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Online Essay

WAR BY LEGISLATION: THE CONSTITUTIONALITY OF CONGRESSIONAL REGULATION OF DETENTIONS IN ARMED CONFLICTS[†]

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ABSTRACT—In this essay, Ford considers provisions of the 2016 National Defense Authorization Act (NDAA) which place restrictions on the disposition of detainees held in Guantánamo Bay. These provisions raise substantial separation of powers issues regarding the ability of Congress to restrict detention operations of the Executive. These restrictions, and similar restrictions found in earlier NDAAs, specifically implicate the Executive's powers in foreign affairs and as Commander in Chief. Ford concludes that, with the exception of a similar provision found in the 2013 NDAA, the restrictions are constitutional.

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INTRODUCTION

On October 22, 2015, President Obama exercised his veto power for just the fifth time to veto the 2016 National Defense Authorization Act (NDAA).[1] The NDAA sets out the annual budget and expenditures for the United States Department of Defense and specifies policies in connection with such expenditures. In his veto statement, the President objected to, among other issues, the provisions relating to detainees held at Guantánamo Bay.[2] The President wrote that the bill fails "to remove unwarranted restrictions on the transfer of detainees," and indeed "impose[s] more onerous ones."[3] This, President Obama argued, undermines the flexibility necessary to address the detainees at Guantánamo Bay, including making determinations regarding which "detainees [would] remain at Guantánamo . . . when and where to prosecute them . . . and when and where to transfer them consistent with our national security and our humane treatment policy."[4] When President Obama finally signed the bill into law, in a signing statement he again objected to "language that would reenact, and in some cases expand, restrictions concerning the detention facility at Guantánamo Bay."[5] This language, he maintained, may "violate constitutional separation of powers principles."[6]

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[1] Jordan Fabian, *Obama Vetoes Defense Bill*, THE HILL (Oct. 22, 2015, 4:26 PM), http://thehill.com/homenews/administration/257798-obama-vetoes-defense-bill [https://perma.cc/D9KD-EK4E].

[2] Message to the House of Representatives Returning Without Approval the National Defense Authorization Act for Fiscal Year 2016, 2015 DAILY COMP. PRES. DOC. 750 (Oct. 22, 2015).

[3] *Id.*

[4] *Id.*

[5] Statement on Signing the National Defense Authorization Act for Fiscal Year 2016, 2015 DAILY COMP. PRES. DOC. 843 (Nov. 25, 2015).

[6] *Id.*

While this might be dismissed as "just politics," the veto reflects real, ongoing constitutional issues. As Harold Koh recently wrote, the separation of powers issues presented by this bill and veto could "take us into largely uncharted constitutional territory."[7] Professor Koh concludes that presidential action contrary to these provisions "would stand even if challenged" based on the President's authority

> as Prosecutor-in-Chief to "determine when and where to prosecute [Guantánamo detainees], based on the facts and circumstances of each case and our national security interests," and as Diplomat-in-Chief and Commander-in-Chief to decide and arrange through negotiations "when and where to transfer them consistent with our national security and our humane treatment policy."[8]

Former White House officials Gregory B. Craig and Cliff Sloan echo Professor Koh's conclusions in an editorial.[9]

Professor Jack Goldsmith, however, takes issue with Professor Koh's conclusions, finding "the arguments for a comprehensive presidential disregard of the homeland transfer restrictions are much more challenging than Koh portrays."[10] Professor Marty Lederman comes to a similar conclusion, finding that "there's very little to be said for the merits of the constitutional argument [to disregard the restrictions]."[11] Other authors have written about specific aspects of the restrictions, including Professors Steve Vladeck[12] and Ingrid Wuerth.[13]

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[7] Harold Hongju Koh, *After the NDAA Veto: Now What?*, JUST SECURITY (Oct. 23, 2015, 11:46 AM), https://www.justsecurity.org/27028/ndaa-veto-what/ [http://perma.cc/56QC-AL4G].

[8] *Id.* (quoting Message to the House of Representatives Returning Without Approval the National Defense Authorization Act for Fiscal Year 2016, 2015 DAILY COMP. PRES. DOC. 750 (Oct. 22, 2015)).

[9] Gregory B. Craig & Cliff Sloan, *The President Doesn't Need Congress's Permission to Close Guantanamo*, WASH. POST (Nov. 6, 2015), https://www.washingtonpost.com/opinions/the-president-doesnt-need-congresss-permission-to-close-guantanamo/2015/11/06/4cc9d2ac-83f5-11e5-a7ca-6ab6ec20f839_story.html [https://perma.cc/Z2UG-D3AA] (concluding Article II of the Constitution gives President Obama "exclusive authority to determine the facilities in which military detainees are held").

[10] Jack Goldsmith, *A Weak Case for the Unconstitutionality of the Detainee Transfer Restrictions (and a Glance at the Bigger Picture),* LAWFARE (Oct. 26, 2015, 9:25 AM), https://lawfareblog.com/weak-case-unconstitutionality-detainee-transfer-restrictions-and-glance-bigger-picture [https://perma.cc/UK6D-6UNT].

[11] Marty Lederman, *The Insoluble Guantánamo Problem (Part Three: Executive Disregard of the GTMO-to-U.S. Relocation Prohibition Is Not a Solution),* JUST SECURITY (Nov. 13, 2015, 8:41 AM), https://www.justsecurity.org/27563/guantanamo-problem-remains-insoluble-part-three-executive-disregard-gtmo-restrictions-solution/ [https://perma.cc/LL7N-J8GX] (emphasis removed).

