

# Challenging the Executive: The Constitutionality of Congressional Regulation of the President's Wartime Detention Policies

## I. INTRODUCTION

The war on terrorism has involved several clashes on the political home front, with the President and Congress asserting conflicting policies. A recent example is Congress's effort to deny funding to transfer detainees from Guantánamo Bay to the United States for prosecution and to place strict, almost impossible conditions on the President's use of funds to release or transfer detainees to other countries.

In the study of national security law, especially during the war on terrorism, "the lion's share of academic attention" has focused on the scenario reflected in Justice Jackson's *Youngstown* Category II analysis, which examines the President's inherent authority to act in the absence of congressional authorization.<sup>1</sup> Yet *Youngstown* Category III scenarios, where presidential action conflicts with congressional authorization, are "now at the forefront of the most important clashes between the political branches" and deserve more careful attention.<sup>2</sup> Most studies using the *Youngstown* framework focus on the scope of presidential power—either in absence or in contravention of congressional authorization.<sup>3</sup> However, the *Youngstown* framework is also relevant to a crucial correlative question: When are congressionally imposed restrictions on the

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1. 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, 693 (2008) [hereinafter Barron & Lederman, *Framing the Problem*]; see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (devising three categories with which to analyze the scope of presidential foreign affairs power).

2. Barron & Lederman, *Framing the Problem*, *supra* note 1, at 693.

3. See, e.g., Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 CONST. COMMENT. 87, 124–45 (2002) (arguing that courts and scholars improperly focus on interpreting congressional intent when the real issue is constitutional interpretation of the President's powers). There are, of course, exceptions to this approach. See generally, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) [hereinafter, Barron & Lederman, *A Constitutional History*] (analyzing the history of congressional involvement in war to determine the scope of presidential war powers).

President unconstitutional? This question arises regardless of whether the President eventually acts in contravention of the will of Congress.

Louis Fisher has warned that “[t]he precise jurisdictions and fields of operation for Congress and the President will always elude us.”<sup>4</sup> Regardless of the difficulty in reaching an ultimate conclusion, a comprehensive framework is necessary for evaluating the scope of Congress’s constitutional authority when Congress seeks to limit the President’s wartime or foreign affairs authority. This Comment argues that Congress may constitutionally constrain the President as long as the legislative action does not violate a mandatory provision or express restriction of the Constitution and does not impede on an exclusive presidential power. Therefore, an appropriate analytical framework should involve the following considerations: (1) mandatory provisions of the Constitution; (2) express restrictions on the authority of Congress or the federal government; (3) the scope of the relevant constitutional grants of power for each branch; and (4) whether a particular power is exclusively lodged in one branch. As the following discussion will suggest, the constitutionality of a particular restriction is a highly contextual analysis that depends on the specific powers in question. This Comment argues that under this framework, the recent restrictions on the President’s authority to prosecute detainees and the restrictions on the transfer of detainees to other countries are constitutional.

This Comment will proceed as follows: Part II will present the problem of the conflicting presidential and congressional policies regarding Guantánamo Bay. Part III will present a framework for analyzing the constitutionality of congressional restrictions. Part IV will apply this framework by looking at the constitutional sources and scope of presidential and congressional authority over wartime detention and foreign negotiations. Part V will conclude.

## II. PRESIDENTIAL & CONGRESSIONAL GUANTÁNAMO BAY POLICY

President Obama faces growing congressional resistance to his detention policies. A brief discussion of the political climate sets the stage for a discussion of the most recent restrictions Congress has placed on the President.

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4. LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 291 (5th ed. rev. 2007) [hereinafter FISHER, CONSTITUTIONAL CONFLICTS].

