, Senator Specter proposed new provisions to FISA stating that no provision of law may repeal or modify FISA unless it “expressly amends or otherwise specifically cites this title,”²² and that “no funds appropriated or otherwise made available by any Act” may be expended for electronic surveillance conducted outside of FISA.²³ Congress failed to enact Senator Specter’s proposal, but it did enact an amendment to FISA that made the clear-statement regime more explicit, specifying that “only an express statutory authorization for electronic surveillance” may authorize electronic surveillance outside of FISA’s procedures.²⁴ And numerous commentators have argued for new provisions in the War Powers Resolution that withhold funds from military ventures that Congress has not specifically authorized.²⁵ Yet such proposals are unable to counter the executive branch’s aggressive interpretive doctrines. Executive-branch lawyers will remain able to concoct congressional “authorization” from vague statutory language by repeating their assertions that codified clear-statement requirements “bind future Congresses” or that ambiguous language in later-enacted statutes implicitly repeals restrictions in Congress’s framework legislation. Future legislators will continue to acquiesce to the President’s

²⁰ See, e.g., *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007).

²¹ Cf. Jack Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* 69, 162-163 (describing how executive-branch legal opinions can serve as a “golden shield” for officials and employees who might otherwise fear criminal liability or political reprisals).

²² See S. 3001, 109th Congress, 2d session, “Foreign Intelligence Surveillance Improvement and Enhancement Act of 2006,” sec. 102(a) (proposing a new provision to FISA providing that “[n]o provision of law shall be construed to implicitly repeal or modify this title or any provision thereof, nor shall any provision of law be deemed to repeal or modify this title in any manner unless such provision of law, if enacted after the date of the enactment of the Foreign Intelligence Surveillance Improvement and Enhancement Act of 2006, expressly amends or otherwise specifically cites this title.”).

²³ See *id.* sec. 103.

²⁴ See FISA Amendments Act of 2008, Pub. L. No. 110-261, section 102(a).

²⁵ See, e.g., John Hart Ely, *War and Responsibility* 138 (1993); Thomas M. Franck, *After the Fall: The New Procedural Framework for Congressional Control Over the War Power*, 71 *Am. J. Int’l L.* 605, 639 (1977); Michael J. Glennon, *Strengthening the War Powers Resolution: The Case for Purse-String Restrictions*, 60 *Minn. L. Rev.* 32 (1975); Louis Fisher, *Congressional Checks on Military Initiatives*, 109 *Poli. Sci. Q.* 739, 749 (1995); Cyrus R. Vance, *Striking the Balance: Congress and the President under the War Powers Resolution*, 133 *U. Pa. L. Rev.* 93-94 (1984).

unilateralism when it is politically convenient to do so.²⁶ And the federal courts' willingness to enforce clear-statement regimes against the President in national-security law bears no relationship to the codified clear-statement requirements in framework legislation or treaties.²⁷

Congress could produce more effective clear-statement regimes if it precommitted itself against enacting vague or ambiguous legislation from which executive-branch lawyers might claim implicit congressional "authorization" for certain actions. Rather than merely enacting statutes that instruct the executive not to construe ambiguous statutory language as authorizing military hostilities or warrantless electronic surveillance, Congress could establish point-of-order mechanisms that impose roadblocks to enacting such vague legislation in the first place.²⁸ A point-of-order mechanism would empower a single legislator to object to legislation that authorizes military force, or that funds the military or intelligence agencies, and that fails to explicitly prohibit or withhold funding for military hostilities beyond 60 days or warrantless electronic surveillance, unless the bill includes the specific authorizing language that Congress's framework legislation requires. This device would reduce the likelihood of Congress ever enacting vague or ambiguous legislation that the executive might use to claim "authorization" for extended military hostilities or warrantless electronic surveillance. It would also induce legislators to confront Presidents that act without specific congressional authorization by empowering a single legislator to object to legislation necessary to fund the President's unauthorized endeavors. Yet the political branches have never established such an enforcement mechanism for the clear-statement requirements in national-security legislation, even though they have established such point-of-order devices to enforce precommitments in framework legislation governing the federal budget process. The result is a regime of faint-hearted clear-statement regimes in national-security law – framework legislation that codifies strongly worded clear-statement rules but that lacks any mechanism to induce compliance by future political actors. This may be a calculated choice by of members of Congress, or it may reflect the President's influence in the legislative process, but no one should think that simply legislating more narrow or explicit clear-statement requirements, or adding funding restrictions to Congress's framework legislation, will be able to prevent the executive from continuing to infer congressional authorization from vague or ambiguous statutory language.

The article proceeds in four parts. Part I describes the different types of clear-statement requirements that Congress enacts in its national-security framework legislation. Part II shows how executive-branch lawyers used expansive theories of the constitutional-avoidance canon and implied repeal to evade Congress's clear-statement regimes during the Kosovo War and the NSA surveillance controversy, and how Congress failed to force compliance with the codified clear-statement requirements. Part III demonstrates that the court's willingness to enforce clear-statement requirements

²⁶ See, e.g., Terry M. Moe and William G. Howell, *The Presidential Power of Unilateral Action*, 15 J. L. Econ. & Org. at 138-139 (1999).

²⁷ See Part III, *infra*.

²⁸ Cf. Thomas C. Schelling, *An Essay on Bargaining*, 46 Am. Econ. Rev. 281 (1956); Jon Elster, *Ulysses Unbound* 41 (2000).

against the President in national-security law has little relationship to the codified requirements in framework legislation or treaties. Finally, Part IV argues that proposals to strengthen the clear-statement requirements in Congress’s national-security framework legislation are unlikely to be effective without institutional mechanisms, such as point of orders, that can deter future legislators from enacting vague or ambiguous legislation from which the executive might claim implicit congressional “authorization,” and that can induce Congress to confront Presidents that act without specific congressional authorization. Simply enacting more narrow or explicit clear-statement requirements, or adding funding restrictions to Congress’s framework legislation, fails to counter the aggressive interpretive doctrines that Presidents of both political parties have used to concoct congressional “authorization” from vague or ambiguous statutory language.

I

Almost every statute that Congress enacts creates a clear-statement regime for future legislation. Consider the federal anti-torture statute, which criminalizes torture committed outside the United States.²⁹ Although it is not phrased as a rule of construction for future legislation, its criminal prohibitions preclude vague or ambiguous statutory language from implicitly authorizing torture because of the strong interpretive presumption against implied repeals.³⁰ The post-September 11 AUMF, which allows the President to use “all necessary and appropriate force” against the 9/11 perpetrators, does not suffice to authorize torturous interrogation techniques. Instead, a statute must explicitly amend the pre-existing torture ban or exempt itself from it, or it must produce an implied repeal by specifically authorizing torture.³¹ The Foreign Intelligence Surveillance Act of 1978 has similar effects on later-enacted statutes. Its “exclusive means” provision precludes vague legislation from implicitly authorizing warrantless electronic surveillance; a statute must amend, repeal, or exempt itself from FISA before the executive can implement such a program.

Both these laws restrict the domain of statutory language that future legislators may use to authorize certain activities. And by affecting the interpretation and meaning of future legislation, these statutes partially entrench certain policy outcomes. At the same time, these statutes make congressional decisions to authorize such actions more transparent and visible. They disable legislators from using vague or obscure statutory provisions to “implicitly authorize” certain activities, so long as the executive respects the earlier-enacted statutory provisions and the Supreme Court’s well-established presumption against implied repeals.

²⁹ 18 U.S.C. §§ 2340-2340A.

³⁰ See cases cited in notes 4-5.

³¹ The Office of Legal Counsel’s repudiated “torture opinion” from 2002 never even tried to argue that the AUMF’s language authorized torture, or that it implicitly repealed the torture prohibitions in 18 U.S.C. §§ 2340-2340A. See, e.g., Memorandum for Alberto Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, *Re: Standards of conduct for interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002).

Other statutes pursue these goals more explicitly and to a greater extent. The 2008 FISA Amendments require “express statutory authorization” for any electronic surveillance conducted outside of FISA.³² Section 8(a)(1) of the War Powers Resolution provides that no statute may authorize military hostilities unless it expressly references the War Powers Resolution.³³ And the McCain Amendment to the 2005 Detainee Treatment Act (“DTA”) provides that its ban on certain forms of cruel, inhuman, or degrading treatment “shall not be superseded” unless a future statute “specifically repeals, modifies, or supersedes the provisions of this section.”³⁴ There are some differences between these statutes and simple statutory prohibitions such as the anti-torture statute. Section 8(a)(1) and the DTA are phrased as rules of construction for future statutes, whereas the anti-torture statute and the “exclusive means” provision in the 1978 FISA statute rely on the well-established presumption against implied repeals. And section 8(a)(1) and the DTA establish a more narrow and rule-like boundary around the language that future legislators must use to authorize military hostilities or cruel, inhuman, or degrading treatment. But these differences are matters only of form and degree.

The following table illustrates the different types of national-security statutes that require clear statements in future legislation:

	Examples	Scope of clear-statement rule	Boundary of clear-statement rule	Form of clear-statement rule
Statutory prohibition on conduct	Anti-torture statute; 1978 FISA “exclusivity” provision	Narrow	Standard	Prohibition on Conduct
Clear language requirement	2008 FISA Amendments	Narrow	Standard	Rule of Construction
Express-reference requirement	War Powers Resolution	More narrow	Rule	Rule of Construction
Entrenchment against implied repeal	McCain Amendment to the Detainee Treatment Act	Most narrow	Rule	Rule of Construction

³² See FISA Amendments Act of 2008, Pub. L. No. 110-261, § 102(a).

³³ See 50 U.S.C. § 1547(a)(1).

³⁴ 42 U.S.C. § 2000dd(c) (Emphasis added).

(Figure 1)

All these laws require future legislators to use clear and specific language to authorize certain conduct, but they differ along three dimensions. The first difference involves the *scope* of future statutory language necessary to authorize certain actions. The “exclusive means” provision in the 1978 FISA statute forecloses most statutes from implicitly authorizing warrantless electronic surveillance, but it might allow other statutes to authorize such surveillance if they specifically exempt themselves from FISA, or include a “notwithstanding any other provision of law” provision, or implicitly repeal FISA’s restrictions by contradicting them. The McCain Amendment, by contrast, requires future statutes specifically to mention its provisions in order to authorize cruel, inhuman, or degrading treatment; implied repeal through contradiction is not effective, nor is a generic “notwithstanding any other provision of law” provision.

The second difference is the *type of boundary* that surrounds the statutory language necessary to authorize certain conduct. The McCain Amendment’s boundary is clear and rule-like; future statutes must specifically reference its provisions in order to authorize “cruel, inhuman, or degrading” treatment. The boundary in the 2008 FISA Amendments, by contrast, is more fuzzy and standard-like: It requires only that statutory authorization for electronic surveillance conducted outside of FISA be “express.”³⁵ What counts as “express” language is a question on which reasonable interpreters might disagree. This second dimension differs from the first; a clear-statement rule might establish a rule-like boundary with a broad scope, or a standard-like boundary with a narrow scope. But the rule-like clear-statement requirements in national-security framework legislation usually allow only a narrow scope of statutory language to authorize certain conduct.

The third and final difference is the law’s *form*. The McCain Amendment to the Detainee Treatment Act and section 8(a)(1) of the War Powers Resolution are phrased as rules of construction for future legislation, while the anti-torture statute controls future statutes’ meanings by relying on the interpretive presumption against implied repeals. Yet this formal difference does not change these statutes’ effects on the interpretation of future statutes: They all constrict the domain of statutory language that future legislators may use to authorize certain executive-branch actions.

Some commentators claim that interpreters cannot allow legislatively-enacted clear-statement requirements to control or affect the meaning of later-enacted statutes. The first line of attack is that codified clear-statement requirements unconstitutionally “bind” future legislators when they limit the scope of statutory language available to authorize certain conduct. Eugene Rostow, for example, asserted that section 8(a)(1) of the War Powers Resolution violated the Constitution for this reason.³⁶ Philip Bobbitt likewise insists that section 8(a)(1) “cannot bind future Congresses” because otherwise

³⁵ See FISA Amendments Act of 2008, Pub L. No. 110-261, § 102(a).

³⁶ Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 Tex. L. Rev. 833, 837 n. 7 (1972) (“How one Congress could constitutionally bind its successors in this way passes my understanding.”).

the 93rd Congress “would effectively enshrine itself in defiance of the electoral mandate.”³⁷

The Supreme Court has long held that Congress lacks the power to “entrench” statutes by specifying that they are unrepealable, or repealable only by a supermajority vote.³⁸ But claims that provisions such as section 8(a)(1) “bind” future Congresses are meritless when legislators remain free to repeal the statute through the ordinary bicameralism-and-presentment process, or enact a statute that exempts itself from section 8(a)(1)’s rule of construction.³⁹ (Such a statute need only state that “section 8(a)(1) of the War Powers Resolution shall not be applicable to the provisions of this Act.”). Perhaps the War Powers Resolution has some moral or political influence that dissuades lawmakers from repealing or circumventing it, which effectively “binds” future Congresses to section 8(a)(1)’s clear-statement regime. But *that* type of “binding” effect cannot make a statute unconstitutional; Congress constantly enacts laws that are politically difficult to repeal,⁴⁰ and every statute renders some future course of action less politically convenient by changing the default position against which future legislation must be enacted.⁴¹ So long as it remains formally possible for future legislators to change that default position by majority vote, the mere fact that a pre-existing statute makes that course of action politically difficult cannot present constitutional problems.