[12] Steve Vladeck, *The Bass-Ackwards Detainee Transfer Provision in the FY2016 NDAA*, JUST SECURITY (Oct. 1, 2015, 9:44 AM), https://www.justsecurity.org/26491/bass-ackward-detainee-transfer-provision-fy2016-ndaa/ [https://perma.cc/26BQ-NELC] (analyzing the general nature of the 2016 NDAA restrictions).

This Essay takes the position that, with one exception, the 2016 NDAA restrictions (and previous NDAA restrictions) do not violate separation of powers principles, despite the concerns stated in the President's signing statement. Part I provides background information on the NDAA and the provisions within the Act relating to Guantánamo detainees. Part II considers the threshold question of whether Congress can substantively legislate through appropriations and authorizations acts rather than standalone legislative acts. Finding that Congress can in fact legislate through appropriations and authorizations acts, the Essay then turns in Part III to the substantive issue of whether and to what extent Congress can limit the President's authority to conduct detention operations arising from an armed conflict. In doing so, Part III examines the legal bases for legislative and executive action, limits Congress can place on the executive power in this area, and executive action that the President has staked out as exceeding the limits placed on him by the Guantánamo provisions.[14] The Essay then concludes that, with one exception, the Guantánamo provisions enacted to date are likely within the scope of Congress's authority.

I. THE GUANTÁNAMO PROVISIONS

The 2016 NDAA contains several provisions related to Guantánamo detainees. Section 1031 prohibits the use of funds "to transfer, release, or assist in the transfer or release to or within the United States, its territories, or possessions" any non-U.S. citizen detained at Guantánamo Bay.[15] Section 1032 prohibits the use of funds to "construct or modify any facility in the United States" for the purpose of accepting a detainee from Guantánamo Bay without congressional authorization.[16] Section 1033 prohibits the release of detainees to certain countries.[17] Section 1034 prohibits the transfer of detainees to other countries without congressional approval.[18] Section 1040 requires that the Executive submit reports to Congress on the terms of any written agreements with foreign countries who accept Guantánamo Bay detainees.[19]

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[13] Ingrid Wuerth, *Detainee Transfer Restrictions and the Captures Clause of the U.S. Constitution*, LAWFARE (Oct. 28, 2015, 7:09 AM), https://www.lawfareblog.com/detainee-transfer-restrictions-and-captures-clause-us-constitution [https://perma.cc/9DT6-GH6Z] (discussing the Captures Clause's application to property, not people).

[14] This Essay collectively refers to the provisions discussed below as the "Guantánamo provisions."

[15] National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1031, 129 Stat. 726, 968 (2015).

[16] *Id.* § 1032.

[17] *Id.* § 1033.

[18] *Id.* § 1034 (limiting transfers to Libya, Somalia, and Syria).

[19] *Id.* § 1040.

These provisions—or provisions substantively indistinguishable therefrom[20]—first appeared in the Supplemental Appropriations Act of 2009.[21] At that time, President Obama did not execute a signing statement objecting to the provisions. Similar provisions arose again in the NDAA for Fiscal Year 2011, the NDAA for Fiscal Year 2013, and the NDAA for Fiscal Year 2015. In these latter instances, President Obama issued signing statements expressly objecting to the Guantánamo provisions.[22] With respect to all three bills, as well as the recently vetoed 2016 NDAA, the President argued that the provisions represented an unconstitutional intrusion upon his foreign affairs and Commander in Chief powers.

On the conduct of foreign affairs, the signing statement accompanying the 2011 NDAA provides an example of the President's concerns: the Executive "must have the ability to act swiftly and to have broad flexibility in conducting our negotiations with foreign countries."[23] With regard to congressional intrusion on the President's Commander in Chief powers, the signing statement to the 2012 NDAA discounts attempts to control the disposition of detainees as an intrusion "upon critical executive branch authority to determine when and where to prosecute Guantánamo detainees, based on the facts and the circumstances of each case and our national security interests."[24] Further, the signing statement concludes by finding the restrictions "hinder[] the executive's ability to carry out its military, national security, and foreign relations activities and . . . would, under certain circumstances, violate constitutional separation of powers principles."[25]

The 2013 NDAA contained similar provisions to which the President objected in another signing statement. Here, the restrictions were critically broadened to include limitations on the disposition of detainees at the

[20] A change in the 2016 NDAA of note is that the process for receiving congressional certification for a transfer has grown more onerous.

[21] Supplemental Appropriations Act of 2009, Pub. L. No. 111-32, § 319, 123 Stat. 1859, 1874–75 (2009).

[22] Statement on Signing the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, 2014 DAILY COMP. PRES. DOC. 945 (Dec. 19, 2014); Statement on Signing the National Defense Authorization Act for Fiscal Year 2013, 2013 DAILY COMP. PRES. DOC. 4 (Jan. 2, 2013); Statement on Signing the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, 2011 DAILY COMP. PRES. DOC. 10 (Jan. 7, 2011).

[23] Statement on Signing the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, 2011 DAILY COMP. PRES. DOC. 10 (Jan. 7, 2011).

[24] Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP. PRES. DOC. 978 (Dec. 31, 2011).

[25] *Id.*

detention facility in Parwan, Afghanistan.[26] Addressing the restrictions related to Afghanistan, the signing statement notes that:

> Decisions regarding the disposition of detainees captured on foreign battlefields have traditionally been based upon the judgment of experienced military commanders and national security professionals without unwarranted interference by Members of Congress. Section 1025 threatens to upend that tradition, and could interfere with my ability as Commander in Chief to make time-sensitive determinations about the appropriate disposition of detainees in an active area of hostilities. Under certain circumstances, the section could violate constitutional separation of powers principles.[27]

This dialogue reached its apogee in the President's veto of the 2016 NDAA. Echoing his earlier signing statements, the veto statement argues

> [t]he executive branch must have the flexibility, with regard to those detainees who remain at Guantánamo, to determine when and where to prosecute them, based on the facts and circumstances of each case and our national security interests, and when and where to transfer them consistent with our national security and our humane treatment policy.[28]

II. LEGISLATION THROUGH APPROPRIATION AND AUTHORIZATION ACTS

Before considering the substantive constitutional issues raised by the Guantánamo provisions, there exists the threshold issue of whether Congress can effect these detention directives through an appropriations or authorization bill. The Supreme Court has not addressed this issue head-on, but two of its decisions are helpful in this regard. In short, case law indicates that where Congress may not intrude on executive authority directly, it may also not so intrude through appropriation or authorization acts.