*A. Political Climate*

While campaigning for the presidency, Barack Obama promised that, once in office, he would close the detention facilities at Guantánamo Bay, Cuba.<sup>5</sup> The Bush Administration had used the detention center to hold suspected terrorists away from the battlefield but outside the reach of the United States judicial system.<sup>6</sup> That policy brought strong criticism by political opponents and international observers.<sup>7</sup> Within days of taking office, President Obama declared that he would close the facility within one year, by January 22, 2010.<sup>8</sup>

Although the closure of Guantánamo Bay is the hallmark of President Obama's detention policy, other aspects of the policy include reassessment of the basis for detention of each detainee, possible release or relocation, trial by military commission, and, for a select few, prosecution in federal court.<sup>9</sup> These plans have faced several hurdles—including significant public opposition to relocating detainees to the United States—that have prevented the Administration from reaching its goal of closing Guantánamo.<sup>10</sup>

In response to the public outcry, Congress cut off funds for the release or transfer of Guantánamo Bay detainees into the United States. Congress placed funding restrictions in six separate laws in 2009 and 2010.<sup>11</sup> Each law made exceptions that allowed the

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5. See, e.g., Steven Lee Myers, *Bush Decides to Keep Guantánamo Open*, N.Y. TIMES, Oct. 21, 2008, at A16 (contrasting the position of President Bush on Guantánamo Bay with the positions of presidential candidates Sen. Barack Obama and Sen. John McCain), available at <http://tinyurl.com/NYTimesGitmo>.

6. MICHAEL JOHN GARCIA ET AL., CONG. RESEARCH SERV., R40139, CLOSING THE GUANTANAMO DETENTION CENTER: LEGAL ISSUES 2 (Mar. 28, 2011).

7. See, e.g., Warren Hoge, *Investigators for U.N. Urge U.S. to Close Guantánamo*, N.Y. TIMES, Feb. 17, 2006, at A6, available at <http://www.nytimes.com/2006/02/17/international/17nations.html?ref=guantanamoabaynavalbasecuba>.

8. GARCIA ET AL., *supra* note 6, at 3; Exec. Order No. 13492, 3 C.F.R. 203, 205 (2009).

9. Exec. Order No. 13492, 3 C.F.R. 205–06.

10. According to one poll, seventy-four percent of respondents opposed relocating Guantánamo Bay detainees to prisons in the respondents' home states. Jeffrey M. Jones, *Americans Oppose Closing Gitmo and Moving Prisoners to U.S.*, GALLUP (June 3, 2009), <http://tinyurl.com/3pxzk9k>. See also GARCIA ET AL., *supra* note 6, at 3–5 (discussing congressional opposition to President Obama's policies).

11. See MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R40754, GUANTANAMO DETENTION CENTER: LEGISLATIVE ACTIVITY IN THE 111TH CONGRESS 3–4 (Jan. 13, 2011) (identifying laws with restrictions on Guantánamo Bay releases and transfers). The restrictions appeared both in legislation authorizing and appropriating funds. *Id.* Whether funding

President to transfer detainees to the United States “for the purposes of prosecuting such individual, or detaining such individual during legal proceedings.”<sup>12</sup> Despite this allowance, the laws contained some restrictions on transfers for the purpose of prosecution. For example, the first law to impose these restrictions only allowed the President to transfer detainees to the United States forty-five days after submitting to Congress a classified “plan” for each detainee.<sup>13</sup> The plan had to include a national security risk assessment, steps to mitigate that risk, a cost analysis, and a statement of the “legal rationale and associated court demands.”<sup>14</sup> The law also required the President to notify the governor of the receiving state two weeks before the transfer and certify “that the individual poses little or no security risk.”<sup>15</sup> While subsequent laws added a few elements to the reporting requirement, they did not significantly increase the burden on the President.<sup>16</sup> The only restriction placed on releasing or transferring detainees to other countries was a reporting requirement: fifteen days before the move, the President had to notify Congress of the detainees’ identities and destinations and provide risk assessments, risk mitigation plans, and the “terms of any agreement”—including any financial agreement—with the receiving countries.<sup>17</sup>

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restrictions appear in authorization or appropriation legislation is irrelevant to whether such restrictions are a valid restraint on the executive. See Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 839–45 (1994) (arguing that there is no constitutional difference among appropriations, authorizations, and other substantive legislation).

12. Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, § 14103(c), 123 Stat. 1859, 1920 (2009).

13. *Id.* § 14103(d).

14. *Id.*

15. *Id.* § 14103(d)(5).