Section 8(a)(1) does constrain future legislators by limiting the scope of statutory language available to those that wish to authorize military hostilities. But the anti-torture statute, the “exclusive means” provision in the 1978 FISA statute, and the McCain Amendment to the Detainee Treatment Act likewise narrow the range of statutory language that future legislators must use to authorize torture, cruel, inhuman, or degrading treatment, or warrantless electronic surveillance. Some of these laws allow for a broader range of statutory language than others, but that is a difference only in degree. To claim that section 8(a)(1) violates the Constitution for that reason is to imply that the Constitution forbids *any* constraints on the language that future legislators must use to authorize executive-branch actions, requiring statutes to be construed in a vacuum without any regard to previously-enacted legislation. That would not be a plausible interpretive theory, much less one that the Constitution requires, as it would forbid interpreters from applying even the ordinary presumption against implied repeals. And

³⁷ See Philip Bobbit, *War Powers: An Essay on John Hart Ely’s War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 Mich. L. Rev. 1364, 1398-1399 (1994).

³⁸ See, e.g., *Manigault v. Springs*, 199 U.S. 473, 487 (1905). But see Eric A. Posner and Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665 (2002) (criticizing the rule against legislative retrenchment).

³⁹ See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2117-2118 (2002); Eric A. Posner and Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1696-1697 (2002).

⁴⁰ Imagine, for example, that a majority of Congress wants to repeal farm subsidies, but that previously enacted laws produced reliance interests that makes repeal politically impossible. See, e.g., Gordon Tullock, *The Transitional Gains Trap*, 6 Bell J. of Econ. 671 (1975).

⁴¹ See, e.g., Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2118 (2002); Eric A. Posner and Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1696-1697 (2002).

the federal courts have uniformly rejected the contention that statutorily-enacted clear-statement rules are unconstitutional attempts to “bind” future Congresses.⁴²

Others have tried to undermine codified clear-statement requirements by relying on the last-in-time rule and the implied-repeal doctrine. The paradigmatic case is a statute that clearly authorizes certain conduct when read in isolation, but lacks the “magical password” required by an earlier-enacted express-reference requirement, such as section 8(a)(1) of the War Powers Resolution. Suppose, for example, that Congress enacts a statute that specifically authorizes the President “to conduct military air operations and missile strikes in cooperation with our NATO allies against the Federal Republic of Yugoslavia,” but omits the express reference to the War Powers Resolution.⁴³ Some have asserted that such a statute would suffice to authorize military hostilities, notwithstanding its failure to reference the War Powers Resolution, and implicitly repeal (in part) section 8(a)(1)’s express-reference requirement.⁴⁴ Justice Scalia’s sole concurrence in *Lockhart v. United States*⁴⁵ adopts this approach, acknowledging that Congress is “presumptively aware” of its codified clear-statement or express-reference requirements, but insisting that “[w]hen the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, regardless of its compliance with any earlier-enacted requirement of an express reference or other ‘magical password.’”⁴⁶ Larry Alexander and Saikrishna Prakash go further and insist

⁴² Congress has codified clear-statement rules as early as 1871, when it provided that a statute’s repeal will not release or extinguish any penalty, forfeiture, or liability incurred under such statute before repeal, “unless the repealing act shall so expressly provide.” See 16 Stat. 431-432. Litigation ensued over whether this statutory provision could control the meaning of future statutes, but the lower federal courts quickly dispatched any claim that this legislatively-enacted clear-statement rule was an unconstitutional attempt to “bind” future Congresses. See, e.g., *Lang v. United States*, 133 F. 201, 206 (7th Cir. 1904) (“Of course, one legislative body cannot tie the hands of its successors with respect to either subject-matter or method of subsequent legislation. But section 13, as I view it, evinces no such attempt.”); *United States v. Chicago, St. P., M. & O. Ry. Co.*, 151 F. 84, 93 (D. Minn. 1907) (“Section 13, to my mind, evinces no attempt on the part of the Congress of 1871 to bind the hands of subsequent Congresses. . . . [E]very subsequent Congress that has not repealed it has recognized it as part of the general body of the law and as a rule of construction to be applied by the courts to acts passed by it, as much as if it had been re-enacted by such Congress.”); *United States v. Standard Oil Co.*, 148 F. 719, 723 (D. Ill. 1907) (“It seems to me that such new rule is no more an impairment of the legislative power of succeeding Congresses than was the previously existing common-law rule an impairment of the power of preceding Congresses. . . . That any succeeding Congress may abrogate the new rule and restore the old rule is equally plain.”); *DeFour v. United States*, 260 F. 596, 599 (9th Cir. 1919) (“In brief, it is the purpose of that section not to place a limit upon the power of succeeding Congresses, but to prescribe a rule of construction which shall be binding upon the courts. . .”). When the issue reached the Supreme Court, it held that the clear-statement rule was to be treated as if it were incorporated into Congress’s subsequent enactments. See *United States v. Reisinger*, 128 U.S. 398, 401 (1888); *Great Northern Railway Co. v. United States*, 208 U.S. 452, 465 (1908).

⁴³ See 145 Cong. Rec. S3110-01 (March 23, 1999). This resolution, which omitted any reference to section 8(a)(1) of the War Powers Resolution, passed the Senate but failed in the House of Representatives. See *id.*; 145 Cong. Rec. H2441 (April 28, 1999).

⁴⁴ See, e.g., John Hart Ely, *War and Responsibility* at 129 & n. 57; William C. Banks and Peter Raven-Hansen, *National Security Law and the Power of the Purse* 129, 131 (1994).

⁴⁵ 546 U.S. 142 (2005).

⁴⁶ *Id.* at 148-149 (2005) (Scalia, J., concurring). Justice Scalia’s argument in *Lockhart* resembles Professor Tribe’s attack on legislatively-enacted express reference requirements in his Constitutional Law

that later-enacted statutes should be construed consistent with “the intentions of the enacting Congress,”⁴⁷ and that those “intentions” must prevail over earlier-enacted express-reference requirements that might have been “out of mind.”⁴⁸ These approaches rely on the last-in-time rule, which resolves repugnancies between earlier and later-enacted statutes.⁴⁹ And several Supreme Court decisions have stated in dictum that legislatively-enacted clear-statement rules must give way when a later-enacted statute “conflicts” with that rule, either expressly or by clear implication.⁵⁰

But it hardly follows that the last-in-time rule *requires* an interpreter to disregard Congress’s express-reference requirements in these situations. A later-enacted statute would undoubtedly repeal section 8(a)(1)’s express-reference requirement if it established a *new rule of construction* for itself or for other statutes that authorize military hostilities. If, for example, a new statute provided that “statutes shall be construed to authorize military hostilities whenever they include the words ‘The President is authorized to use necessary and appropriate force,’” that would contradict and supersede section 8(a)(1)’s interpretive rule. And some interpreters might insist that a statute that specifically authorizes military hostilities but omits the express reference to the War Powers Resolution implicitly establishes a new rule of construction for itself, otherwise the later-enacted statute would become meaningless or absurd. But an interpreter that accepts the presumption against implied repeals, or presumes Congress’s “awareness”⁵¹ or “familiarity”⁵² with codified express-reference requirements, could

treatise. See 1 Laurence H. Tribe, *American Constitutional Law*, § 2-3 at 126 n. 1 (3d ed. 2000) (arguing that “[a]lthough a court interpreting a later statute should certainly bear in mind Congress’s familiarity” with its earlier-enacted clear-statement rules, “those statutes’ rules of construction should not be seen as automatically trumping all other interpretive considerations.”). *But see* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2114-2120 (2002) (criticizing Tribe’s argument). In earlier versions of his treatise, by contrast, Professor Tribe described section 8(a)(1) as “among the provisions of most lasting significance” in the War Powers Resolution, and did not question its constitutionality or its effectiveness in controlling the meaning of future legislation. See Laurence H. Tribe, *American Constitutional Law*, § 4-7 at 236 (2d ed. 1988); Laurence H. Tribe, *American Constitutional Law*, § 4-6 at 178 (1st ed. 1977).

⁴⁷ See Larry Alexander and Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 Const. Comment. 97, 106 (2004).

⁴⁸ *Id.*

⁴⁹ See, e.g., *United States v. Tynen*, 78 U.S. 88, 91 (1870) (“When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first.”).

⁵⁰ See, e.g., *Hertz v. Woodman*, 218 U.S. 205, 218 (1910) (stating that if a later statute “necessarily, or by clear implication, conflicts with the general declared” in an earlier-enacted clear-statement rule, “the latest expression of the legislative will must prevail.”); *Warden v. Marrero*, 417 U.S. 653, 659, n. 10 (1974) (stating that “[o]nly if [a later-enacted statute] can be said by fair implication or expressly to conflict with” an earlier-enacted clear-statement rule would there be reason to hold that the later statute “superseded” the clear-statement rule); *Great Northern Railway Co. v. United States*, 208 U.S. 452, 465 (1908) (noting that a legislatively-enacted clear-statement rule “cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment.”).

⁵¹ See *Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) (stating that Congress is “presumptively aware” of its codified express-reference or express-statement requirements).

⁵² See 1 Laurence H. Tribe, *American Constitutional Law*, § 2-3 at 126 n. 1 (3d ed. 2000) (urging courts to “bear in mind Congress’s familiarity” with its earlier-enacted clear-statement rules).

sensibly regard such a statute as reflecting an inability or unwillingness to overcome the burden of inertia established by the codified interpretive rule. Consider the tension between sections 8(d)(1) and 2(c) of the War Powers Resolution. The former statute provides that “[n]othing in this chapter . . . is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties,”⁵³ while the latter asserts that “[t]he constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”⁵⁴ The latter statute, when read in isolation, purports to limit the President’s Commander-in-Chief authority, but when read in context with section 8(d)(1)’s rule of construction, it becomes little more than an aspirational statement of congressional beliefs.⁵⁵ In like manner, an interpreter may regard a statute that purports to authorize military hostilities while omitting the express reference to the War Powers Resolution as akin to a “sense of Congress” resolution that expresses aspirational support for something that Congress lacks the wherewithal to give legal force, rather than an attempt to alter or supersede the interpretive default rule in Congress’s framework legislation.

The Alexander/Prakash intentionalist approach would establish a wider range of statutes that could “conflict” with and supersede codified clear-statement requirements. But again, no interpreter is legally compelled to adopt their approach, especially when one considers the far-reaching implications of elevating congressional intentions over codified rules of construction. If legislative inattention or unawareness would require interpreters to disregard a statutory express-reference rule such as section 8(a)(1), it would similarly compel them to disregard other laws that affect the meaning of future statutes, including simple statutory prohibitions that control future statutes’ meaning through the presumption against implied repeals. Many legislators, for example, were likely unaware of specific provisions in the Geneva Conventions when they authorized President Bush to use “all necessary and appropriate force” against the September 11 perpetrators. Yet the Supreme Court insisted in *Hamdan v. Rumsfeld*⁵⁶ that President Bush needed “specific, overriding authorization” to convene military commissions that deviated from procedures required by the Geneva Conventions, even if those procedures might interfere with the President’s ability to conduct the War on Terror. Indeed, opening the door to such inquiries would undermine not only the presumption against implied repeals, but any legislative or judicial efforts to achieve rule-based interpretive principles for future legislation.⁵⁷

⁵³ 50 U.S.C. § 1547(d)(1).

⁵⁴ 50 U.S.C. § 1541(c).

⁵⁵ See, e.g., *Overview of the War Powers Resolution*, 8 Op. O.L.C. 271, 274 (noting that the executive branch “has taken the position from the very beginning that section 2(c) of the WPR does not constitute a legally binding definition of Presidential authority to deploy our armed forces.”).

⁵⁶ 548 U.S. 557 (2006).

⁵⁷ Alexander and Prakash admit as much, arguing that the judiciary lacks the power to establish rules of thumb for statutory construction, and that the courts’ interpretive principles must “mirror the meaning that one would otherwise derive from a statute.” See Larry Alexander and Saikrishna Prakash,

None of these objections is fatal to Congress's efforts to legislate clear-statement regimes in national-security law. They establish only that fundamental disagreements exist over interpretive theory, and that some interpreters may choose to take a broad view of "conflict" or "repugnancy" between a codified clear-statement requirement and a later-enacted statute. But there is no legal obligation for interpreters to adopt a theory of implied repeal that undermines or disregards Congress's codified clear-statement requirements. And so long as adherence to Congress's codified clear-statement requirements is a *permissible* interpretive approach, the success of Congress's efforts to establish clear-statement regimes will depend on whether institutional mechanisms can ensure that future political actors will comply with the clear-statement requirements in Congress's framework legislation.⁵⁸

Yet such mechanisms have been largely non-existent as executive-branch lawyers from both political parties have concocted legal rationales to evade Congress's clear-statement requirements in national-security law. Part II describes how the Clinton Administration's Office of Legal Counsel escaped section 8(a)(1) of the War Powers Resolution during the Kosovo War, and how its arguments established a roadmap for the Bush Administration to undermine other statutes designed to prevent the President from acting without specific congressional authorization. Part III describes the institutional response from Congress and the courts. Although the Supreme Court has been willing to enforce clear-statement requirements against the executive in national-security law, there is little correlation between the Court's willingness to intervene and the codified clear-statement requirements in Congress's framework legislation. And Congress, having the institutional weapons to force the executive to comply with its codified clear-statement rules, acquiesced to the President's assertions of implicit congressional authorization for the Kosovo War and the NSA surveillance program.

II

A

Operation Allied Force began on March 24, 1999, when President Clinton unilaterally ordered airstrikes in the Federal Republic of Yugoslavia. Two days later, he sent a report to the Speaker of the House.⁵⁹ These events triggered section 5(b) of the

Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation, 20 Const. Comment. 97, 102 (2004) ("In our view, the federal judiciary has no authority to create binding rules of interpretation that it will use to construe federal statutes."); *id.* at 104 ("We do not believe that the judiciary may constitutionally enforce a judicially crafted rule against implied repeals.").