The Court first examined a similar issue in *United States v. Klein*,[29] a case arising in the aftermath of the Civil War. On December 8, 1863, President Lincoln issued the Proclamation of Amnesty and Reconstruction, which pardoned supporters of the Confederacy and offered full restoration of any property seized on the basis of Confederate support upon an oath of

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[26] National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 1025, 126 Stat. 1632, 1913 (2013).

[27] Statement on Signing the National Defense Authorization Act for Fiscal Year 2013, 2013 DAILY COMP. PRES. DOC. 4 (Jan. 2, 2013).

[28] Message to the House of Representatives Returning Without Approval the National Defense Authorization Act for Fiscal Year 2016, 2015 DAILY COMP. PRES. DOC. 750 (Oct. 22, 2015).

[29] 80 U.S. (13 Wall.) 128 (1872).

loyalty to the federal government.[30] The estate administrator for a decedent, who qualified under the pardon, petitioned the courts for the proceeds from the sale of cotton that had been confiscated from the decedent.[31] The Court of Claims awarded the proceeds to the estate and the Supreme Court affirmed the ruling after the government filed an appeal.[32] During the appeal, and in response to a similar Supreme Court case,[33] Congress passed a law that prohibited the introduction as evidence of the President's pardon in a claim action against the government.[34]

The Court struck down the new law, ruling that it infringed on "the constitutional power of the Executive."[35] Recalling the intention of the Constitution to establish coordinated but independent branches of government, the Court noted "the executive alone is intrusted [sic] the power of pardon; and it is granted without limit."[36] "[T]he legislature cannot change the effect of such a pardon," the Court continued, "any more than the executive can change a law."[37] This, then, is an example of an instance in which the judiciary barred Congress from invading a sphere of power exclusively reserved to the Executive.

The Court addressed a related issue almost eighty years later in *United States v. Lovett*.[38] There, the issue concerned a provision of an appropriations bill which provided that "no salary or compensation should be paid" to certain federal employees who had been indicted by the House Committee on Un-American Activities.[39] Affected employees challenged the bill as, alternatively, an unlawful bill of attainder, a due process violation, and an unconstitutional "encroachment on exclusive executive authority,"[40] since "the power to remove executive employees [is] a power not entrusted to Congress but to the Executive Branch of Government."[41]

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[30] Proclamation No. 11, 13 Stat. 737 (Dec. 8, 1863).

[31] *Klein*, 80 U.S. at 132.

[32] *Id.*

[33] *See* United States v. Padelford, 76 U.S. (9 Wall.) 531 (1870) (affirming an award of proceeds to a plaintiff who complied with the President's pardon requirements).

[34] *See* Act of July 12, 1870, ch. 251, 16 Stat. 230, 235 (1869–71) ("[N]o pardon or amnesty granted by the President, whether general or special, by proclamation or otherwise, nor any acceptance of such pardon or amnesty, nor oath taken, or other act performed in pursuance or as a condition thereof, shall be admissible in evidence on the part of any claimant in the court of claims as evidence in support of any claim against the United States . . . .").

[35] *Klein*, 80 U.S. at 147.

[36] *Id.*

[37] *Id.* at 148.

[38] 328 U.S. 303 (1946).

[39] *Id.* at 305, 308.

[40] *Id.* at 307.

[41] *Id.* at 306.

The Court struck down the bill as an unlawful bill of attainder.[42] While the Court did not rule on the separation of powers issue, they addressed two relevant arguments. First, they rejected the argument that the appropriations powers "are plenary and not subject to judicial review."[43] Second, the Court noted that Congress could not accomplish through an appropriations act that which they could not accomplish lawfully through an act of legislation.[44]

Read in conjunction, *Klein* and *Lovett* indicate that congressional appropriations and authorizations acts may raise the separation of powers concerns raised by the President in his veto statement. For the purposes of this Essay, this Part demonstrates that the Guantánamo provisions may be unconstitutional if their effect is to intrude on powers reserved to the Executive, albeit through appropriations and authorizations rather than as direct impediments to presidential actions.

III. DISCUSSION

In order to assess whether the Guantánamo provisions are substantively constitutional and what President Obama may do in response, it is essential to examine the interaction of constitutional powers and duties vested in the Executive and in Congress. This Part performs that analysis. Section A considers what constitutional provisions grant Congress authority to enact the Guantánamo provisions. Section B then sheds light on the authority vested in the President by Article II. Section C zeroes in on congressional and presidential authority for detention, and Section D closes the analysis by considering the consequences of the President acting contrary to congressional acts purporting to grant or limit detention authority.

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[42] *Id.* at 315.

[43] *Id.* at 307.