16. See, e.g., Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 552(d)(1), (2), 123 Stat. 2142, 2178–79 (2009) (adding an assessment “of the risk that the individual might instigate an act of terrorism” if transferred, or “that the individual might advocate, coerce, or incite violent extremism, ideologically motivated criminal activity, or acts of terrorism, among inmate populations at incarceration facilities”); see also MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R40754, GUANTANAMO DETENTION CENTER: LEGISLATIVE ACTIVITY IN THE 111TH CONGRESS 6–9 (Dec. 9, 2010) (discussing the restrictions and reporting requirements in the various laws).

17. Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 552(e), 123 Stat. at 2178–79. Some transfers have involved promises of increased foreign aid to the receiving country. See Charlie Savage & Andrew W. Lehren, *Cables Depict Coaxing by U.S. in Bid to Clear Guantánamo’s Prison*, N.Y. TIMES, Nov. 30, 2010, at A1, available at <http://www.nytimes.com/2010/11/30/world/americas/30gitmo.html>.

Two events occurred in late 2010 that provided the catalyst for Congress to take a more aggressive approach: the return of a verdict in the case of U.S. embassy bomber Ahmed Khalfan Ghailani, and the release of a report from the Director of National Intelligence (DNI) on recidivism rates among detainees released to other countries.

On November 17, 2010, a jury returned a verdict on the first Guantánamo Bay detainee prosecution in federal courts.<sup>18</sup> The jury found Ghailani guilty of one count of conspiracy to destroy government property; he was acquitted of the remaining 284 counts.<sup>19</sup> Key testimony that may have proved dispositive was found inadmissible because it had been obtained by coercive interrogation techniques.<sup>20</sup> The Justice Department and supporters of civilian trials for suspected terrorists hailed the guilty verdict as a victory for the Administration and a sign of the potential for further successful criminal prosecutions.<sup>21</sup> Critics saw it differently. They feared that the verdict came too close to letting a Guantánamo Bay detainee free on U.S. soil.<sup>22</sup>

Three weeks after the Ghailani verdict, the DNI released a report at the request of Congress which provided further fodder for the Administration's critics. The report declared that twenty-five percent of detainees released to other countries were suspected or confirmed to have "reengage[d] in terrorist or insurgent activities after transfer."<sup>23</sup> Furthermore, the report predicted that future releases

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18. Benjamin Weiser, *U.S. Jury Acquits Former Detainee of Most Charges*, N.Y. TIMES, Nov. 18, 2010, at A1, available at <http://www.nytimes.com/2010/11/18/nyregion/18ghailani.html?ref=nyregion>.

19. *Id.*

20. Charlie Savage, *Terror Verdict Tests Obama's Strategy on Trials*, N.Y. TIMES (Nov. 19, 2010), available at <http://www.nytimes.com/2010/11/19/nyregion/19detainees.html>.

21. *See id.*

22. *See id.*

23. DIRECTOR OF NATIONAL INTELLIGENCE, SUMMARY OF THE REENGAGEMENT OF DETAINEES FORMERLY HELD AT GUANTANAMO BAY, CUBA, (Dec. 7, 2010), [http://www.dni.gov/electronic\\_reading\\_room/120710\\_Summary\\_of\\_the\\_Reengagement\\_of\\_Detainees\\_Formerly\\_Held\\_at\\_Guantanamo\\_Bay\\_Cuba.pdf](http://www.dni.gov/electronic_reading_room/120710_Summary_of_the_Reengagement_of_Detainees_Formerly_Held_at_Guantanamo_Bay_Cuba.pdf). The report defines "terrorist or insurgent activities" as "planning terrorist operations, conducting a terrorist or insurgent attack against Coalition or host-nation forces or civilians, conducting a suicide bombing, financing terrorist operations, recruiting others for terrorist operations, arranging for movement of individuals involved in terrorist operations, etc." *Id.* The definition explicitly excludes "mere communications with individuals or organizations—including other former GTMO detainees—on issues not related to terrorist operations, such as reminiscing over shared experiences at GTMO, communicating with past terrorist associates about non-nefarious

would also result in at least some degree of recidivism.<sup>24</sup> When the report was released, it was instantly used as a talking point for critics of the Administration's detention policies.<sup>25</sup>