⁵⁸ Cf. Adrian Vermeule, *Judging under Uncertainty* 32-33 (noting that first-best arguments over interpretive theory end in stalemate, and should be resolved by institutional considerations).

⁵⁹ See *Authorization for Continuing Hostilities in Kosovo*, 2000 WL 33716980 (O.L.C.) at *13. Section 4(a)(1) of the War Powers Resolution requires the President to submit a report to Congress whenever, "[i]n the absence of a declaration of war," United States Armed Forces are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," or "into the territory, airspace or waters of a foreign nation, while equipped for combat,

War Powers Resolution, which required the President to “terminate” the hostilities within sixty days, unless Congress: (1) declares war or enacts “specific authorization” to use the Armed Forces; (2) enacts a law that extends the 60-day window; or (3) is “physically unable to meet as a result of an armed attack upon the United States.”⁶⁰ And under section 8(a)(1) of the War Powers Resolution, no statute may authorize military hostilities unless it “specifically authorizes the introduction of United States Armed Forces into hostilities” and “state[s] that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.”⁶¹

But Congress never provided “specific authorization” for these airstrikes. Although the Senate passed a resolution authorizing the President to conduct “military air operations” against Serbia,⁶² the House of Representatives defeated that resolution on a 213-213 tie vote.⁶³ Instead, Congress enacted a \$13 billion Emergency Supplemental Appropriations Act, which provided aid to U.S. farmers, funding for military construction projects, and appropriations related to the Kosovo hostilities. Specifically, the statute provided \$5 billion for the “Overseas Contingency Operations Transfer Fund”⁶⁴ and \$300 million for military technology “needed for the conduct of Operation Allied Force.” It also required the President to submit a report to Congress describing “any significant revisions to the total cost estimate” for Operation Allied Force “through the end of fiscal year 1999.”⁶⁵ President Clinton signed the Appropriations Act on May 21, 1999, shortly before the 60-day clock expired on May 25. But he did not “terminate” the Kosovo War within that 60-day window; he continued bombing until June 11, 1999.

The 1999 Emergency Supplemental Appropriations Act lacks any statement that specifically authorized the conflict, and it never references the War Powers Resolution. But the Office of Legal Counsel insisted that this legislation authorized President Clinton to extend the Kosovo War beyond 60 days.⁶⁶ This conclusion is impossible to reconcile with section 8(a)(1) of the War Powers Resolution, which states that authorization for military hostilities “shall not be inferred from any provision of law . . . *including any provision contained in any appropriations Act,*” unless the provision “specifically authorizes the introduction of United States Armed Forces into hostilities” and “sta[tes] that it is intended to constitute specific statutory authorization within the meaning of this

except for deployments which relate solely to supply, replacement, repair, or training of such forces.” 50 U.S.C. § 1543(a)(1).

⁶⁰ See 50 U.S.C. § 1544(b). See also *Authorization for Continuing Hostilities in Kosovo*, 2000 WL 33716980 (O.L.C.) at *13 (acknowledging that President Clinton’s report to Congress triggered the 60-day clock under section 5(b) of the War Powers Resolution). The War Powers Resolution allowed President Clinton to extend the 60-day window for “not more than an additional thirty days” if he “determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.” 50 U.S.C. § 1544(b). President Clinton never invoked this provision during the Kosovo War.

⁶¹ Pub. L. No. 93-148 (emphasis added).

⁶² See 145 Cong. Rec. S3110-01 (March 23, 1999).

⁶³ See 145 Cong. Rec. H2441 (April 28, 1999).

⁶⁴ See Pub. L. No. 106-31, chapter 3.

⁶⁵ *Id.* at § 2006.

⁶⁶ See *Authorization for Continuing Hostilities in Kosovo*, 2000 WL 33716980 (O.L.C.).

joint resolution.”⁶⁷ But the OLC opinion uses two legal arguments to escape the War Powers Resolution’s clear-statement regime.

First, OLC repeats the meritless contention that section 8(a)(1)’s express-reference requirement “run[s] afoul of the axiom that one Congress cannot bind a later Congress,”⁶⁸ even though Congress remains free to repeal section 8(a)(1) through the ordinary bicameralism-and-presentment process.⁶⁹ OLC cited several Supreme Court decisions to buttress its constitutional attack on section 8(a)(1), but none of them is on point.⁷⁰ Most of those opinions state only that Congress may not enact unrepealable statutes;⁷¹ they have nothing to say about statutes that establish *revocable* rules of construction for future legislation.⁷² And the OLC memo simply ignores the numerous federal-court decisions that had rejected arguments that statutorily-enacted clear-statement rules were unconstitutional attempts to “bind” future Congresses.⁷³ OLC also

⁶⁷ 50 U.S.C. § 1547(a)(1) (emphasis added).

⁶⁸ *Authorization for Continuing Hostilities in Kosovo*, 2000 WL 33716980 (O.L.C.) at *9. *See also id.* at *10 (“If section 8(a)(1) were read to block all possibility of inferring congressional approval of military action from any appropriation, unless that appropriation referred in terms to the WPR and stated that it was intended to constitute specific authority for the action under that statute, then it would be unconstitutional.”).

⁶⁹ *See* notes 38-42 and accompanying text.

⁷⁰ *See Authorization for Continuing Hostilities in Kosovo*, 2000 WL 33716980 (O.L.C.) at *9 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Street v. United States*, 133 U.S. 299 (1890); *Marcello v. Bonds*, 349 U.S. 302 (1955); and *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting)). Justice Brennan’s dissenting opinion in *United States Trust Co.* concerned the interpretation of the Constitution’s Contract Clause and had nothing to do with legislatively-enacted clear-statement rules. *See* 431 U.S. at 45 (1977) (Brennan, J., dissenting).

⁷¹ *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (noting that legislative acts “are alterable when the legislature shall please to alter [them]”); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (noting that “one legislature is competent to repeal any [law] which a former legislature was competent to pass, and . . . one legislature cannot abridge the powers of a succeeding legislature”). *Street v. United States*, 133 U.S. 299 (1890), similarly noted that an Act of Congress “could not have . . . any effect on the power of a subsequent Congress,” but section 8(a)(1) preserves Congress’s *power* to authorize military hostilities; it changes only the default position from which Congress legislates.

⁷² The OLC opinion mischaracterizes *Marcello v. Bonds*, 349 U.S. 302 (1955), as holding that statutes may not require “magical passwords” in future legislation. But *Marcello* holds only that section 559 of the Administrative Procedure Act, which provides that a subsequent statute could not supercede or modify the APA “except to the extent that it does so expressly,” 5 U.S.C. § 559, does not require a “magical password” *as written*. *See* 349 U.S. at 310 (“Unless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act, we must hold that the present statute expressly supersedes the hearing provisions of that Act.”). Section 559 is a less demanding rule of construction than section 8(a)(1) of the War Powers Resolution, requiring only “express” language rather than a specific reference to a previously enacted statute. Nowhere does *Marcello* hold or intimate that Congress is constitutionally disabled from enacting statutes such as section 8(a)(1) of the War Powers Resolution, which actually require “magical passwords” in future legislation. Indeed, the *Marcello* Court respected Congress’s prerogative to enact rules of construction for future statutes and fully enforced section 559 of the APA according to its terms. *See id.* at 310 (noting that “[e]xemptions from the terms of the Administrative Procedure Act are not lightly to be presumed in view of the statement in § 12 of the Act that modifications must be express.”).

⁷³ *See* cases cited in note 42.

relies on commentators who assert that section 8(a)(1) “cannot bind future Congresses”⁷⁴ and “cannot control the way in which [a later] Congress express[es] their intent.”⁷⁵ But none of these commentators cite relevant legal authorities to support their views,⁷⁶ nor do they explain how section 8(a)(1) “binds” or “controls” future Congresses when Congress remains free to repeal it or exempt future statutes from its requirements.⁷⁷

From that groundwork, the OLC opinion invokes the constitutional-avoidance canon, and converts section 8(a)(1) into a “background principle” that applies only if a statute is “*entirely* ambiguous” as to whether it authorizes military hostilities.⁷⁸ Rather than declaring section 8(a)(1) unconstitutional, OLC chose to “interpret” section 8(a)(1) to avoid the supposed “constitutional problem” presented by one Congress binding its successors. This is a far-reaching application of the constitutional-avoidance canon. The

⁷⁴ See *Authorization for Continuing Hostilities in Kosovo*, 2000 WL 33716980 (O.L.C.) at *9 (quoting Philip Bobbit, *War Powers: An Essay on John Hart Ely’s War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 Mich. L. Rev. 1364, 1398-1399 (1994) (“[F]ramework statutes - like Gramm-Rudman, for example - cannot bind future Congresses. If Congress can constitutionally authorize the use of force through its appropriations and authorization procedures, an interpretive statute that denies this inference - as does . . . the original War Powers Resolution - is without legal effect. On the other hand, if one Congress could bind subsequent Congresses in this way, it would effectively enshrine itself in defiance of [an] electoral mandate. . . . A rule of interpretation, if it contravenes a valid constitutional power - in this case, . . . that a subsequent Congress could constitutionally endorse a war by an appropriations and authorization statute - would amount to a restriction on the ability of a Congress to repeal by inference preexisting law. Such a fresh hurdle to later legislation is nowhere authorized by the Constitution and is inconsistent with the notion of legitimacy derived through the mandate of each new Congress.”).

⁷⁵ See *Authorization for Continuing Hostilities in Kosovo*, 2000 WL 33716980 (O.L.C.) at *10 (quoting William C. Banks & Peter Raven-Hansen, *National Security Law and the Power of the Purse* 131 (1994)).

⁷⁶ Professor Bobbitt cites no legal authorities whatsoever for his constitutional attack on section 8(a)(1). See Philip Bobbit, *War Powers: An Essay on John Hart Ely’s War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 Mich. L. Rev. 1364, 1398-1399 (1994). Professors Banks and Raven-Hansen rely only on *Marcello v. Bonds*, 349 U.S. 302 (1955), which does not establish any constitutional barrier to statutes such as section 8(a)(1) of the War Powers Resolution. See *supra* note 72. See William C. Banks & Peter Raven-Hansen, *National Security Law and the Power of the Purse* 130-131 (1994).

⁷⁷ Against these sources stood other commentators, such as John Hart Ely, who saw no constitutional problems with section 8(a)(1), and insisted that it should be enforced as a “bright-line test” unless repealed by a subsequent Congress. See John Hart Ely, *War and Responsibility* at 129 (“If subsequent Congresses don’t like [section 8(a)(1)], they can repeal the Resolution. *Until they do, the conventions it establishes should control.*”) (Emphasis added). Professor Ely allowed that Congress might implicitly repeal section 8(a)(1) in “extreme circumstances,” if it “for some bizarre reason . . . were to make unmistakable its intention both to authorize a war and to do so in a way that did not comply with section 8(a)(1).” *Id.* at 129 & n. 57. But he was clear that only a repeal could justify a departure from section 8(a)(1)’s bright-line rule, and only statutes with an “unmistakable intention” to authorize war would repeal it. To avoid the appearance of cherry-picking agreeable commentators, the OLC opinion cites Professor Ely’s book and states that he “notes that unless the Resolution is repealed, a subsequent Congress can only authorize hostilities through an appropriation statute under ‘extreme circumstances.’” See *Authorization for Continuing Hostilities in Kosovo*, 2000 WL 33716980 (O.L.C.) at *12. But the OLC opinion mischaracterizes Ely’s views; his caveat for “extreme circumstances” applies *only if* a statute repealed section 8(a)(1), and left no room for authorization through appropriation statutes absent such repeal.

⁷⁸ See *Authorization for Continuing Hostilities in Kosovo*, 2000 WL 33716980 (O.L.C.) at *12 (emphasis added).

Supreme Court has held that the constitutional-avoidance canon can apply only when a statute allows for more than one interpretation.⁷⁹ Not only is section 8(a)(1)'s express-reference requirement unambiguous, it applies specifically to “any provision contained in any appropriations Act.”⁸⁰ And the only relevant sources that OLC cites to establish a “constitutional problem” with section 8(a)(1)'s express-reference requirement are opinions from commentators that were unsupported by legal authorities. If that can allow an interpreter to use the constitutional-avoidance canon to alter the meaning of specific and unambiguous statutory language, then the executive can escape almost any statutory constraint; most Acts of Congress encounter at least one commentator with constitutional objections.⁸¹ The Bush Administration would later emulate this tactic of interpreting pellucid statutory language to avoid an asserted “constitutional problem” that judicial precedents have never recognized.⁸²

More importantly, the Clinton Administration never explains the distinction between statutes that unconstitutionally “bind” future Congresses and those that do not. Its argument seems driven by an intuition that section 8(a)(1) unduly burdens a future Congress's ability to authorize military hostilities.⁸³ Yet every law establishes default positions and burdens of inertia that advocates of some future policy must overcome by enacting certain statutory language.⁸⁴ The ban on torture, for example, requires pro-torture legislators to enact statutory language specific enough to produce an express or implied repeal of 18 U.S.C. §§ 2340-2340A. Nowhere did OLC's Kosovo memo argue that the presumption against implied repeals is unconstitutional, nor did it assert that the Constitution requires interpreters to ignore previously-enacted statutes in the U.S. Code. The opinion even concedes that Congress's codified clear-statement requirements

⁷⁹ See, e.g., *Gonzales v. Carhart*, 127 S.Ct. 1610, 1631 (2007) (stating that “the canon of constitutional avoidance does not apply if a statute is not ‘genuinely susceptible to two constructions.’” (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998))).

⁸⁰ See 50 U.S.C. § 1547(a)(1) (emphasis added).