[44] *Id.* at 316–17 ("No one would think that Congress could have passed a valid law, stating that after investigation it had found [plaintiffs] 'guilty' of the crime of engaging in 'subversive activities,' defined that term for the first time, and sentenced them to perpetual exclusion from any government employment. Section 304, while it does not use that language, accomplishes that result. The effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule.' The Constitution declares that that cannot be done either by a State or by the United States." (footnote omitted)); *see also* Nat'l Fed'n of Fed. Emps. v. United States, 688 F. Supp. 671, 684 n.17 (D.D.C. 1988) ("Congress cannot accomplish that which by direct legislative action would be beyond its constitutional authority." (citing *Lovett*, 328 U.S. at 316)), *vacated sub nom.* Am. Foreign Serv. Ass'n v. Garfinkel, 490 U.S. 153 (1989); Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 255 (1991) (striking down a "'Board of Review' composed of nine Members of Congress and vested with veto power" over the Metropolitan Washington Airports Authority as an unconstitutional restriction on executive power).

A. The Basis of Authority for Legislative Action

If we accept the idea that "Congress cannot accomplish that which by direct legislative action would be beyond its constitutional authority,"[45] then, presumably, the converse would be also be true: What Congress can do through a lawful act of legislation it can do through an appropriations or authorization bill. In order to determine whether Congress lawfully enacted the Guantánamo authorization and appropriation provisions, then, the relevant inquiry is: What is the constitutional basis for direct congressional action on these issues?

The constitutional authority for the NDAA can be found in Article I, Section 8 of the Constitution. This foundational provision provides that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ."[46] Relevant to the Guantánamo detainee issue, however, Congress appears to be attempting not simply to fund the government, but rather to control the foreign affairs of the country. The Constitution contains scant direct support for any such congressional authority. In the area of foreign affairs generally, express congressional powers are limited to the declaration of war,[47] the regulation of commerce with foreign nations,[48] the advice and consent role in approving ambassadors,[49] and the spending power.[50]

In contrast, Congress finds myriad authorities specifically regarding defense-related legislation, including the power to "provide for the common Defence,"[51] "[t]o raise and support Armies,"[52] "[t]o provide and maintain a Navy,"[53] "[t]o make Rules for the Government and Regulation of the land and naval Forces,"[54] and "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."[55] Collectively, these authorities—taken together with the

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[45] *Nat'l Fed'n of Fed. Emps*, 688 F. Supp. at 684 n.17 (citing *Lovett*, 328 U.S. at 316).
[46] U.S. CONST. art. I, § 8, cl. 1.
[47] *Id.* art. I, § 8, cl. 11.
[48] *Id.* art. I, § 8, cl. 3.
[49] *Id.* art. II, § 2, cl. 2.
[50] *Id.* art. I, § 8, cl. 1.
[51] *Id.*
[52] *Id.* art. I, § 8, cl. 12.
[53] *Id.* art. I, § 8, cl. 13.
[54] *Id.* art. I, § 8, cl. 14.
[55] *Id.* art. I, § 8, cl. 11.

Necessary and Proper Clause[56]—create expansive powers regarding the military and, by extension, military affairs to include detention operations.

As early as 1800, in *Bas v. Tingy*, the Court found the Congress can declare war with a scope of their choosing.[57] The next year in *Talbot v. Seeman*, the Court found "[t]he whole powers of war being, by the constitution of the United States, vested in congress."[58] The Court reaffirmed the breadth of congressional powers over military affairs in *United States v. O'Brien*, where the Supreme Court found that "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."[59] Despite far-reaching endorsements of congressional powers to regulate the military, in practice Congress has rarely intervened in the conduct of detention on the battlefield.[60]

B. The Basis of Authority for Executive Action

Though broad and sweeping, congressional powers regarding military affairs are not plenary. As with congressional powers, there are ample constitutional sources of executive authority in this area.[61] Of the

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[56] *Id.* art. I, § 8, cl. 18 (Congress shall have the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[57] 4 U.S. (4 Dall.) 37, 43 (1800) (opinion of Chase, J.) ("Congress is empowered to declare a general war, or congress may wage a limited war . . . .").

[58] 5 U.S. (1 Cranch) 1, 28 (1801).

[59] 391 U.S. 367, 377 (1968); *see also* Chappell v. Wallace, 462 U.S. 296, 301 (1983) (affirming Congress's power to establish "the framework of the Military Establishment").

[60] *See generally* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) (discussing how the War Powers have been treated by the Executive and Legislature since 1789, and concluding that Congress has historically placed legislative restraints on the conduct of wars); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 712–20 (2008) (assessing the structural and historical reasons for the current debate over the President's assertion of a unilateral authority over the use of force); Christopher M. Ford, *From Nadir to Zenith: The Power to Detain in War*, 207 MIL. L. REV. 203, 204 (2011) (recognizing the tension between congressional and presidential power regarding the power to detain individuals on the battlefield).

[61] Beyond the specific constitutional provisions discussed below, some scholars have pointed to the textual construct of Article I and Article II and have argued the grant of powers in Article II are inherently permissive, whereas Article I only provides powers that are expressly granted. *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 256–57 (2001) ("Yet when one compares the introductory clauses of the first three Articles, the Article II Vesting Clause must be read as a grant of power. The Article I Vesting Clause explicitly indicates that Congress's legislative powers only extend to those powers 'herein granted.' The Article II Vesting Clause lacks such language, thereby suggesting that it may vest powers beyond those subsequently enumerated." (citation omitted)). This argument has been the subject of considerable debate. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) ("I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated."); Curtis A.

enumerated executive powers, the Commander in Chief power is by far the most compelling and relevant source for the President's authority to make key defense policy decisions. In *Fleming v. Page*, the Court held that "[a]s commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual . . . ."[62] The purpose of the Commander in Chief Clause is to "vest in the President the supreme command over all the military forces,—such supreme and undivided command as would be necessary to the prosecution of a successful war."[63] The Court reached a similar conclusion in *Reid v. Covert*, where it held that, "[i]n the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefront."[64] The Presidential Oath of Office, found in the Constitution, further affirms the role of the President as Commander in Chief; to wit, the President is required to "preserve, protect and defend the Constitution of the United States."[65]