### *B. Tightening the Purse Strings*

The Ghailani verdict and the DNI report served as rallying cries for the President's opponents. Using its appropriations power, Congress determined to stop prosecutions and significantly tighten controls on the transfer and release of detainees to other countries. In the 2011 National Defense Authorization Act, Congress prohibited the use of any funds authorized under the Act "to transfer, release, or assist in the transfer or release [of Guantánamo Bay detainees] to or within the United States, its territories, or possessions . . ."<sup>26</sup> Unlike previous restrictions, however, this prohibition did not include an exception for prosecution.<sup>27</sup> While the Act does not explicitly prohibit prosecution, a blanket prohibition on transfer to the United States has the same effect—and was intended to do so.<sup>28</sup> Furthermore, the prohibition appears to restrict the executive branch as a whole, even though the provision is limited to Department of Defense funds. If the Department of Justice or another executive department were to transfer detainees, it would

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activities, writing anti-U.S. books or articles, or making anti-U.S. propaganda statements." *Id.*

24. *Id.* At the time of the report, 598 detainees had been released or transferred out of Guantánamo Bay. The Obama Administration had released sixty-six detainees outside of the habeas process. The report noted that although the recidivism rate was lower among these detainees, there appears to be a two-and-a-half-year lag before the recidivists return to terrorism. *Id.*

25. *See, e.g.*, Ryan Famuliner, *Gitmo Recidivism Report Concerns Sen. Bond*, MISSOURINET.COM (Dec. 9, 2010), <http://www.missourinet.com/2010/12/09/gitmo-recidivism-report-concerns-sen-bond-audio/>.

26. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4351 (2011) [hereinafter 2011 National Defense Authorization Act]. The restriction is limited to detainees held at Guantánamo Bay "on or after January 20, 2009," and does not apply to non-citizen members of the U.S. Armed Forces. *Id.*

27. *See id.*; *see also* GARCIA, *supra* note 11, at 4-5.

28. *See* GARCIA, *supra* note 11, at 5 & n.21 (discussing statements of legislators discussing the restrictions). The Act specifically denies funds for the transfer of Khalid Sheikh Mohammed and then expands the denial to other detainees held at Guantánamo Bay. *See* 2011 National Defense Authorization Act § 1032. Mohammed has been the focal point of the Administration's policy of prosecuting some detainees in U.S. civilian courts. *See, e.g.*, ERIC HOLDER, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL ANNOUNCES FORUM DECISIONS FOR GUANTANAMO DETAINEES (Nov. 13, 2009), <http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html>.

likely need the assistance of the Department of Defense, which has custody over the Guantánamo Bay detainees. The Act prohibits such assistance.<sup>29</sup>

The Act also severely limits the transfer of detainees to other countries. It does so by limiting potential host countries and effectively setting the essential terms of any negotiations to transfer detainees. Before using any funds “available to the Department of Defense” to transfer a detainee overseas, the Secretaries of Defense and State must certify to Congress thirty days in advance that the receiving state (1) is not a sponsor of terrorism; (2) “maintains effective control” over its detention facilities; (3) is not “facing a threat that is likely to substantially affect its ability to exercise control over the individual”; (4) has agreed to “ensure” that the detainee cannot “threaten the United States, its citizens, or its allies in the future”; (5) “has taken such steps as the Secretary determines are necessary to ensure that the individual cannot engage or reengage in any terrorist activity”; and (6) has agreed to share intelligence information with the United States.<sup>30</sup> Without a waiver from the Secretary of Defense that the transfer “is in the national security interests of the United States,” all transfers are prohibited whenever “there is a confirmed case of any” former Guantánamo Bay detainee having “subsequently engaged in any terrorist activity” after transfer to that country.<sup>31</sup> One exception to all of these restrictions is the transfer of detainees in accordance with an order from a habeas court.<sup>32</sup>

Coupled with the unwillingness of many countries to take detainees, these conditions make it almost impossible to transfer detainees who have not been ordered released through the habeas

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29. See 2011 National Defense Authorization Act § 1032 (“None of the funds authorized to be appropriated by this Act for fiscal year 2011 may be used to transfer, release, or assist in the transfer or release [of Guantánamo Bay detainees] to or within the United States.” (emphasis added)); see also GARCIA, *supra* note 11, at 5. But see ACLU, LETTER TO PRESIDENT BARACK OBAMA (Jan. 5, 2011), available at <http://tinyurl.com/3ggsbab> (arguing that other executive departments would be free to transfer detainees).