⁸¹ For a few examples, consider commentators who argue that the Commander-in-Chief clause renders the anti-torture statute unconstitutional to the extent that it purports to regulate the interrogation of enemy combatants, see, e.g., Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander-in-Chief Power*, 40 Ga. L. Rev. 807, 827-829 (2006), or those who maintain that Congress lacks the power to regulate manufacturing under the Commerce Clause, see, e.g., Richard A. Epstein, *The Proper Scope of the Commerce Clause*, 73 Va. L. Rev. 1387 (1987); Randy Barnett, *Restoring the Lost Constitution* 278-291 (2004).

⁸² See, e.g., Memorandum for Alberto Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, *Re: Standards of conduct for interrogation under 18 U.S.C. §§ 2340 – 2340A* (Aug. 1, 2002) (claiming that the federal anti-torture statute “does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority” because “serious constitutional concerns” would arise if the statute applied to such interrogations).

⁸³ Cf. Paul W. Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 Hastings Const. L.Q. 185, 185, 204 (1986) (arguing that the Gramm-Rudman-Hollings budget legislation was an unconstitutional attempt to “constrain future Congresses,” even though it remained possible for Congress to repeal it, because it “alters the qualitative character of the legislative action required to enact or preserve future spending policies”).

⁸⁴ See, e.g., Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2118 (2002) (“[E]very act of Congress changes the text that a future Congress must pass to achieve its goals, by changing the status quo against which the future Congress legislates.”); Eric A. Posner and Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1696-1697 (2002).

“might” inform a later statute’s meaning when its text and legislative history are “entirely ambiguous.”⁸⁵ But OLC never attempts to define or limit the circumstances in which an interpreter may disregard a codified clear-statement requirement on constitutional grounds. This gives the executive branch considerable latitude to interpret away Congress’s other codified clear-statement requirements, including statutory prohibitions such as the 1978 FISA statute, by asserting that they “bind” successor Congresses.

OLC’s second legal argument was that the 1999 Emergency Supplemental Appropriations Act effects an “implied partial repeal” of section 8(a)(1). It reached this conclusion by asserting that the Appropriations Act’s text and legislative history demonstrate “Congress’s clear intent” to authorize military hostilities in Kosovo beyond the 60 days that the War Powers Resolution allowed.⁸⁶ But these claims are implausible. First, nothing in the Emergency Supplemental Appropriations Act conflicts with the restrictions in the War Powers Resolution. Although the Appropriations Act provides \$5 billion for the “Overseas Contingency Operations Transfer Fund,”⁸⁷ it never earmarks this money for military operations in Kosovo. The statute also appropriates \$300 million for military technology “needed for the conduct of Operation Allied Force,” but this provision has no bearing on the *duration* of lawful hostilities or on whether President Clinton could continue the war beyond May 25, 1999. Finally, the statute requires the President to submit a report that provides “any significant revisions to the total cost estimate” for Operation Allied Force “through the end of fiscal year 1999.”⁸⁸ This provision suggests that Operation Allied Force *might* continue beyond May 25 to the end of the fiscal year, but that contingency still depends on Congress enacting a subsequent authorization statute that satisfies section 8(a)(1) of the War Powers Resolution. There is no repugnancy between the 1999 Emergency Supplemental Appropriations Act and the War Powers Resolution that could produce an implied repeal.⁸⁹

Second, OLC’s claim that Congress “clearly intended to authorize” the Kosovo War beyond the War Powers Resolution’s 60-day window is demonstrably untrue. The OLC opinion sifts the statute’s legislative history and quotes from legislators that anticipated that the appropriations statute would enable President Clinton to execute a long-term war in Kosovo.⁹⁰ But many other legislators insisted that their vote for the

⁸⁵ *Id.* at *12.

⁸⁶ See *Authorization for Continuing Hostilities in Kosovo*, 2000 WL 33716980 (O.L.C.) at *13-*22.

⁸⁷ See Pub. L. No. 106-31, chapter 3. Congress established the Overseas Contingency Fund in 1996. See Pub. L. No. 104-208. Congress appropriates money to the Fund, and DOD can transfer money from the fund to the military services’ operation and maintenance accounts to pay for ongoing contingency operations.

⁸⁸ *Id.* at § 2006.

⁸⁹ See cases cited in notes 4-5. OLC acknowledged that the “law disfavors implied repeals,” but relegated this observation to a footnote. See *Authorization for Continuing Hostilities in Kosovo*, 2000 WL 33716980 (O.L.C.) at n. 22.

⁹⁰ See, e.g., *Authorization for Continuing Hostilities in Kosovo*, 2000 WL 33716980 (O.L.C.) at *19-*22 (quoting Congressman David Obey as saying: “The administration has asked about \$6 billion to cover the cost of this war, plus they have asked for humanitarian assistance. The amount that they have requested will pay for an 800-plane war, 24 hours a day bombing of virtually every target in Yugoslavia

Appropriations Act would neither authorize the war nor endorse President Clinton's actions.⁹¹ Those statements discredit OLC's assertion that "Congress was aware that a vote for the [appropriations] bill would be a vote to authorize the campaign."⁹² What's more, the Emergency Supplemental Appropriations Act bundles the Kosovo-related appropriations with aid for U.S. farmers, pork-barrel military spending, aid to Central American countries victimized by Hurricane Mitch, and other politically attractive spending projects.⁹³ That a legislator voted for this total package hardly evinces an "intent" to extend the Kosovo War beyond 60 days by partially repealing the War Powers Resolution. Former Senators have noted that Vietnam War appropriations were similarly bundled with spending items that were politically difficult to oppose, imposing significant political obstacles to legislators who disapproved the war and wanted to defund it.⁹⁴ The Emergency Supplemental Appropriations Act may have enabled President

that one could imagine anywhere. That will be sustained on a daily basis through the end of the fiscal year." 145 Cong. Rec. H2827 (daily ed. May 6, 1999).

⁹¹ Congressman Hansen, for example, voted in favor of a resolution directing President Clinton to remove all troops from Serbia within 30 days, but nevertheless voted for the Appropriations Act because "[w]hen American troops are deployed in the field of battle it is the duty of every American [to] offer them our clear support and prayers for their safe return home. That is why I will vote for a supplemental appropriations bill that [] pays today's bills in Kosovo." 145 Cong. Rec. H2414-02, at H2416 (remarks of Congressman Hansen). Congressman Goss expressed similar sentiments while debating the special rule for the Kosovo appropriations bill: "[T]his debate today is not about policy. I repeat, this is not a policy debate today. It is about money. It is about resources to take care of our troops, and that is something that Congress must pursue with a single-minded intensity. . . . Taking care of our troops . . . [is] among the most fundamental duties this body has." 145 Cong. Rec. H2815-07, at H2818 (remarks of Congressman Goss). Majority Whip Tom DeLay also made clear that his vote for the appropriations statute would not endorse President Clinton's war policy: "I have not been shy in stating my own opposition to manner in which the President has handled this situation, but this bill is about supporting our troops and making sure they have the tools and the training that they need to return home safely." 145 Cong. Rec. H2815-07 at H2820. *See also id.* at H2821 ("[W]hile I object to the President's handling of this situation, I know our troops need our support now more than ever. The Congress cannot abandon our troops just because the President deploys them unwisely. . . . We must support our troops even as we disagree with the President. . . . We have an obligation to give our sons and daughters everything they need to protect themselves.").

⁹² *See Authorization for Continuing Hostilities in Kosovo*, 2000 WL 33716980 (O.L.C.) at *23. *See also Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973) ("[I]n voting to appropriate money . . . a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation . . . refers to that war. A Congressman wholly opposed to the war's commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting. An honorable, decent, compassionate act of aiding those already in peril is no proof of consent to the actions that placed and continued them in that dangerous posture.").

⁹³ *See* Emergency Supplemental Appropriations Act, Pub. L. No. 106-31, chs. 1-3 (May 21, 1999).

⁹⁴ *See* Hearings before the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs, House of Representatives, 93rd Cong., 1st Sess., (Mar. 7, 1973) p. 8 (statement of Hon. Jacob K. Javits) (noting that war funding measures are "rarely unequivocally before us in a clear-cut way. Funds for troops in the field are often mixed up with other funds for deployment of forces around the world, et cetera. As you know, the budget for Vietnam was never per se the budget for Vietnam. It was always combined with hardware and munitions, and the pay of the troops, and so on."); Thomas F. Eagleton, *War and Presidential Power* 125 ("I could not accept the idea that broad appropriations acts authorizing money for a large number of vital governmental functions could be read as specific authorizations for hostilities."). *See also Campbell v. Clinton*, 203 F.3d 19, 31, n.10 (2000) (Randolph, J., concurring) ("As 'every schoolboy knows,' Congress may pass such [appropriations]

Clinton to continue the war beyond 60 days, but that is a far cry from a clear congressional intent to partially repeal the War Powers Resolution.

Finally, OLC's belief that the Appropriations Act implicitly repealed substantive legislation contradicts settled understandings regarding the scope of appropriations laws. The Supreme Court enforces a strong presumption against interpreting appropriations to amend previously enacted statutes, noting that a contrary regime would stymie the budget process with fears that appropriations might implicitly repeal prior statutory prohibitions.⁹⁵ And Rule XXI, clause 2 of the Rules of the House of Representatives prohibits general appropriations bills from including provisions that "chang[e] existing law."⁹⁶ Although the House waived points of order against violations of this rule when it debated the Emergency Supplemental Appropriations Act,⁹⁷ the rule reflects a strong institutional understanding that appropriations do not implicitly amend substantive legislation. Yet OLC declared that a mere appropriations law partially repealed the War Powers Resolution, even though its language never authorized President Clinton to continue the Kosovo War beyond the War Powers Resolution's 60-day window, and many of its congressional supporters insisted that it would not authorize the President's military endeavors.

B

Six-and-a-half years after the Kosovo War, the Bush Administration used similar legal arguments to claim that Congress had authorized warrantless electronic surveillance in the post-September 11th Authorization to Use Military Force ("AUMF"). Like the Clinton Administration, the Bush Administration needed to surmount a codified clear-statement requirement. The 1978 Foreign Intelligence Surveillance Act imposes criminal liability on anyone who "engages in electronic surveillance under color of law except as authorized by statute."⁹⁸ And a separate statutory provision, codified at 18 U.S.C. § 2511(2)(f), insists that Congress's codified procedures "*shall be the exclusive means* by which electronic surveillance . . . may be conducted."⁹⁹ By prohibiting other statutes from authorizing such surveillance outside the procedures specified in FISA and chapter

legislation, not because it is in favor of continuing the hostilities, but because it does not want to endanger soldiers in the field.").

⁹⁵ See, e.g., *TVA v. Hill*, 437 U.S. 153, 190 (1978) ("When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure."). OLC attempted to distinguish *TVA v. Hill*, see *Authorization for Continuing Hostilities in Kosovo*, 2000 WL 33716980 (O.L.C.) at *23, but the Supreme Court's presumption against implied repeals applies to all legislation, see cases cited in notes 4-5, and the 1999 Emergency Supplemental Appropriations Act comes nowhere close to overcoming it.

⁹⁶ See Rules of the House of Representatives, 106th Congress, Rule XXI, clause 2, part 2(b) (§ 1038) ("A provision changing existing law may not be reported in a general appropriation bill. . ."); *id.* at 2(c) (§ 1039) ("An amendment to a general appropriation bill shall not be in order if changing existing law. . .")

⁹⁷ See 145 Cong. Rec. H2815-H2816, H2823.

⁹⁸ 50 U.S.C. § 1809(a).

⁹⁹ See 18 U.S.C. § 2511(2)(f) (emphasis added).

119 of Title 18, the “exclusive means” provision requires future statutes to amend FISA’s restrictions or exempt themselves from them, or so clearly authorize electronic surveillance as to effect an implied repeal of FISA’s exclusivity requirement. Like section 8(a)(1) of the War Powers Resolution, it precludes Congress from implicitly authorizing warrantless electronic surveillance through ambiguity or acquiescence to the executive branch.¹⁰⁰

Yet the Department of Justice claimed that the post-9/11 Authorization to Use Military Force (“AUMF”) authorized warrantless electronic surveillance, even though the AUMF does not mention FISA or electronic surveillance. The AUMF simply provides (in relevant part) that the President may “use all necessary and appropriate force” against nations, organizations, or persons that he determines were connected to the September 11th attacks.¹⁰¹ A DOJ White Paper insists that specific statutory language was unnecessary to authorize the NSA surveillance program, and escapes FISA’s exclusivity requirement by deploying the same arguments that the Clinton Administration used to avoid the War Powers Resolution’s clear-statement rule. First, the DOJ White Paper claims that “[t]here would be a serious question as to whether the Ninety-Fifth Congress could have so tied the hands of its successors” by precluding future statutes from implicitly authorizing warrantless electronic surveillance.¹⁰² The obvious riposte is that Congress remains free to repeal FISA’s exclusivity requirement at any time, or exempt future statutes from its requirements; no legislature’s “hands” are “tied” by this interpretive default rule. But this was equally true of the clear-statement requirement in section 8(a)(1) of the War Powers Resolution, which the Clinton Administration’s OLC similarly refused to enforce on the ground that it “binds” future Congresses.¹⁰³ The DOJ White Paper takes the Clinton Administration’s argument to its logical conclusion, and asserts that even the ordinary presumption against implied repeals “tie[s] the hands” of Congress to the extent that it allows a past statute to affect a future statute’s meaning.

Invoking the constitutional-avoidance canon, the DOJ White Paper asserts that FISA’s exclusivity requirement is insufficiently “clear” to affect the meaning of the later-enacted AUMF.¹⁰⁴ But it never identifies the ambiguous language in FISA.¹⁰⁵ FISA

¹⁰⁰ FISA reinforces this clear-statement regime by providing that if Congress declares war, the President may engage in warrantless electronic surveillance “for a period not to exceed fifteen calendar days.” 50 U.S.C. § 1811. Not even a Declaration of War can implicitly authorize warrantless electronic surveillance beyond that 15-day window.