A government brief in *Hamdi v. Rumsfeld* provides a neat synopsis of the President's Commander in Chief authority in the context of detentions in war time:

> The challenged exercise of authority falls within the President's core war powers, comes with the statutory authorization of Congress, and directly implicates vital national security interests in defending the Nation against an unprincipled, unconventional, and savage enemy. . . .
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> . . . .
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> . . . This case directly involves the President's core functions as Commander in Chief in wartime: the capture, detention, and treatment of the enemy and the collection and evaluation of intelligence vital to national security. Furthermore, the President here is acting with the added measure of the express statutory backing of Congress.[66]

Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 546 (2004) (While not endorsing the theory, the authors note the "textual difference [between Article I and Article II], usually bolstered with historical materials, has long undergirded the claim that the Article II Vesting Clause implicitly grants the President a broad array of residual powers not specified in the remainder of Article II.").

[62] 50 U.S. (9 How.) 603, 615 (1850).

[63] United States v. Sweeny, 157 U.S. 281, 284 (1895); *see also* Nordmann v. Woodring, 28 F. Supp. 573, 576 (W.D. Okla. 1939) ("[A]s Commander in Chief, the President has the power to employ the Army and the Navy in a manner which he may deem most effectual.").

[64] Reid v. Covert, 354 U.S. 1, 33 (1957).

[65] U.S. CONST. art. II, § 1, cl. 8.

[66] Brief for Respondents-Appellants at 9, 13–14, Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002) (No. 02-6895), 2002 WL 32728567 (citing Authorization for Use of Military Force, Pub. L. No. 107-

Undergirding all jurisprudence related to military affairs is a longstanding tradition of deference to the Executive over military affairs. In *Department of the Navy v. Egan*, the Supreme Court held that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."[67] Similarly, in *Youngstown*, Justice Jackson argued that he, as a member of the Court, "should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."[68]

Deference to the President's authority extends to areas beyond military and defense policy. The Executive has also long been regarded as paramount in the field of foreign affairs.[69] In *United States v. Curtiss-Wright Export Corp*., the Supreme Court famously—and controversially—found that the Executive's authority in foreign affairs represents the

> plenary and exclusive power of the President as *the sole organ* of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.[70]

While *Curtiss-Wright* has been roundly criticized for overstating the breadth of executive powers in foreign affairs,[71] other cases have supported

40, 115 Stat. 224 (2001) (granting the President authorization to use force against parties involved in the September 11, 2001 terrorist attacks); *Youngstown*, 343 U.S at 635–37 & n.2 (Jackson, J., concurring)).

[67] 484 U.S. 518, 530 (1988).

[68] *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring). *But see id.* at 645–46 (noting that when the President focuses his power domestically, the Court should not indulge the President in the same way).

[69] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 812 n.19 (1982) (noting that the conduct of foreign affairs is one of the "'central' Presidential domains").

[70] *Curtiss-Wright*, 299 U.S. at 320 (emphasis added)*; see also* United States v. Kuok, 671 F.3d 931, 939 (9th Cir. 2012) (citing *Curtiss-Wright* as authority for the proposition that the President is the sole organ in foreign affairs); United States v. Amirnazmi, 645 F.3d 564, 578–79 (3d Cir. 2011) (citing *Curtiss-Wright* as authority for the proposition that the courts broadly interpret Congress's grants of the foreign affairs power to the President); *cf.* Dames & Moore v. Regan, 453 U.S. 654, 661–62 (1981) (citing *Curtiss-Wright* and *Youngstown* in acknowledging the President's role in foreign affairs, but discussing the difficulty of making widely applicable rules of executive power in the foreign relations context).

[71] *See, e.g.*, Zivotofsky v. Kerry, 135 S. Ct. 2076, 2115 (2015) (Roberts, C.J., dissenting) ("The expansive language in *Curtiss-Wright* casting the President as the 'sole organ' of the Nation in foreign affairs certainly has attraction for members of the Executive Branch. . . . But our precedents have never accepted such a sweeping understanding of executive power."); Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 379–80 (2000) (citing MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 18–34 (1990); HAROLD HONGJU KOH, THE

the idea that the conduct of foreign affairs is one of the "'central' Presidential domains."[72]

C. Congressional Limits on the Power to Detain

As the dispute over the Guantánamo provisions illustrates, there is fundamental disagreement between the branches regarding the nature and breadth of authority in the area of detentions. In *Youngstown Sheet & Tube v. Sawyer*, the Supreme Court famously examined overlapping executive and legislative authorities in the context of a national security issue. There, Justice Robert Jackson's concurring opinion—widely regarded as the definitive statement on the separation of powers between the President and Congress—articulates three situations in which the President may act, ranging from actions consistent to those inconsistent with legislative action.[73] This framework is useful for assessing which branch reigns supreme when Congress and the President conflict over matters of national defense and foreign affairs.

What authority then does the Executive have with regard to detention operations generally? There is no constitutional provision specifically regarding the authority to detain during armed conflict. Where the Court has addressed the issue, they have simply found that seizure and detention of enemy combatants in armed conflict is an "important incident to the conduct of war."[74] Some argue that, in such circumstances, war-related powers "not granted exclusively to Congress are vested concurrently with the President and Congress, meaning that either can exercise such

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NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 94 (1990); Jack L. Goldsmith, *Federal Courts, Foreign Affairs and Federalism*, 83 VA. L. REV. 1617, 1659–61 (1997) (detailing the critics of *Curtiss-Wright*).