30. 2011 National Defense Authorization Act, § 1033(a)–(b).

31. *Id.* § 1033(c).

32. *Id.* § 1033(a)(2), (c)(3). Since the Supreme Court recognized the detainees’ right to habeas relief in *Boumediene v. Bush*, 553 U.S. 723, 771 (2008), courts have granted habeas relief to thirty-seven detainees, twenty-four of whom have been released; the remaining population at Guantánamo Bay is 172. *Guantanamo Habeas Scorecard*, CTR. FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/GTMOscorecard> (last updated Feb. 9, 2011).

process.<sup>33</sup> President Obama opposed these restrictions, but he signed the bill into law because the restrictions were a small part of a much larger bill authorizing funding for the military.<sup>34</sup> In his signing statement, however, President Obama stated that the restrictions on transferring detainees to the United States “represent[] a dangerous and unprecedented challenge to critical executive branch authority” over prosecution of Guantánamo detainees and could ultimately “undermine[] our Nation’s counterterrorism efforts . . . [and] harm our national security.”<sup>35</sup> He asserted that the restrictions on transfers to other countries “interfere” with the President’s foreign policy and national security authority to make “consequential” decisions “in the context of an ongoing armed conflict.”<sup>36</sup> He stated that the President “must have the ability to act swiftly and to have broad flexibility in conducting our negotiations with foreign countries.”<sup>37</sup>

President Obama did not go so far as to call the restrictions unconstitutional, nor did he express any intention to ignore the restrictions. Rather, he said he would “work with the Congress to seek repeal of these restrictions, . . . seek to mitigate their effects, and . . . oppose any attempt to extend or expand them in the future.”<sup>38</sup> The President has since reasserted these objections,<sup>39</sup> as has Attorney General Eric Holder. On April 4, 2011, Attorney General Holder announced that the Administration would try Khalid Sheikh Mohammed and four other 9/11 conspirators in military commissions,<sup>40</sup> effectively abandoning the Administration’s

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33. See Robert Chesney, *Key Points from Today’s Executive Order on GTMO Detention Review*, LAWFARE BLOG (Mar. 7, 2011, 4:02 PM), <http://tinyurl.com/3pwgmaj> (“Absent a habeas order compelling a release, current legislation makes it *nearly* impossible to effectuate a release from GTMO. The long and short of it is that the Secretary of Defense must make a series of rather difficult [sic] certifications, arguably impossible to meet in most circumstances.”).

34. Press Release, President Barack Obama, The White House Office of the Press Sec’y, Statement by the President on H.R. 6523 (Jan. 7, 2011), <http://www.whitehouse.gov/the-press-office/2011/01/07/statement-president-hr-6523>.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Press Release, President Barack Obama, The White House Office of the Press Sec’y, New Actions on Guantanamo Bay Detainee Policy (Mar. 7, 2011), <http://tinyurl.com/43yocc7>; *Fact Sheet: New Actions on Guantanamo and Detainee Policy*, WHITE HOUSE OFFICE OF THE PRESS SEC’Y (Mar. 7, 2011), <http://tinyurl.com/3jy97ow>.

40. Statement of Att’y Gen. Eric Holder, U.S. Dep’t of Justice, Statement of the Attorney General on the Prosecution of the 9/11 Conspirators (Apr. 4, 2011),

commitment to try these individuals in federal court. Yet Attorney General Holder reiterated the Administration's preference for civilian trials and declared that the Administration would "continue to seek to repeal those restrictions."<sup>41</sup>

Observers have criticized the Administration for not taking a stronger position on this issue—or at least a more consistent position.<sup>42</sup> Emboldened by the Administration's response, the House of Representatives included similar provisions in the 2012 National Defense Authorization Act.<sup>43</sup> Perhaps in response to the earlier criticism, the Administration threatened to veto the Act if it contained these restrictions.<sup>44</sup> The Administration reiterated his concerns about the "dangerous and unprecedented challenge" the restrictions posed to the President's prosecutorial discretion and stated that the foreign transfer restrictions interfered with his national security and foreign affairs powers.<sup>45</sup> But unlike several other provisions in the 2012 National Defense Authorization Act for which the Administration issued a veto threat, it did not say that the detainee restrictions raised constitutional concerns.<sup>46</sup> Ultimately, the

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<http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110404.html>.