¹⁰¹ See Pub. L. 107-243 (2001).

¹⁰² U.S. Department of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (2006), available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf> [hereinafter DOJ White Paper] at 22.

¹⁰³ See *Authorization for Continuing Hostilities in Kosovo*, 2000 WL 33716980 at *2, *9-*10. See also notes 68-77 and accompanying text.

¹⁰⁴ See *id.* at 22 (describing 18 U.S.C. § 2511(2)(f) as “[f]ar from a clear statement of congressional intent”); *id.* (“In the absence of a clear statement to the contrary, it cannot be presumed that Congress attempted to abnegate its own authority in such a way.”); *id.* at 26 (“Nor could the Ninety-Fifth Congress tie the hands of a subsequent Congress in this way, *at least in the absence of far clearer statutory language* expressly requiring that result.”) (emphasis added).

¹⁰⁵ See 18 U.S.C. § 2511(2)(f). In a footnote, DOJ suggested that 50 U.S.C. § 1809(a), which criminalizes “electronic surveillance under color of law except as authorized by statute,” could be “read to

designates its procedures as the “exclusive means” by which electronic surveillance shall be conducted; that leaves no room for the AUMF to authorize warrantless surveillance without language clear enough to amend or repeal FISA. Without evincing any sense of irony, the DOJ White Paper contrasts FISA’s exclusivity provision with section 8(a)(1) the War Powers Resolution, describing section 8(a)(1) as “far clearer statutory language,” and implying that section 8(a)(1) *is* sufficiently clear to control the meaning of future statutes.¹⁰⁶ The DOJ White Paper never mentions the Clinton-era OLC Kosovo memo, which converted this “far clearer statutory language” into a mere “background principle” that no longer controls the meaning of future legislation.

Finally, the DOJ White Paper claims that the AUMF affects an implied partial repeal of FISA’s exclusivity requirement.¹⁰⁷ Once again, this follows the reasoning in the OLC Kosovo memo, which argues that the 1999 Emergency Supplemental Appropriations Act implicitly repealed section 8(a)(1) of the War Powers Resolution. But here, as in the Kosovo situation, there is no conflict or repugnancy between the earlier and later-enacted statutes. The DOJ White Paper claims that “[t]he President’s determination” that the NSA surveillance program was necessary and appropriate created a “clear conflict” between the AUMF and FISA.¹⁰⁸ But the AUMF authorizes only “necessary and appropriate force”; it does not extend to whatever force the President believes to be necessary and appropriate. “Necessary and appropriate” force is ambiguous, and it is hard to see how warrantless electronic surveillance qualifies as “appropriate” force when pre-existing statutes criminalize it. The DOJ White Paper essentially argues that ambiguous statutory language may implicitly repeal an earlier statute if the President chooses to interpret the later-enacted statute that way. That approach to the last-in-time rule is irreconcilable with the Supreme Court’s precedents, which insist that “the intention of *the legislature* to repeal must be clear and manifest.”¹⁰⁹ It is also noteworthy that the AUMF’s drafters were careful to satisfy section 8(a)(1)’s clear-statement requirement in authorizing the President to use military force.¹¹⁰ The comparative lack of reference to FISA or electronic surveillance implies that the political branches were unable or unwilling to overcome the burden of inertia created by FISA’s “exclusive means” provision, or to establish a repugnancy sufficient to implicitly repeal FISA’s provisions.¹¹¹

constitute a procedure or incorporate procedures not expressly enumerated in FISA.” See DOJ White Paper at 23 n. 8. But 50 U.S.C. § 1809 is not a “procedure” in FISA; it is a substantive criminal prohibition that allows an exception for electronic surveillance authorized by statute.

¹⁰⁶ See DOJ White Paper at 26.

¹⁰⁷ *Id.* at 36 n. 21.

¹⁰⁸ *Id.* (Emphasis added).

¹⁰⁹ *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936) (emphasis added). See also cases cited in notes 4-5.

¹¹⁰ See Pub. L. 107-243 § 2(b)(1). (“Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.”).

¹¹¹ FISA’s “exclusive means” provision renders *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), inapposite. The Non-Detention Act provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress,” see 18 U.S.C. § 4001(a), and five Justices in *Hamdi* concluded that the AUMF qualifies as an “Act of Congress” that allowed the President to detain a U.S. citizen as an “enemy combatant,” even though the AUMF does not specifically authorize citizen

III

Congress or the federal judiciary might have taken steps to enforce these codified clear-statement requirements against the executive branch's aggressive interpretive theories. Legislators, for example, could have withheld appropriations from the unauthorized activities, refused to confirm the President's nominees in retaliation for his unilateral endeavors, or even commenced impeachment proceedings if legislators deemed the President's "constitutional avoidance" and "implied repeal" arguments to be abusive or lawless.¹¹² Congress, however, did none of those things in responding to the Kosovo War or the NSA warrantless surveillance controversy, and Presidents Clinton and Bush were able to continue these endeavors for a time without specific congressional authorization.

The judiciary likewise could have countered the executive branch's evasion of Congress's codified clear-statement regimes, especially since the Clinton and Bush Administration's theories of constitutional avoidance and implied repeal were out of line with existing judicial precedents. Some members of Congress sued President Clinton in federal district court, claiming that the President violated the War Powers Resolution by continuing the Kosovo War beyond 60 days. And the federal district court in *Campbell v. Clinton*¹¹³ recognized that the Appropriations Act could not constitute "authorization" under section 8(a)(1) of the War Powers Resolution.¹¹⁴ But the district court held that the plaintiffs lacked Article III "standing" and refused to rule on the merits of the dispute.¹¹⁵ On appeal, the D.C. Circuit similarly held that the plaintiffs lacked Article III standing because they retained "ample legislative power" to stop the war by withholding funds.¹¹⁶ And Congress, left to fend for its own institutional prerogatives, never used its constitutional powers to induce the President to comply with section 8(a)(1)'s clear-statement regime. To the contrary, Congress facilitated President Clinton's decision to continue the war by enacting the Appropriations Act without attempting to force the Administration to comply with the War Powers Resolution's clear-statement framework.

Litigants also asked the federal judiciary to enforce FISA's clear-statement regime, but to no avail. Although a federal district court enjoined the NSA program, the

detention. *Id.* at 517-519. But the Non-Detention Act lacks any provision akin to FISA's "exclusive means" requirement, so it does not codify any roadblock to future statutes that implicitly authorize citizen detention.

¹¹² See Jesse Choper, *Judicial Review and the National Political Process* 281-308 (1980) (describing the institutional weapons that Congress might against a President that acts without proper congressional authorization).

¹¹³ 52 F. Supp. 2d 34 (1999).

¹¹⁴ *Id.* at 44 n.9. See also *Campbell v. Clinton*, 203 F.3d 19, 31 n.10 (D.C. Cir. 2000) (Randolph, J., concurring) (noting that the Emergency Supplemental Appropriations Act "contained no language even roughly approximating that required by the War Powers Resolution.").

¹¹⁵ *Campbell v. Clinton*, 52 F. Supp. 2d 34, 43 (D.D.C. 1999).

¹¹⁶ *Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000). Judge Silberman's concurring opinion went even further, arguing that the "political question" doctrine foreclosed courts from enforcing the War Powers Resolution's 60-day limit, even in cases where a plaintiff could establish standing. See, e.g., *Campbell v. Clinton*, 203 F.3d at 24-25.

court of appeals promptly stayed that ruling and eventually dismissed the case on the ground that the plaintiffs lacked Article III standing.¹¹⁷ Even though the plaintiffs regularly communicated with persons that they might be targeted for surveillance, the Court determined that the plaintiffs lacked “injury in fact” because they could not show that they actually were subject to surveillance, either in the past or the future.¹¹⁸ Instead, the plaintiffs asserted only the possibility that they might be monitored, and the court deemed that too “speculative” to create an Article III case or controversy.¹¹⁹

After the court of appeals’ rulings in the Kosovo and NSA surveillance litigation, the Supreme Court of the United States denied certiorari and refused to reconsider the judge-created standing doctrines that had insulated the executive branch’s legal arguments from judicial review.¹²⁰ Yet the Supreme Court has not been shy about enforcing other clear-statement requirements against the President in national-security disputes. In *Hamdan v. Rumsfeld*,¹²¹ where a habeas petitioner challenged the President’s authority to establish military commissions at Guantanamo Bay, the Supreme Court reached the merits of the dispute, notwithstanding the existence of statutes and doctrines that the Court might have used to avoid ruling on the issue.¹²² Then the Justices held that Common Article 3 of the Geneva Conventions, and Article 36 of the UCMJ, foreclosed the post-9/11 AUMF and other generally-worded statutes from authorizing President Bush’s November 13, 2001 Military Commissions Order. The contrast in approaches is stark, and the Supreme Court’s unwillingness to enforce Congress’s explicit clear-statement regimes in the War Powers Resolution and FISA is puzzling in light of the Court’s eagerness to enforce a clear-statement requirement in *Hamdan*, where it was far less clear that the Geneva Conventions required specific congressional authorization for the President’s actions.

In *Hamdan*, the Bush Administration claimed that three statutes authorized the President’s November 13, 2001 Military Commissions Order. First, it argued that the

¹¹⁷ *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007).

¹¹⁸ *Id.* at 656 (opinion of Batchelder, J.) (“[B]ecause the plaintiffs cannot show that they have been or will be subjected to surveillance personally, they clearly cannot establish standing under the Fourth Amendment or FISA.”); *id.* at 656 (opinion of Batchelder, J.) (describing plaintiff’s anticipated harm as “neither imminent nor concrete – it is hypothetical, conjectural, or speculative”); *id.* at 688 (Gibbons, J., concurring in the judgment) (“The disposition of all of the plaintiffs’ claims depends upon the single fact that the plaintiffs have failed to provide evidence that they are personally subject to the TSP. Without this evidence, on a motion for summary judgment, the plaintiffs cannot establish standing for any of their claims, constitutional or statutory.”).

¹¹⁹ *Id.* at 656-57 (opinion of Batchelder, J.); *id.* at 690 (Gibbons, J., concurring).

¹²⁰ Numerous commentators have challenged the notion that Article III requires plaintiffs to show “injury in fact,” and have criticized the “injury in fact” requirement as manipulable and incoherent. *See, e.g.*, Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 Colum. L. Rev. 1432 (1988); William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221 (1989); Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 Yale L.J. 816 (1969).

¹²¹ 548 U.S. 557 (2006).

¹²² *See Hamdan*, 548 U.S. at 572-584 (rejecting the government’s contention that the Detainee Treatment Act deprived the federal courts of jurisdiction over habeas petitions brought by Guantanamo Bay detainees); *id.* at 584-590 (rejecting the government’s contention that the Court’s precedents required it to abstain).

2005 Detainee Treatment Act ratified¹²³ the earlier Military Order when it gave the D.C. Circuit exclusive jurisdiction to review “any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).”¹²⁴ Second, the administration argued that the AUMF authorized the President to exercise his traditional war powers, including the trial and punishment of enemy combatants.¹²⁵ Finally, it relied on Article 21 of the UCMJ, which stated that provisions conferring jurisdiction upon courts-martial “do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by the law of war may be tried by military commission.”

But the Court held that these statutes were insufficient to authorize military commissions that lacked the procedures prescribed by Common Article 3 of the Geneva Conventions and Article 36 of the UCMJ. Instead, the President needed “specific, overriding authorization”¹²⁶ to overcome the limitations in those pre-existing laws due to the presumption against implied repeals. The Court enforced these latter provisions as clear-statement rules that precluded the President from acting pursuant to less specific statutory language.¹²⁷

Yet it was far from evident that Common Article 3’s limitations even applied to the United States’ armed conflict with al Qaeda, so as to require specific congressional authorization for the President’s proposed military commissions. Common Article 3 applies only to “conflict[s] not of an international character occurring in the territory of one of the High Contracting Parties,”¹²⁸ and President Bush interpreted this language to apply only to civil wars completely internal to one signatory state. The text does not compel this interpretation,¹²⁹ but the President’s view was at least a permissible construction of the treaty language, and prior Court decisions had afforded “great weight” to executive-branch treaty interpretations.¹³⁰ Indeed, only one day before the Court announced its judgment in *Hamdan*, it had reiterated in *Sanchez-Llamas v. Oregon*¹³¹ that

¹²³ Brief for Respondent at 15.

¹²⁴ See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2)(A), 119 Stat. 2743.

¹²⁵ Brief for Respondent at 16.

¹²⁶ 548 U.S. at 593.

¹²⁷ See *Hamdan*, 126 S. Ct. at 2775.

¹²⁸ Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364, art. 3.

¹²⁹ For example, the phrase “international character” is ambiguous as to whether it requires a conflict between sovereign nations or includes any conflict in the territory of more than one nation. And “one of the High Contracting Parties” need not be construed to mean “only one of High Contracting Parties.”