[72] *Harlow*, 457 U.S. at 812 n.19; *see also Egan*, 484 U.S. at 529; Mitchell v. Forsyth, 472 U.S. 511, 540 (1985) (citing *Harlow* with approval); Goldsmith, *supra* note 71, at 1684 ("Foreign relations is (and is perceived to be) the President's responsibility.").

[73] *Youngstown*, 343 U.S. at 635–37 (Jackson, J., concurring). First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635. The second category includes situations where "the President acts in absence of either a congressional grant or denial of authority." *Id.* at 637. In these situations, the President is acting in a "zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* The third situation is where "the President takes measures incompatible with the expressed or implied will of Congress." *Id.* In this situation the President's "power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.*

[74] *Ex parte* Quirin, 317 U.S. 1, 28–31 (1942); Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'") (quoting *Ex parte* Quirin, 317 U.S. at 28, 30).

authorities."[75] However, under Justice Jackson's framework in *Youngstown*, where Congress has acted, the President "may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."[76]

With regard to detentions in armed conflicts, Congress has taken a number of legislative actions. These include the Detainee Treatment Act,[77] the Military Commissions Act,[78] and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act).[79] Of these Acts, only two approach anything close to the directives found in the Guantánamo provisions. The first is the Detainee Treatment Act, a short piece of legislation prohibiting the "cruel, inhuman, or degrading treatment or punishment" of any "individual in the custody or under the physical control of the United States Government."[80] This is the full extent of its directives regarding the disposition of detainees. Notably, the Act specifically defers to the Executive on the tactical handling of the detainees: "[n]o person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation," a document which is written and promulgated by a component of the Department of Defense.[81]

The other legislative action arguably approaching control over detainees is the PATRIOT Act. There, at least one court found that "Congress carefully stated how it wished the Government to handle aliens believed to be terrorists who were seized and held within the United States."[82] In reality, however, the relevant provisions are not onerous; they only direct that certain individuals be charged within certain periods of

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[75] Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 304 (2008).

[76] Hamdan v. Rumsfeld, 548 U.S. 557, 593 n.23 (2006) (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)); s*ee also* Brown v. United States, 12 U.S. (8 Cranch) 110, 147 (1814) ("If, indeed, there be a limit imposed as to the extent to which hostilities may be carried by the executive, I admit that the executive cannot lawfully transcend that limit . . . .").

[77] Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. X, 119 Stat. 2739 (2005).

[78] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

[79] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).

[80] Detainee Treatment Act § 1003(a).

[81] *Id.* § 1002(a) (emphasis added).

[82] Al-Marri v. Pucciarelli, 534 F.3d 213, 248 (4th Cir. 2008) (en banc), *vacated as moot sub nom.* al-Marri v. Spagone, 555 U.S. 1220 (2009) (mem.).

time[83] and limit indefinite detentions.[84] These provisions are not nearly as directive as the Guantánamo provisions. For example, while the PATRIOT Act requires the Attorney General to maintain custody over certain detainees, it does not direct where they are to be held or otherwise restrict their movement.[85] The Guantánamo provisions, on the other hand, impose explicit restrictions and requirements on the movement of detainees.[86] Further, the PATRIOT Act concerned *domestic* law enforcement, while the Guantánamo provisions deal with individuals captured *overseas* in an armed conflict. Thus, the PATRIOT Act is not a perfect analogue for the Guantánamo provisions.

Despite these varied legislative actions relating to detentions, both Presidents Obama and Bush relied on the Authorization for Use of Military Force (AUMF), and the Authorization for Use of Military Force Against Iraq[87]—legislation which does not reference detention.[88] Still, this reading remains unchallenged.

D. Executive Action Contrary to the Guantánamo Provisions

As this Essay has shown thus far, while Congress has not legislated on the great majority of the general conduct of detention operations, it has unequivocally expressed opposition to certain actions regarding the movement or transfer of detainees from Guantánamo Bay.[89] Any action contrary to these provisions would place the President firmly on the far end of Justice Jackson's spectrum of authority. Here, presidential "power is at its lowest ebb" and requires the President to act "upon his own constitutional powers."[90] What inherent powers, then, does the President possess to make determinations regarding the disposition of detainees

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[83] PATRIOT Act § 412.

[84] *Id.*

[85] *Id.*

[86] National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, §§ 1031–36, 1040, 129 Stat. 726, 968–73, 975 (2015).

[87] Brief for Respondents-Appellants at 14, Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002) (No. 02-6895), 2002 WL 32728567 (citing Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)) (Bush Administration argument that "the President here is acting with the added measure of the express statutory backing of Congress"); Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 1, *In re* Guantanamo Bay Detainee Litig., Misc. No. 08-442 (TFH) (D.D.C. Mar. 13, 2009) (Obama Administration noting that "[t]he United States bases its detention authority as to such persons on the Authorization for the Use of Military Force").

[88] Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002); Authorization for Use of Military Force.

[89] *See supra* notes 15–19 and accompanying text.

[90] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

captured in an armed conflict? In his various signing statements, President Obama eschews claims of inherent or unitary authority to act in the area of detention in foreign combat. Instead, he argues more broadly that the Guantánamo provisions intrude on two aspects of executive power: powers related to the conduct of foreign affairs and powers related to the conduct of armed conflict. This Section reviews those arguments in turn.