41. *Id.*

42. See ACLU, *supra* note 29 (urging President Obama to take the position that the restriction only applied to the Department of Defense or, alternatively, that the restrictions were unconstitutional); Benjamin Wittes, *Whining Statement*, LAWFARE BLOG (Jan. 7, 2011, 6:57 PM), <http://www.lawfareblog.com/2011/01/whining-statement/>; Benjamin Wittes, *Thought #1 on the Holder Statement*, LAWFARE BLOG (Apr. 4, 2011, 4:11 PM), <http://www.lawfareblog.com/2011/04/thought-1-on-the-holder-statement/>; see also Jack Goldsmith, *The Weakness in the Obama Signing Statement*, LAWFARE BLOG (Jan. 9, 2011, 12:36 PM), <http://www.lawfareblog.com/2011/01/the-weakness-in-the-obama-signing-statement/>.

43. See H.R. 1540, 112th Cong. §§ 1039–40 (as passed by House, May 26, 2011). Under this version of the bill, the restriction on transfers to the United States would extend beyond Guantánamo Bay to cover detainees held at other overseas locations. See *id.* § 1039. The restrictions on transfers to foreign countries would be less stringent than the 2011 National Defense Authorization Act in one regard: rather than agreeing to a general commitment to share intelligence information with the United States, receiving countries would only need to agree to share intelligence relating to the transferred detainee. See *id.* § 1040(a)(2)(F).

44. EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT & BUDGET, STATEMENT OF ADMINISTRATION POLICY: H.R. 1540—NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2012 (May 24, 2011), [http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1540r\\_20110524.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1540r_20110524.pdf) (last visited Oct. 29, 2011).

45. *Id.*

46. See *id.*

House ignored the threat and retained the provisions.<sup>47</sup> In light of the earlier criticism of the President, could he have taken an even stronger stance? Could he have legitimately argued that the restrictions are unconstitutional?

### III. *YOUNGSTOWN* CATEGORY III AND THE LIMITS OF CONGRESSIONAL POWER

Wartime constitutional conflicts often are analyzed from the perspective of presidential power, and scholars often are concerned primarily with the President's inherent authority to act in contravention of the will of Congress. The scope of congressional power is a necessary component in this analysis given the shared nature of most foreign affairs and war powers, and the question of whether Congress can constitutionally restrain the President deserves attention regardless of whether the President ultimately acts in contravention of the will of Congress. Justice Robert Jackson's *Youngstown* framework is useful in assessing these questions, but it must be viewed as part of a larger framework for assessing congressional power to restrain the President.

#### *A. Youngstown Category III from the Perspective of Congressional Power*

In his concurrence to *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson suggested that the scope of presidential power could be analyzed under three categories.<sup>48</sup> Category I involves the President and Congress acting in concert; in this case, presidential power is at its height.<sup>49</sup> Category II involves the President acting in the face of congressional silence or acquiescence; in this situation, presidential power is in an uncertain "zone of twilight."<sup>50</sup> Category III involves the President acting in a way "incompatible with the expressed or implied will of Congress"; here, "[presidential] power is at its lowest ebb."<sup>51</sup>

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47. The House passed the bill on May 26, 2011. The Senate has yet to pass the bill. *See, Bill Summary & Status, 112th Congress, H.R. 1540*, LIBRARY OF CONGRESS THOMAS, <http://thomas.loc.gov/home/thomas.php#> (last visited Oct. 20, 2011).

48. 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

49. *Id.* at 635–37.

50. *Id.* at 637.

51. *Id.*

The conflict between the President and Congress over Guantánamo Bay policy involves perhaps an atypical *Youngstown* Category III scenario. Justice Jackson's framework presupposes presidential action. In the Guantánamo Bay dispute, the President has yet to act. He has only rhetorically challenged the authority of Congress to intrude upon his prerogatives; in practice, he has acquiesced to the congressional restrictions. From a political and constitutional perspective, such acquiescence will make it harder to seek repeal of the provisions and more likely that the President's veto threat will go unheeded unless the President can persuasively argue that Congress lacks constitutional authority for these actions.<sup>52</sup> This scenario thus highlights the importance of determining the scope of Congress's power to restrain the President.