¹³⁰ See, e.g., *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (“While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.”); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (“[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”). See also *El Al Israel Airlines, Ltd., v. Tseng*, 525 U.S. 155, 169 (1999) (“Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty.”); *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933) (“[T]he construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight.”);

¹³¹ 548 U.S. 331 (2006).

courts owe substantial deference to executive-branch treaty interpretations.¹³² Yet the *Hamdan* Court did not even mention its precedents that required deference to the executive as it held that Common Article 3 applied to all conflicts not between sovereign nations, including the United States' armed conflict with al Qaeda.¹³³

The *Hamdan* Court also made opportunistic use of the Geneva Conventions' negotiating record. In the draft Convention proposed at Stockholm, Common Article 3's protections applied to "all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of *one or more* of the High Contracting Parties."¹³⁴ The final version, by contrast, extended Common Article 3 to "all cases of armed conflict not of an international character occurring in the territory of *one* of the High Contracting Parties."¹³⁵ The *Hamdan* Court thought it significant that the final document omitted the phrase "especially [to] cases of civil war," and insisted that Common Article 3 must therefore apply beyond civil wars.¹³⁶ The Court also asserted that the final version of Common Article 3 carried a "broader scope of application" than "earlier proposed iterations."¹³⁷ But the Court never so much as mentioned that the delegates contracted Common Article 3's scope from "the territory of *one or more* of the High Contracting Parties" (in the Stockholm text) to "the territory of *one* of the High Contracting Parties" (in the final version). This change supports the President's view that Common Article 3 applies only to armed conflicts wholly internal to one signatory state, and the Court conveniently chose to ignore it.¹³⁸

Why would the Justices be so eager to enforce a clear-statement requirement in *Hamdan*, where it was far from obvious that the Geneva Conventions required specific congressional authorization for the President's actions, yet be unwilling to enforce the clear-statement requirements in the War Powers Resolution and FISA, where Congress had explicitly legislated a clear-statement requirement that was designed to prevent the

¹³² *Id.* at 355 (quoting *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)).

¹³³ See, e.g., Eric A. Posner and Adrian Vermeule, *Terror in the Balance* 271-272 (2006) (denouncing *Hamdan*'s failure to defer to the President's treaty interpretations as "lawless"); John Yoo, *An Imperial Judiciary at War: Hamdan v. Rumsfeld*, 2006 *Cato Sup. Ct. Rev.* 83 (2006). *Hamdan*'s Geneva discussion was also controversial because the Court had already concluded that the military commissions were illegal under Article 36 of the UCMJ, see *Hamdan*, 126 S. Ct. at 2800-2804, making it less necessary to reach out and decide the disputed Common Article 3 issue. Cf. Cass R. Sunstein, *Clear-Statement Principles and National Security: Hamdan and Beyond*, 2006 *Sup. Ct. Rev.* 1, 29 (noting that the Court's opinion in *Hamdan* was "far from minimalist").

¹³⁴ See International Committee for the Red Cross, *Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War* 31 (1960) (emphasis added).

¹³⁵ Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364, art. 3. (emphasis added).

¹³⁶ See *Hamdan*, 126 S. Ct. at 2796.

¹³⁷ See *id.* ("In fact, limiting language that would have rendered Common Article 3 applicable "especially [to] cases of civil war, colonial conflicts, or wars of religion," was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations.").

¹³⁸ The Solicitor General's brief had flagged this discrepancy between the Stockholm text and the final version of Common Article 3, so the Justices were aware of it. See SG's brief, footnote 24.

President from acting without specific congressional authorization? One possible explanation may be that judges are reluctant to enjoin a war or a terrorist surveillance program because they are uncertain of the national-security harms that their decision would cause. Nonjusticiability doctrines and denials of certiorari enable the courts to avoid responsibility for that outcome, even if they believe that the President is acting lawlessly by failing to obtain specific congressional authorization. Perhaps the Justices were less concerned about the consequences of enjoining the Guantanamo military commissions, which involved only the punishment of captured terrorists who no longer posed a national-security threat.¹³⁹ On this view, the Supreme Court's unexplained departure from its precedents that required deference to a President's treaty interpretations, and its highly selective use of Geneva's negotiating record, might be an attempt to compensate for its non-intervention during the Kosovo and NSA surveillance controversies. By failing to enforce Congress's clear-statement requirements in the War Powers Resolution and FISA, the courts had skewed the President's incentives to act unilaterally even when an existing statute required specific congressional authorization. *Hamdan*'s broad construction of Common Article 3 counters this by requiring Presidents to consider the risk that courts might broadly construe codified clear-statement requirements in the event that they decide to reach the merits of a dispute. This gives future Presidents an incentive to seek specific congressional authorization whenever language in an existing statute or treaty *might* be read to require such a clear statement from Congress, even if the President reasonably believes that the statute or treaty is inapplicable. In this sense, the tension between *Hamdan* and court precedents requiring deference to the executive produce a regime of legal uncertainty that could dissuade the executive branch from pressing its expansive constitutional avoidance and implied repeal theories in other contexts whenever judicial review of the merits is at possible, even if the courts ultimately decide to avoid ruling on the merits.¹⁴⁰

But the federal courts' performances in *Hamdan*, and in the Kosovo and NSA surveillance litigation, show that judicial enforcement of clear-statement requirements has little to do with the commands in Congress's framework legislation or treaties. Instead, judicial enforcement of codified clear-statement requirements is sporadic and unpredictable; some of them are underenforced, while others are overenforced. The outcomes in court bear no relationship to a legislature's decision to establish narrow, rule-like, or explicit clear-statement requirements in national-security framework legislation.

IV

¹³⁹ See Eric A. Posner and Adrian Vermeule, *Terror in the Balance* 272 (2006) (characterizing *Hamdan* as a "reassertion of judicial muscle after an emergency has run its course").

¹⁴⁰ Cf. Adrian Vermeule, *Holmes on Emergencies*, Harvard Public Law Working Paper No. 07-07 (available at SSRN: <http://ssrn.com/abstract=998601>) (suggesting that one possible benefit of legal uncertainty is that it might keep actors or institutions from pressing the limits of their authority); Jack Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* 33 (noting the danger that the executive branch might interpret the law "opportunistically to serve its own ends" when it acts outside the reach of courts).

All of these recent controversies illustrate the difficulties that confront efforts to legislate effective clear-statement regimes in national-security law. First, interpretive doctrines such as the constitutional-avoidance canon and the last-in-time rule enabled executive-branch lawyers to concoct congressional “authorization” from vague or ambiguous statutory provisions, even in the teeth of framework legislation that required specific congressional authorization for the President’s actions. The executive-branch legal arguments were strained, yet they provided some political cover for the President’s actions and, in the NSA surveillance episode, might have protected lower-level executive employees from the fear of criminal liability. Second, Congress failed to compel the President to seek the specific congressional authorization that the framework legislation required. There are many possible reasons for Congress’s failure to force Presidents Clinton and Bush to comply with the clear-statement regimes. The harms that the executive branch caused to Congress’s institutional prerogatives and the rule of law may have been too abstract to trigger a stronger backlash, and were unlikely to hinder any legislator’s re-election bid because there was sufficient political support for the President’s actions.¹⁴¹ Or perhaps partisan loyalties contributed to the Republican-led 109th Congress’s acquiescence to President Bush’s actions during the NSA surveillance controversy, or Democratic legislators’ unwillingness to withhold funds for the Kosovo War.¹⁴² Finally, judicial enforcement of codified clear-statement requirements in national-security law is arbitrary and sporadic. In *Hamdan*, the Supreme Court enforced a clear-statement requirement by adopting a broad construction of vague language the Geneva Conventions, yet in the Kosovo and NSA surveillance controversies, the courts were content to allow Congress’s explicit clear-statement requirements in the War Powers Resolution and FISA to go unenforced.

All of this has spurred proposals to strengthen the clear-statement regimes in Congress’s national-security legislation. Some have proposed to amend the War Powers Resolution and FISA by tightening the clear-statement requirements and adding provisions that withhold funding from activities that Congress has not specifically authorized. And Congress continues to enact new clear-statement requirements in its national-security legislation; it recently imposed more narrow and explicit clear-statement rules regarding electronic surveillance outside of FISA and detainee treatment.¹⁴³ But these statutes and proposals are unlikely to prevent executive-branch lawyers from continuing to apply their broad theories of constitutional avoidance and implied repeal to infer congressional “authorization” from vague or ambiguous statutes. Nor are they likely to enhance the ability of legislators or courts to resist executive-branch endeavors that lack the specific authorization that the framework statutes require. A more effective clear-statement regime in national-security law will require point-of-order mechanisms that precommit future legislators against enacting ambiguous statutory language that executive-branch lawyers might use to claim congressional authorization,

¹⁴¹ See, e.g., Daryl J. Levinson, *Empire-Building Government*, 118 Harv. L. Rev. 915 (2005).

¹⁴² Cf. Daryl J. Levinson and Richard Pildes, *Separation of Parties, not Powers*, 119 Harv. L. Rev. 2311, 2348 (2006) (noting “the disappearance of checks and balances during periods of strongly unified government.”).

¹⁴³ See, e.g., FISA Amendments Act of 2008, Pub. L. 110-261, § 102(a); Detainee Treatment Act of 2005 Pub. L. 109-148 § 1003(c) (codified at 42 U.S.C. § 2000dd(c)).

and that enable future legislators to resist the executive when it acts without specific congressional authorization. Congress's insistence on legislating more narrow and explicit clear-statement requirements in its national-security legislation, without any point-of-order devices or other precommitment mechanisms, will do little to establish an effective clear-statement regime in national-security law.

A

Numerous proposals to strengthen the clear-statement regimes in Congress's national-security legislation have focused on imposing more narrow clear-statement requirements or adding funding restrictions to the framework legislation. Consider, for example, Senator Specter's proposal in the 109th Congress to reform the Foreign Intelligence Surveillance Act. The Specter bill reiterates that FISA (along with chapters 119, 121, and 206 of title 18, United States Code) shall be "the exclusive means" by which electronic surveillance may be conducted in the United States, but adds the phrase "notwithstanding any other provision of law."¹⁴⁴ The Specter proposal further states that no provision of law may repeal or modify FISA unless it "expressly amends or otherwise specifically cites this title."¹⁴⁵ Congress failed to enact Senator Specter's proposal, but it did enact a provision in the 2008 FISA Amendments that specifies that "only an express statutory authorization for electronic surveillance" may authorize electronic surveillance outside of FISA's procedures.¹⁴⁶ This new statute attempts to foreclose the Bush Administration's argument that FISA's "exclusive means" provision was insufficiently "clear" to affect the meaning of the later-enacted AUMF.¹⁴⁷ Congress also imposed a very narrow clear-statement requirement in the McCain Amendment to the 2005 Detainee Treatment Act, providing that its prohibition on certain forms of cruel, inhuman, or degrading treatment "shall not be superseded, except by a provision of law enacted after January 6, 2006, which specifically repeals, modifies, or supersedes the provisions of this section."¹⁴⁸ This clear-statement requirement is more narrow than

¹⁴⁴ See S. 3001, 109th Congress, 2d session, "Foreign Intelligence Surveillance Improvement and Enhancement Act of 2006," sec. 101. Other legislation proposed in the 109th Congress includes similar language in an attempt to tighten FISA's clear-statement rule. See, e.g., H.R. 5371, 109th Congress, 2d Sess., sec. 3 ("Notwithstanding any other provision of law, chapters 119 and 121 of title 18, United States Code, and the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1801 et seq.) shall be the exclusive means by which electronic surveillance may be conducted.").

¹⁴⁵ See S. 3001, 109th Congress, 2d session, "Foreign Intelligence Surveillance Improvement and Enhancement Act of 2006," at sec. 102(a) (proposing a new provision to FISA providing that "[n]o provision of law shall be construed to implicitly repeal or modify this title or any provision thereof, nor shall any provision of law be deemed to repeal or modify this title in any manner unless such provision of law, if enacted after the date of the enactment of the Foreign Intelligence Surveillance Improvement and Enhancement Act of 2006, expressly amends or otherwise specifically cites this title.").

¹⁴⁶ See FISA Amendments Act of 2008, Pub. L. No. 110-261, section 102(a).

¹⁴⁷ See note 104 and accompanying text.

¹⁴⁸ See, e.g., 42 U.S.C. § 2000dd(c). See also S. 3001, 109th Congress, 2d session, "Foreign Intelligence Surveillance Improvement and Enhancement Act of 2006," § 102(a) (proposing a new provision to FISA providing that "[n]o provision of law shall be construed to implicitly repeal or modify this title or any provision thereof, nor shall any provision of law be deemed to repeal or modify this title in any manner unless such provision of law, if enacted after the date of the enactment of the Foreign Intelligence Surveillance Improvement and Enhancement Act of 2006, expressly amends or otherwise specifically cites this title.").

those in the War Powers Resolution and FISA, as it entrenches the McCain Amendment against *any* type of implied repeal.

There have also been numerous proposals to add funding restrictions to Congress's national-security legislation. Senator Specter's proposed FISA amendments, for example, provide that "no funds appropriated or otherwise made available by any Act" may be expended for electronic surveillance conducted outside of FISA and chapters 119, 121, and 206 of title 18, U.S. Code.¹⁴⁹ Professor John Hart Ely proposed a similar amendment to the War Powers Resolution that withholds funding from military ventures that Congress has not specifically authorized.¹⁵⁰ Other commentators have endorsed similar proposals.¹⁵¹ But none of these proposed reforms is likely to prevent the executive branch from continuing to infer congressional "authorization" from ambiguous later-enacted statutes, nor are they likely to prevent future Congresses from acquiescing to this practice.

The first problem is that these new statutes and proposals fail to counter the aggressive interpretive doctrines that executive-branch lawyers use to infer congressional authorization from legislation that lacks the required clear statement. The Clinton Administration's Kosovo memo already provides a roadmap for the executive branch to evade the clear-statement rule in the 2008 FISA Amendments, which insists that "only an express statutory authorization for electronic surveillance" may authorize electronic surveillance outside of FISA's procedures.¹⁵² The OLC Kosovo memo characterizes the express-reference requirement in section 8(a)(1) of the War Powers Resolution as an invalid attempt to "bind" future Congresses, and converts it into a standard-like "background principle" that applies only when future legislation is "entirely ambiguous" as to whether it authorizes military hostilities.¹⁵³ There is little reason to think that future executives will treat FISA's new express-language requirement any differently if they anticipate that Congress is likely to acquiesce. Executive-branch lawyers can also invoke the Clinton and Bush Administration's broad theories of implied repeal if they find language in a later-enacted statute that might be read to authorize warrantless surveillance. The more narrow clear-statement requirements in Senator Specter's proposed FISA reforms and the recently-enacted McCain Amendment would fare no better. Even though they purport to entrench themselves against implied repeal,¹⁵⁴ the

¹⁴⁹ See *id.* sec. 103.