1. The Conduct of Foreign Affairs—The President has argued that the Executive "must have the ability to act swiftly and to have broad flexibility in conducting our negotiations with foreign countries."[91] Two provisions in the 2016 NDAA implicate this concern: Section 1033 prohibits the release of detainees to certain countries,[92] and Section 1034 prohibits the transfer of detainees to other countries without congressional approval.[93]

It is self-evident that transferring individuals captured in armed conflict to various countries implicates foreign affairs. As of the date of this Essay, the U.S. has transferred several hundred detainees to fifty-seven countries.[94] Each move requires the identification of a transfer country, acquiescence by that foreign government, and negotiations between the United States and the transfer government regarding responsibilities for each government regarding the transfer. A recent move of ten Yemeni citizens to Oman, for instance, was the culmination of a multi-phased agreement that took more than a year to negotiate.[95] Further, the 2016 NDAA implicates the President's foreign affairs power more than past versions of the legislation; it contains new provisions that require the Secretary of Defense to certify that the transfer is "in the national security interests of the United States."[96]

In debates over the preeminence of the Executive over Congress in the field of foreign affairs, *Curtiss-Wright* is the natural starting point. As noted above, the case has been widely criticized for too broadly

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[91] Statement on Signing the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, 2011 DAILY COMP. PRES. DOC. 10 (Jan. 7, 2011).

[92] National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1033, 129 Stat. 726, 968–69 (2015) (banning transfers to Libya, Somalia, and Syria).

[93] *Id*. § 1034.

[94] Andrei Scheinkman et. al., *The Guantanamo Docket: Transfer Countries*, N.Y. TIMES, http://projects.nytimes.com/guantanamo/transfer-countries (last updated Jan. 21, 2016) [https://perma.cc/VE9B-EKNJ].

[95] Adam Goldman & Missy Ryan, *Issue of Where to Move Guantanamo Detainees Threatens Closure Plan*, WASH. POST (Aug. 10, 2015), https://www.washingtonpost.com/world/national-security/guantanamo-closure-plan-suffers-setback-over-us-site-for-detainees/2015/08/10/1540c2e0-3f68-11e5-9561-4b3dc93e3b9a_story.html [https://perma.cc/3CDN-N948].

[96] National Defense Authorization Act for Fiscal Year 2016 § 1034(b)(1).

characterizing the President's powers.[97] The Supreme Court recently reexamined *Curtiss-Wright* in *Zivotofsky v. Kerry* and concluded "*Curtiss-Wright* did not hold that the President is free from Congress' lawmaking power in the field of international relations."[98] Accepting, as some might still, that *Curtiss-Wright* and other cases stand for the proposition that the Executive enjoys a greater breadth of powers in foreign affairs vis-à-vis domestic affairs,[99] executive action must still "stem either from an act of Congress or from the Constitution itself."[100] Such action, furthermore, "is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue."[101]

In *Zivotofsky*, the Court upheld the Executive's actions concerning foreign affairs in the face of contradictory legislation. This case arose from the birth of the petitioner to U.S. citizens living in Jerusalem.[102] Zivotofsky's mother sought to have "Israel" listed as the place of his birth on his passport and the consular report of birth abroad in accordance with the Foreign Relations Authorization Act, Fiscal Year 2003. The Act states that "[f]or purposes of the registration of birth . . . or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel."[103] This provision, however, runs counter to long-standing U.S. policy concerning the status of Jerusalem. In a signing statement, President Bush noted that this section "impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and . . . to formulate the position of the United States, speak for the

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[97] *See* sources cited *supra* note 71.

[98] 135 S. Ct. 2076, 2090 (2015). This case is not to be confused with *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), in which the Court found the political question doctrine did not bar judicial consideration of the issue.

[99] *See, e.g.*, Medellin v. Texas, 552 U.S. 491, 523–24 (2008) ("The United States maintains that the President's constitutional role 'uniquely qualifies' him to resolve the sensitive foreign policy decisions that bear on compliance with an ICJ decision and 'to do so expeditiously.'. . . We do not question these propositions." (citation omitted)); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767 (1972) (plurality opinion) ("[T]his Court has recognized the primacy of the Executive in the conduct of foreign relations quite . . . emphatically . . . ."); *see also* United States v. Kuok, 671 F.3d 931, 939 (9th Cir. 2012) (citing *Curtiss-Wright* as authority for the proposition that the President is the sole organ in foreign affairs); United States v. Amirnazmi, 645 F.3d 564, 578–79 (3d Cir. 2011) (citing *Curtiss-Wright* as authority for the proposition that the courts broadly interpret Congress's grants of foreign affairs power to the President).

[100] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

[101] *Zivotofsky*, 135 S. Ct. at 2090.

[102] *Id.* at 2083.

[103] Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002).

Nation in international affairs, and determine the terms on which recognition is given to foreign states."[104]

The Court found that "judicial precedent and historical practice teach that it is for the President alone to make the specific decision of what foreign power he will recognize as legitimate."[105] In contrast to the recognition of foreign governments at issue in *Zivotofsky*, there is no case law on point and no historical claims by the Executive—save for the Bush Administration[106]—over the inherent authority to conduct detention operations. Given the lack of case law and definitive historical practice, it is impossible to conclude that the power to conduct detention operations as a function of the foreign affairs power "resides in the President alone."[107]

2. The Conduct of Armed Conflict—President Obama's second argument concerns the "executive's ability to carry out its military, national security, and foreign relations activities."[108] The Bush Administration expressly and consistently argued that this power included an inherent power to detain,[109] a power the Administration noted was "at the heart of [the President's] constitutional powers as Commander in Chief."[110] In *Hamdi v. Rumsfeld*, the Court declined to address these claims, agreeing instead "with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF."[111] The Obama Administration, too, has relied exclusively on the authority found in the AUMF.[112]

The Court's failure to rule on whether the Executive has inherent authority to detain does not, of course, preclude the existence of such authority. As opposed to President Obama's claim regarding his conduct of foreign affairs, where there was no historical or judicial precedent, here

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[104] Statement on Signing the Foreign Relations Act, Fiscal Year 2003, 38 WEEKLY COMP. PRES. DOC. 1658, 1659 (Sept. 30, 2002).