*B. A Test for Determining the Extent of Congressional Power*

Even though Justice Jackson viewed the specific facts in *Youngstown* as involving a Category III scenario, his concurrence unfortunately provides little guidance on how a Category III analysis should proceed.<sup>53</sup> Justice Jackson suggests a precise calculus—the President “can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter”—but this formulation is misleading in its supposed precision and unhelpful in its mathematical abstraction.<sup>54</sup> Furthermore, Justice Jackson's Category III analysis should be seen as one part of a larger analysis of constitutional conflicts.

This Comment argues that a comprehensive framework for evaluating the constitutional limits on the power of Congress under *Youngstown* Category III involves four considerations: (1) constitutionally mandated activities; (2) express restrictions on congressional or federal power; (3) the scope of the express or

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52. *Cf. id.* at 610–11 (Frankfurter, J., concurring) (“[A] a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, . . . may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II [of the Constitution].”); Raven-Hansen & Banks, *supra* note 11, at 849–50 (“[T]his interaction may create customary national security law. The custom evidences the political branches’ joint interpretation of the President’s constitutional or statutory authority.”).

53. *See Youngstown*, 343 U.S. at 638–40 (Jackson, J., concurring).

54. *Id.* at 637. As will be discussed below, however, this equation does provide an essential key to analyzing constitutional conflicts. *See infra* notes 73–80 and accompanying text.

implied powers of each branch; and (4) whether constitutional authority rests exclusively in one branch.

*1. Constitutionally mandated activities*

The first limit on congressional power is perhaps the narrowest. Congress may not prevent the performance of any constitutionally mandated activity.<sup>55</sup> For example, the Constitution requires a census to be conducted every ten years.<sup>56</sup> While Congress is given discretion over the “manner” in which the census will be conducted, Congress would be in violation of the Constitution if it failed to provide funds for the census or if it passed a law prohibiting the President from conducting the census.<sup>57</sup> Perhaps the only mandatory requirement that could be related to war powers or foreign affairs is that Congress must provide for the President’s salary.<sup>58</sup> If Congress made the President’s salary contingent upon pursuit of a particular foreign affairs or defense policy, the legislature would likely be in violation of this provision. Professor Kate Stith has suggested other relevant mandatory provisions: “Congress itself would violate the Constitution if it refused to appropriate funds for the President to receive foreign ambassadors or to make treaties.”<sup>59</sup> Although this may be the appropriate reading of the Ambassadors Clause, the use of the word “shall” in the Treaties Clause, at least, is more naturally read to designate who shall conduct the activity rather than to require that the activity be conducted.<sup>60</sup>

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55. Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1350–51 (1987–1988) (“Congress is obliged to provide public funds for constitutionally mandated activities—both obligations imposed upon the government generally and independent constitutional activities of the President.”).

56. U.S. CONST. art. I, § 2, cl. 3 (“The actual Enumeration shall be made within three Years after the first meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.”). The purpose of this requirement is to ensure just apportionment of representation in the House of Representatives and of taxes. See THE FEDERALIST NO. 36, at 187–93 (Alexander Hamilton) (E. H. Scott ed., 1898).

57. Stith, *supra* note 55, at 1351 n.31.

58. See U.S. CONST. art. II, § 1, cl. 7 (“The President shall, at stated Times, receive for his Services, a Compensation . . . .”); *id.* at art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .”).

59. Stith, *supra* note 55, at 1351.

60. See U.S. CONST. art. II, § 3 (“[H]e shall receive Ambassadors and other public Ministers . . . .”); *id.* art. II, § 2, cl. 2 (“He shall have Power, by and with the Advice and Consent of the Senate, to make treaties . . . .”).