¹⁵⁰ See, e.g., John Hart Ely, *War and Responsibility* 121, 138 (1993) (proposing an amendment to the War Powers Resolution specifying that "[n]o funds appropriated or otherwise made available under any law may be obligated or expended for any activity which would have the purpose of effect of violating any provision of the [War Powers] Act.").

¹⁵¹ See, e.g., Thomas M. Franck, *After the Fall: The New Procedural Framework for Congressional Control Over the War Power*, 71 *Am. J. Int'l L.* 605, 639 (1977); Michael J. Glennon, *Strengthening the War Powers Resolution: The Case for Purse-String Restrictions*, 60 *Minn. L. Rev.* 32-33 (1975); Louis Fisher, *Congressional Checks on Military Initiatives*, 109 *Poli. Sci. Q.* 739, 749 (1995); Cyrus R. Vance, *Striking the Balance: Congress and the President under the War Powers Resolution*, 133 *U. Pa. L. Rev.* 93-94 (1984).

¹⁵² See FISA Amendments Act of 2008, Pub. L. No. 110-261, section 102(a).

¹⁵³ See *Authorization for Continuing Hostilities in Kosovo*, 2000 WL 33716980 at *9-*10.

¹⁵⁴ See *id.* at sec. 102(a).

executive can assert, as it did during the Kosovo and NSA surveillance controversies, that this partial entrenchment “binds” future Congresses and proceed with its broad theories of implied repeal.

The proposals to add funding restrictions to FISA and the War Powers Resolution are equally vulnerable to expansive executive-branch theories of implied repeal. Recall that the OLC Kosovo memo asserts that the 1999 Emergency Supplemental Appropriations Act implicitly repealed restrictions in the War Powers Resolution, even though the Appropriations Act never earmarked funds for military operations in Kosovo, nor specifically authorized military operations in Kosovo beyond the WPR’s 60-day window. By OLC’s lights, it was enough that some members of Congress thought that the President might continue the Kosovo hostilities beyond 60 days and that the appropriations legislation did not expressly withhold funds for that purpose.¹⁵⁵ In like manner, a future executive might claim that a generic Authorization to Use Military Force implicitly repeals Senator Specter’s proposed funding restrictions under the last-in-time rule, so long as it can concoct some argument that legislators are aware (or should be aware) that warrantless surveillance of the enemy is a “fundamental incident of the use of military force.”¹⁵⁶ Or the executive might claim that annual appropriations bills for the intelligence agencies implicitly repeal the earlier-enacted funding restrictions if legislators are aware of the President’s warrantless surveillance activities but fail to expressly reaffirm FISA’s restrictions. Proposals that would add funding restrictions to the War Powers Resolution are similarly incapable of withstanding the executive-branch lawyers’ broad theories of implied repeal. Those funding restrictions, like section 8(a)(1) of the War Powers Resolution, would be brushed aside whenever implicit congressional “authorization” might be found in vague or ambiguous statutory language.

The challenge for these efforts to strengthen the War Powers Resolution and FISA is that *any* future ambiguous statute will provide rope for executive-branch lawyers to concoct congressional “authorization” for the President’s actions, no matter what restrictions or interpretive instructions Congress provides in framework legislation. None of these proposed reforms will disable the executive from using its expansive theories of constitutional avoidance and implied repeal to provide a veneer of legality for the President’s actions, and to minimize the prospect of future criminal sanctions and political reprisals against executive-branch employees.

B

Congress could establish more effective clear-statement regimes in national-security law if it precommitted itself against enacting vague or ambiguous statutory language that the executive might use to claim implicit congressional “authorization.” One such precommitment strategy would be to include point-of-order mechanisms in the War Powers Resolution and FISA (and other national-security framework statutes).

¹⁵⁵ See notes 86-97 and accompanying text.

¹⁵⁶ Cf. DOJ White Paper at 10 (arguing that “[t]he broad language of the AUMF affords the President, at a minimum, discretion to employ the traditional incidents of the use of military force” and that “the NSA surveillance described by the President is a fundamental incident of the use of military force”).

These would empower any individual legislator to object to any bill that authorizes military force, or that funds the military or the intelligence agencies, and that fails to explicitly prohibit military hostilities beyond 60 days or warrantless electronic surveillance, unless Congress has specifically authorized such activities. Congress could further specify that if the point of order is sustained, the bill will be automatically amended to specifically prohibit or withhold funding for such activities.

When a legislator raises a point of order, the chair must either sustain it and declare the legislation out of order, or overrule it.¹⁵⁷ Then a majority vote of the chamber can reverse the chair's ruling. Establishing point-of-order mechanisms in the War Powers Resolution and FISA would strengthen the codified clear-statement requirements in two ways. First, they would impose a procedural roadblock to ambiguous statutory language that executive-branch lawyers might construe as implicitly authorizing extended military hostilities or warrantless electronic surveillance. Second, they would help deter future legislators from acquiescing to Presidential actions that Congress has not specifically authorized. Yet Congress has never established a point-of-order mechanism to enforce the clear-statement requirements in its national-security legislation,¹⁵⁸ even though it regularly employs this device to enforce precommitments in legislation that governs the federal budget process.

If Congress had included such a point-of-order mechanism in the War Powers Resolution, any legislator could have objected to the 1999 Emergency Supplemental Appropriations Act when it reached the House or Senate floor. Any such objection would require the chair to sustain the point of order and amend the legislation, because the bill appropriated money for the military yet failed to withhold funds for military hostilities that extend beyond 60 days. Then a majority vote of the entire chamber would have been necessary to overturn the chair's ruling and allow the 1999 Emergency Supplemental Appropriations Act to survive as written. And if the chair had decided to overrule the point-of-order objection in violation of the chamber's rule, the objecting legislator could have appealed the chair's ruling to the full chamber, where a majority vote could overrule the chair's ruling and sustain the point of order. If FISA had included a point-of-order enforcement mechanism, any legislator could have raised a similar objection to the post-September 11th Authorization to Use Military Force, and the

¹⁵⁷ See Charles Tiefer, *Congressional Practice and Procedure: A Reference, Research, and Legislative Guide* 24.

¹⁵⁸ Senator Biden proposed legislation in the 106th Congress that would establish a point of order against appropriations for certain military hostilities that Congress had not authorized. *See* 144 Cong. Rec. S9447 (section 106 of Senator Biden's proposed "Use of Force Act," which establishes a point of order against any measure "containing funds to perpetuate a use of force that Congress, by concurrent resolution, has found to be illegitimate"). And in 1979, Congress considered legislation that would establish a point of order against any bill to fund or carry out any executive agreement that the Senate determined should have been submitted to it as a treaty. *See* S. 3076, 95th Cong., 2d Sess., § 502 (1978), *cited in* 1 *United States Foreign Relations Law* 461, 463-66 (Thomas Franck and Michael Glennon, eds. 1980). But Congress never enacted these proposals. Section 5(C) of the proposed Baker-Christopher "War Powers Consultation Act of 2009" hints at establishing point-of-order mechanisms to induce the President to seek congressional authorization for significant armed conflicts, but it also proposes to repeal the clear-statement requirement in section 8(a)(1) of the War Powers Resolution. **CITE?**

annual appropriations legislation to fund the intelligence agencies, unless those statutes were amended to specifically preclude electronic surveillance outside of FISA.

Point-of-order mechanisms would not completely foreclose Congress from enacting ambiguous legislation such as the 1999 Emergency Supplemental Appropriations Act or the post-9/11 Authorization to Use Military Force. But they would impose significant procedural obstacles to legislation that executive-branch lawyers *might* use to claim implicit congressional authorization for extended military hostilities or electronic surveillance. Unless Congress specifically authorizes military hostilities beyond 60 days or warrantless electronic surveillance, appropriations statutes that fail to explicitly prohibit or withhold funding for such activities will survive only if: (1) Every single legislator in a chamber fails to raise a point-of-order objection; (2) A majority in that chamber votes to overrule a point-of-order objection; or (3) Congress repeals the point-of-order device before considering the bill. The last of these three possibilities would face difficult hurdles, even though the Constitution's Rules of Proceedings clause allows a single House to change its rules without having to enact a statute through the bicameralism and presentment processes.¹⁵⁹ In the Senate, the standing rules remain in effect from one Congress to the next, and any attempt to change a Senate rule is subject to a filibuster, where a supermajority is needed to invoke cloture and end debate.¹⁶⁰ And in the House, the standing rules may be changed only by a unanimous consent agreement, by a 2/3 supermajority vote to suspend the rules,¹⁶¹ or by a simple majority voting to approve a proposal from the House Rules Committee, which has jurisdiction over the House rules.¹⁶² The House Rules Committee can also propose a "special rule" to govern the House debate over a particular bill, and if the full House approves the special rule by majority vote, then the procedures in the special rule will govern the House's

¹⁵⁹ See U.S. Const. art. I, § 5 (allowing each House of Congress to "determine the rules of its proceedings"); 2 U.S.C. § 1515.

¹⁶⁰ See Senate Rule XXII. Senators might try to circumvent this entrenched supermajority requirement by arguing that the Constitution's Rules of Proceedings clause allows them to alter their rules by a simple majority vote, regardless of constraints imposed by internal Senate rules. But Senators have been highly reluctant to use such a maneuver, perhaps concerned that it would undermine other entrenched Senate rules that have benefited themselves or the institution as a whole.

¹⁶¹ See House Rule XXVII. Because votes to suspend the House rules require a two-thirds majority of those voting, this procedure has been used only for noncontroversial legislation. See Charles Tiefer, *Congressional Practice and Procedure* 299, 310, 296-300 (1989).

¹⁶² See House Rule X(1)(n). Because votes to change House rules in the middle of a session cannot occur without a proposal from the House Rules Committee, they have been rare. See, e.g., 123 Cong. Rec. 22,949 (1977). See, e.g., 135 Cong. Rec. 8775 (1989). See also Barry R. Weingast and William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. Pol. Econ. 132, 144 (1988) (showing how committee jurisdiction limits majority cycling in legislatures and provides durability to congressional decisions). And while it remains theoretically possible for a majority of the House to try to invoke the Rules of Proceedings clause to change the rules mid-session without a recommendation from the House Rules Committee, the House has stabilized its rules against such maneuvers by relying on party discipline and the high transactions costs attendant with such attempts to change the status quo. See, e.g., Gary W. Cox and Mathew D. McCubbins, *Bonding, Structure, and the Stability of Political Parties: Party Government in the House*, 19 Leg. Stud. Q. 215, 217-221 (1994) (showing how transactions costs and majority party caucus rules entrench House rules by requiring its members to vote with the majority of the caucus on the adoption of key House rules as a condition for membership in the party's caucus).

consideration of that specific legislation. And some “special rules” purport to waive *all* points of order against the pending legislation, which allows a simple majority of the House (along with a simple majority of the Rules Committee) to prevent legislators from raising a point of order mechanism against certain bills.¹⁶³ But Congress can foreclose this evasion by providing that special rules that waive points of order against bills pertaining to the military or intelligence agencies are themselves out of order; Congress included such a provision in the Unfunded Mandates Reform Act, and can include a similar provision in establishing points of order in national-security legislation.¹⁶⁴

When a point-of-order lurks in the background, legislators have incentives to draft bills in a manner that will avoid a possible point-of-order objection that could slow or derail the legislation. In 1995, for example, Congress enacted the Unfunded Mandates Reform Act of 1995 (“UMRA”), which established a point of order against legislation that imposed unfunded mandates on state or local governments in excess of \$50 million a year (net of savings).¹⁶⁵ On several occasions in the 104th Congress, the sponsors of major reform legislation modified their proposals before they reached the floor in order to avoid a point-of-order objection under the UMRA.¹⁶⁶

¹⁶³ Walter J. Oleszek, *Congressional Procedures and the Policy Process* 127 (3d ed. 1989) (“In recent Congresses, [the] Rules [Committee] has granted blanket waivers of all points of order against pending legislation.”); Charles Tiefer, *Congressional Practice and Procedure* 285-91 (1989) (“Waiver provisions may [say] . . . that all points of order are waived for the whole bill.”); Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 Cal. L. Rev. 593, 618, n.161 (1988) (noting how the House of Representatives has waived points of order established in the Congressional Budget and Impoundment Control Act of 1974).

¹⁶⁴ See, e.g., 2 U.S.C. § 658e(a) (“It shall not be in order in the House of Representatives to consider a rule or order that waives” the point-of-order mechanism established in the Unfunded Mandates Reform Act). See also Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. Kan. L. Rev. 1113, 1165 (1996) (noting that such a provision is “unusual” but “important because it empowers members of the House who want to force a separate vote on an unfunded mandate by eliminating one way by which such a vote can be circumvented”). Bicameralism can also help prevent evading a point-of-order mechanism. If one House of Congress is willing to waive a point-of-order requirement, as the House of Representatives so often does, the other House must also follow suit. And the House’s waiver might provoke the Senate to reject the bill entirely. See, e.g., Jeremy Bentham, *Political Tactics* 26 (“This is true: but a single assembly may have the best rules, and disregard them when it pleases. . . . If there are two assemblies, the forms will be observed; because if one violate them, it affords a legitimate reason to the other for rejection of everything presented to it after such suspicious innovation.”).

¹⁶⁵ See Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48.