[105] *Zivotofsky*, 135 S. Ct. at 2090.

[106] *See, e.g.*, Gherebi v. Obama, 609 F. Supp. 2d 43, 53 n.4 (D.D.C. 2009) (citing Hamdi v. Rumsfeld, 542 U.S. 507, 516–17 (2004) (plurality opinion) and al-Marri v. Pucciarelli, 534 F.3d 213, 221 (4th Cir. 2008), *vacated as moot sub nom.* al-Marri v. Spagone, 555 U.S. 1220 (2009)) (noting that the Bush Administration has argued that it "could detain individuals pursuant to the President's authority as Commander-in-Chief.").

[107] *Zivotofsky*, 135 S. Ct. at 2094.

[108] Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP. PRES. DOC. 978 (Dec. 31, 2011).

[109] *See* cases cited *supra* note 106.

[110] Brief for the Petitioner at 27, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027), 2004 WL 542777, at *27.

[111] *Hamdi*, 542 U.S. at 517.

[112] *Gherebi v. Obama*, 609 F. Supp. 2d 43, 53 (D.D.C. 2009) (noting that the Obama Administration "clarified that it believes that its detention authority arises solely from the AUMF").

there is substantial historical and judicial support for the existence of some inherent detention authority in the Executive's Commander in Chief powers. The Executive has conducted foreign detention operations absent legislative action in every armed conflict in this nation's history.[113] This includes establishing the policies of whom, when, and where detainees would be taken as well as the issues regarding the disposition of detainees.

As the Court noted elsewhere in *Hamdi*, "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war."[114] The President's role in waging war and, by extension, conducting detention operations, is extensive. William Howard Taft once wrote that the Commander in Chief Clause precludes Congress from "order[ing] battles to be fought on a certain plan" or "direct[ing] parts of the army to be moved from one part of the country to another."[115] This passage echoes Chief Justice Chase's concurring opinion in *Ex parte Milligan*, where he wrote that Congress's war powers extended "to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief."[116] Similarly, the Supreme Court held in *Fleming v. Page* that "[a]s commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual."[117] These holdings all highlight that the Commander in Chief Clause seeks to create a "supreme and undivided command."[118]

This is, of course, a pragmatic concern, as successful military operations required unified command, speed, decisiveness, and secrecy; traits which lend themselves, as Alexander Hamilton noted in *The Federalist Papers*, to a singular executive rather than a legislative body.[119]

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[113] *See* Ford, *supra* note 60, at 204; *see also* Barron & Lederman, *supra* note 60, at 977 (noting that during the War of 1812 "Congress did pass several statutes dealing with the specific issue of prisoners of war, authorizing the President to make such regulations and arrangements for their safekeeping and support 'as he may deem expedient,' but only 'until the same shall be otherwise provided for by law'" (citation omitted)).

[114] *Hamdi*, 542 U.S. at 519.

[115] William Howard Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 610 (1916).

[116] 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring).

[117] 50 U.S. (9 How.) 603, 615 (1850).

[118] United States v. Sweeny, 157 U.S. 281, 284 (1895).

[119] THE FEDERALIST NO. 70, at 355 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("Decision, activity, secrecy, and despatch [sic] will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.").

Then-Attorney General Robert Jackson reached a similar conclusion in a 1941 memorandum, finding that

> the President's responsibility as Commander in Chief embraces the authority to command and direct the armed forces in their immediate movements and operations designed to protect the security and effectuate the defense of the United States. . . . [T]his authority undoubtedly includes the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country.[120]

Looking to both case law and past practice, the Executive exercises broad control over the tactical conduct of hostilities including the conduct of detention operations on the battlefield. Where, however, aspects of the armed conflict move away from the battlefield, "[t]he exigencies which have required military rule on the battlefront are not present in areas where no conflict exists."[121] Thus, the Executive's authority over detention operations diminishes as those operations move further and further from the battlefield.

Where Congress has not acted on the issue, the President possesses broad authority to conduct detention operations, because his authority is at its maximum. Where Congress has acted, the constitutionality of presidential action is contingent on the nature of the actions. Thus, a legislative act requiring the detention of a particular individual on a battlefield would be unconstitutional because it would intrude too far into the President's power to exercise command over battlefield decisions. Conversely, legislation restricting the movement of detainees outside the parameters of the hot battlefield would likely be constitutional.

Applying these principles to the Guantánamo provisions, Congress acted within its authority to limit the expenditure of money to transfer detainees into the United States. In the same vein, Congress likely exceeded its authority in the 2013 NDAA by including provisions detailing detention activities on the foreign battlefield. Here, the President's authority is exclusive.

CONCLUSION

More than twenty years ago, Chief Justice Burger warned that "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must

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[120] Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58, 61–62 (1941).

[121] Reid v. Covert, 354 U.S. 1, 35 (1957) (plurality opinion).

be resisted."[122] The Guantánamo provisions represent a cluster of such pressures. The situation is made markedly more complex by lack of judicial decisions on point and a lack of congressional guidance to the President in the Authorization for Use of Military Force, which expressly discusses detention operations. Plainly, the Executive's authority over the conduct of hostilities is vast. Where Congress has expressly spoken, however—particularly with regard to activities occurring away from the battlefront—the Executive's authority is diminished. Here, with the notable exception of the provisions in the 2013 NDAA relating to detainees in Afghanistan, the Guantánamo provisions likely do not unconstitutionally invade the President's authority over foreign affairs and armed conflict, and thus, despite raising complex separation of powers questions, are likely constitutional.

[122] INS v. Chadha, 462 U.S. 919, 951 (1983).