¹⁶⁶ See, e.g., Paul L. Posner, *Unfunded Mandates Reform Act: 1996 and Beyond*, 27 J. of Federalism 53, 56-59 (1997) (describing how the Unfunded Mandates Reform Act induced legislators to modify bills that proposed telecommunications reform, immigration reform, and securities reform before they reached the floor in order to avoid a point-of-order objection); *id.* at 57 (noting that the “primary impact” of the Unfunded Mandates Reform Act came from its “effect as a deterrent to mandates during the drafting and early consideration of legislation. Sponsors of legislation feared that their carefully crafted coalitions might fall apart, if faced with a point-of-order vote on the floor of either chamber.”). See also Elizabeth Garrett, *Accounting for the Federal Budget and Its Reform*, 41 Harv. J. on Legis. 187, 195 (2004) (describing how lawmakers enact expiring tax cuts rather than permanent tax cuts to avoid point-of-order objections codified in the Senate’s “Byrd Rule”).

Point-of-order mechanisms would also induce Congress to re-enact prohibitions on extended military hostilities and warrantless electronic surveillance in its annual appropriations legislation, and consistently confront the President with legislation that reiterates the prohibitions in the framework statutes. If the President vetoes the legislation, he will have to bargain with Congress to get specific authorization or a waiver of the point of order. And if the President signs the legislation, it becomes more difficult for his lawyers to concoct a legal rationale to escape Congress's codified clear-statement regime. They would be unable to argue that the restrictions unconstitutionally "bind" future legislatures. When the contemporaneous Congress imposes these restrictions in statutes that the President signs, they cannot be fobbed off as unconstitutional dead-hand influences from a bygone Congress. The point-of-order device will also prevent executive-branch lawyers from resorting to their broad theories of "implied repeal" when it induces Congress's future legislation to explicitly prohibit military hostilities beyond 60 days or warrantless electronic surveillance. Statutes that might enable executive-branch lawyers to claim to exploit the last-in-time rule and claim implicit congressional "authorization" from vague or ambiguous statutory language would be subject to a point of order in both the House and Senate. The executive-branch legal arguments in the Kosovo and NSA surveillance memos put the onus on Congress to specifically negate a Presidential prerogative in future legislation; the point-of-order mechanism provides an institutional answer to that challenge.

The second advantage of the point-of-order device is that it would improve the likelihood of Congress enforcing its codified clear-statement regime against a recalcitrant executive. When Congress annually reaffirms statutory prohibitions on certain endeavors, a President that acts without specific congressional authorization will defy a statutory prohibition that the contemporaneous Congress has enacted, rather than a restriction imposed by a Congress from another era. That should give legislators more impetus to retaliate with the weapons in their constitutional arsenal, as the President's actions more directly threaten their institutional prerogative to legislate constraints on executive action. The point-of-order also reduces the transactions costs of enforcing the clear-statement regime against the executive, because it empowers a single legislator to insist that bills pending in Congress explicitly prohibit activities that lack specific congressional authorization,¹⁶⁷ and the appropriations process ensures that this opportunity will arise at least once a year. Any legislator, for example, could have objected to the 1999 Emergency Supplemental Appropriations Act on the ground that it financed activities related to the Kosovo hostilities without specifically authorizing the conflict or reiterating the statutory prohibitions in the War Powers Resolution. Such an objection would force an up-or-down roll-call vote in Congress on the discrete issue of whether to adhere to section 8(a)(1)'s clear-statement regime, rather than forcing anti-war legislators to vote on a bill that bundles provisions that they oppose with many others that they support.¹⁶⁸ This will leave Congress unable to finance unilateral Presidential

¹⁶⁷ See, e.g., Adrian Vermeule, *Submajority Rules: Forcing Accountability upon Majorities*, 13 J. Pol. Phil. 74, 79 (2005) (noting that submajority agenda-setting rules can be used to "force the majority to make a highly visible, ultimate substantive decision on a given question.").

¹⁶⁸ See, e.g., Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. Kan. L. Rev. 1113, 1165 (1996).

endeavors unless a majority in each House votes to override a point-of-order objection on that specific question, or unless every member in a chamber declines to raise a point of order to the appropriations legislation.

C

Point-of-order devices are commonplace in framework legislation that governs the federal budget process. For example, the Unfunded Mandates Reform Act of 1995 declares that “it shall not be in order” in the House or the Senate to consider certain legislation that imposes certain unfunded mandates on state and local governments.¹⁶⁹ The Senate’s “Byrd Rule” allows individual Senators to raise points of order against certain provisions in budget reconciliation bills that increase the deficit in future fiscal years.¹⁷⁰ And the Congressional Budget and Impoundment Control Act of 1974 and the Gramm-Rudman-Hollings legislation also employed point-of-order mechanisms to enforce budgetary precommitments.¹⁷¹ Without the point-of-order mechanisms, future Congresses could easily escape these framework statutes’ constraints by proposing and enacting legislation that exempts itself from these earlier-enacted restrictions. The point-of-order device empowers individual legislators to resist such efforts in future Congresses, and strengthens the precommitment in the framework statute.¹⁷²

But Congress has never included this type of mechanism to enforce its clear-statement requirements in national-security legislation. In these statutes, Congress codifies strongly worded clear-statement regimes that require Presidents to obtain specific congressional authorization for certain actions, but it fails to establish effective mechanisms to enforce them against future political actors. The clear-statement requirements become mere parchment barriers that executive-branch lawyers can evade with expansive theories of constitutional avoidance and implied repeal, while Congress acquiesces to Presidential actions that lack specific congressional authorization. Congress could enact stronger institutional enforcement mechanisms for its codified clear-statement regimes, but it does not do so, even as it continues to enact more narrow and explicit clear-statement requirements in its national-security legislation.¹⁷³

There are at least three possible explanations for the disparate precommitment strategies in Congress’s budgetary and national-security legislation. First, lawmakers may anticipate stronger future political pressures to deviate from budgetary precommitments. For this reason, they may believe that effective framework legislation requires them to include a point-of-order mechanism. But with national-security legislation, legislators may think that the point-of-order device is less necessary

¹⁶⁹ See 2 U.S.C. § 658d(a).

¹⁷⁰ See 2 U.S.C. § 644.

¹⁷¹ See, e.g., 2 U.S.C. § 633; The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037, § 201(b).

¹⁷² See also Elizabeth Garrett and Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 Duke L.J. 1277, 1326-1330 (2001) (advocating point-of-order mechanisms to allow individual members of Congress to raise constitutional objections to proposed legislation).

¹⁷³ See, e.g., FISA Amendments Act of 2008, Pub. L. No. 110-261, § 102(a); 42 U.S.C. § 2000dd(c).

because they predict, at the time they enact the legislation, that there will be fewer temptations for future political actors to deviate from the codified clear-statement regime.

A second explanation may be that legislators want the national-security precommitments to be weaker than the precommitments in the federal budget laws. Some legislators might believe that the deficit-control precommitments are more important to enforce than the clear-statement regimes in Congress's national-security framework statutes. They might want the clear-statement regimes in the War Powers Resolution and FISA to serve as "outlaw-and-forgive" regimes,¹⁷⁴ which provide an advisory caution against executive-branch unilateralism but leave room for congressional acquiescence if the President decides to proceed without specific authorization. Or legislators might enact the clear-statement requirements as a political show to placate constituents who are outraged over executive-branch abuses, without any genuine concern for enforcing them against future political actors.¹⁷⁵ This approach preserves legislators' ability to hurl credible accusations of lawbreaking when the President acts without specific congressional authorization, while allowing other legislators to avoid casting a transparent vote on whether to authorize or stop the President's supposedly unauthorized endeavors.¹⁷⁶

Finally, the President's influence in the legislative process may account for the dearth of effective enforcement mechanisms in Congress's national-security legislation. The President can shape legislation not only with his veto power but also with his ability to influence legislators, especially those who belong to his political party. Any proposal

¹⁷⁴ For criticism of outlaw-and-forgive regimes, see Eric A. Posner and Adrian Vermeule, *Should Coercive Interrogation be Legal?*, 104 Mich. L. Rev. 671, 694-697 (2006).

¹⁷⁵ See, e.g., John Hart Ely, *War and Responsibility* (1993); Harold Hongju Koh, *The National Security Constitution* 117, 123-133 (1990). See Hearings on War Powers After 200 Years before the Special Subcommittee On War Powers of the Senate Committee On Foreign Relations, 100th Cong., 2d Sess. 366 (1988) (testimony of former Sen. Thomas Eagleton) ("I came to the conclusion that Congress really didn't want to be in on the decisionmaking process as to when, how, and where to go to war. I came to the conclusion that Congress didn't really want to have its fingerprints on sensitive matters pertaining to putting our Armed Forces into hostilities."). See also Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers*, 27 Ark. L. Rev. 583, 600 ("The problem about Congress is simply this: Not only does it not govern, it does not want to govern.") (emphasis in original); Philip Kurland, *The Impotence of Reticence*, 1968 Duke L.J. 619, 636 ("As of now, however, Congress does not have the guts to stand up to its responsibilities. And the American electorate does not have the interest to see that Congress does so."); Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 Iowa L. Rev. 993, 1057 (2006) (noting that "[m]embers of Congress are aware that bright-line rules that mandate congressional intervention under certain circumstances are likely to expose them to unpredictable and considerable electoral risks").

¹⁷⁶ For example, numerous members of Congress who voted against legislation to specifically authorize the Kosovo hostilities passed off their vote for the 1999 Emergency Supplemental Appropriations Act as showing "support for our troops" rather than support for the President's policy. See, e.g., 145 Cong. Rec. H2815-07 at PIN? (Speaker Dennis Hastert) ("The issue is simple: Do you support our men and women in uniform as they defend America's interests . . .? Last week, the House spoke on the President's policies concerning the engagement in Kosovo, and clearly, the House had some misgivings about those policies. But today, let there be no mistake, the United States Congress stands with its soldiers, sailors, and airmen as they defend America." Similar posturing occurred during the Vietnam War, where members of Congress claimed that their votes for appropriations did not reflect their endorsement of the war itself. See, e.g., 111 Cong. Rec. 9497 (Sen. Albert Gore, Sr.); 112 Cong. Rec. 4382 (1966) (Sen. Clark).

to add meaningful enforcement mechanisms to the clear-statement requirements in Congress's national-security legislation would provoke resistance from the President and his allies in Congress. The President would be far less likely to oppose congressional efforts to establish point-of-order devices in the budgetary framework legislation.¹⁷⁷

The upshot is that Congress's national-security legislation has produced faint-hearted clear-statement regimes, which establish strongly-worded clear-statement requirements in framework legislation but omit a mechanism to enforce them against future political actors. This may represent a détente or compromise between the political branches, or an intentional choice by members of Congress. But the mechanisms of enforcement (if any) determine whether a codified clear-statement requirement will prevent the executive branch from inferring congressional "authorization" from vague or ambiguous legislation. Merely narrowing a codified clear-statement requirement, or amplifying the commands in Congress's framework legislation, as recent enactments and proposals have done, will do little to counter the executive branch's aggressive interpretive theories of constitutional avoidance or implied repeal, or the willingness of future legislators or courts to acquiesce to Presidential initiative.

CONCLUSION

Congress will frequently legislate clear-statement requirements in its national-security legislation. But executive-branch lawyers have a well-rehearsed stock of legal arguments that they use to evade them. Their broad theories of constitutional avoidance and implied repeal are irreconcilable with the Supreme Court's interpretive doctrines, but they enable the President to assert that his actions are legally justified and may embolden executive-branch officials and employees who might otherwise fear criminal liability or political reprisals. As a result, Presidents of both political parties continue to infer congressional authorization from vague or ambiguous statutory language, even in the teeth of codified clear-statement requirements in Congress's framework legislation. And Congress has been unwilling to force the executive to comply with its codified clear-statement regimes.

Recently-enacted legislation has imposed more narrow and explicit clear-statement regimes regarding electronic surveillance outside of FISA and detainee treatment. And many have proposed legislation that withholds funds from extended military hostilities or electronic surveillance that Congress has not specifically authorized. But these statutes and proposals do nothing to counter the executive branch's expansive theories of constitutional avoidance and implied repeal. Presidents will still

¹⁷⁷ One other possibility is that lawmakers might have underestimated the judiciary's inability or unwillingness to enforce the clear-statement requirements in statutes such as the War Powers Resolution and in FISA. See, e.g., *Campbell v. Clinton*, 203 F.3d 19, 20-24 (D.C. Cir. 2000); *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007). This may have some explanatory power for Congress's failure to include point-of-order devices in the 1970s legislation, but it doesn't explain Congress's failure to include them in the recently-enacted national-security legislation, such as the 2008 FISA Amendments and the 2005 Detainee Treatment Act.

attempt to claim congressional “authorization” from vague or ambiguous statutory language, and brush aside the tighter clear-statement requirements on the ground that they “bind future Congresses,” and that the ambiguous later-enacted statute “implicitly repeals” the codified clear-statement requirement. An effective clear-statement regime will need a mechanism that induces future Congress to specifically prohibit extended military hostilities, electronic surveillance outside of FISA, torture, and cruel, inhuman, or degrading treatment, in any future legislation that might be construed to implicitly authorize it.

A point-of-order mechanism would help precommit future legislators against enacting vague or ambiguous legislation that the executive might use to claim implicit congressional “authorization” for such actions. And it would improve the likelihood that future legislators will confront a President that acts without specific congressional authorization by withholding funding for such endeavors. Yet Congress has never established such a device in its national-security legislation, even though it enacts point-of-order mechanisms to enforce precommitments in framework legislation governing the federal budget process. Whatever the reasons for Congress’s unwillingness to establish a point-of-order enforcement mechanism for its codified clear-statement regimes in national-security law, no one should think that simply codifying more narrow or explicit clear-statement requirements will stop Presidents from continuing to infer congressional authorization from vague or ambiguous statutory language.