## 2. *Express restrictions*

The next consideration involves express restrictions on federal power. When the legislature is denied all power under the Constitution to undertake a certain act, the restriction applies regardless of whether Congress would otherwise be acting within the scope of a constitutional grant of power.<sup>61</sup> The most obvious examples would be the prohibitions on bills of attainder,<sup>62</sup> ex post facto laws,<sup>63</sup> and reducing the judicial salary or the President's salary for the present term.<sup>64</sup> Individual rights protections in the Bill of Rights would also fall into this category. For example, Congress generally may not require the President to curtail someone's First Amendment rights.<sup>65</sup> Similarly, violations of structural limitations in the Constitution would also be prohibited.<sup>66</sup> For example, Congress could not place conditional restrictions on the President's conduct of war that required a congressional committee to approve an executive decision before funds were released or action was authorized; such

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61. See Louis Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT'L L. 758, 762–63 (1989) [hereinafter Fisher, *Purse Strings*] (“It is conventional to say that Congress, in adding conditions and provisos to appropriations bills, may not achieve unconstitutional results.”); Raven-Hansen & Banks, *supra* note 11, at 885 (discussing the uncontroversial proposition that appropriation legislation may not violate express constitutional restrictions).

62. U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder . . . shall be passed.”); *United States v. Lovett*, 328 U.S. 303, 305, 311–12, 315–18 (1946) (declaring unconstitutional an appropriations measure that denied funding for the salaries of three named federal employees who had been found complicit in “subversive activities” by the House Committee on Un-American Activities).

63. U.S. CONST. art. I, § 9, cl. 3 (“No . . . ex post facto Law shall be passed.”).

64. *Id.* art. II, § 1, cl. 7 (“The President shall, at stated Times, receive for his services, a Compensation, which shall neither be increased nor diminished during the period for which he shall have been elected . . .”); *id.* art. III, § 1 (“The Judges . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

65. See Stith, *supra* note 55, at 1050 (“[T]he First Amendment imposes a limitation upon the exercise of all government powers, including Congress’ appropriations power.” (footnote omitted)). However, the protections of individual liberties often depend upon the application of a balancing test. In a national security context, balancing individual and governmental interests will generally lead to a less potent restriction on government action. See, e.g., Sarah N. Rosen, Comment, *Be All That You Can Be? An Analysis of and Proposed Alternative to Military Speech Regulations*, 12 U. PA. J. CONST. L. 875, 880–97 (2009–2010) (discussing the Supreme Court’s treatment of military speech restrictions in comparison to civilian speech restrictions).

66. *Cf.* *INS v. Chadha*, 462 U.S. 919 (1983) (overruling provisions that allowed one house of Congress to “veto” the decision of an executive agency because such procedures violated the bicameralism and presentment clauses).

action would violate the bicameralism and presentment requirements in the Constitution.<sup>67</sup> Some of the limits in this category thus reflect an absolute lack of legislative authority,<sup>68</sup> while others entail a more contextual analysis that involves balancing government and individual interests.<sup>69</sup>

### 3. *Scope of the constitutional grant*

The third consideration—the scope of the express or implied powers of each branch—requires little justification, but perhaps some clarification. In a sense, each category of limitations goes to the scope of Congress’s power. But once it has been determined that Congress is not required to act or forbidden from acting in a certain manner, the inquiry must turn to an examination of the meaning of express or implied constitutional grants of power relevant to the particular statute under consideration. As part of a limited government, Congress must act pursuant to an express or implied grant of power in the Constitution.<sup>70</sup> Even if Congress’s implied powers are read broadly under the Necessary and Proper Clause,<sup>71</sup> there must still be some foundation in the Constitution for

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67. See U.S. CONST. art. I, § 7, cl. 2 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections . . . .”); *Chadha*, 462 U.S. 919; cf. William P. Barr, *Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions*, 13 Op. O.L.C. 258, 261 (1989) (providing a similar analogy to illustrate limits on the appropriations power).

68. See THE FEDERALIST NO. 78, at 426 (Alexander Hamilton) (E. H. Scott ed., 1898) (“By a limited Constitution, I understand one which contains *certain specified exceptions to the Legislative authority*; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like.” (first emphasis added)).

69. See *supra* note 65.

70. See *Ex parte Quirin*, 317 U.S. 1, 25 (1942) (“Congress and the President, like the courts, possess no power not derived from the Constitution.”); THE FEDERALIST NO. 14, at 77 (James Madison) (E. H. Scott ed., 1898) (“In the first place, it is to be remembered, that the General Government is not to be charged with the whole power of making and administering laws: its jurisdiction is limited to certain enumerated objects . . . .”); THE FEDERALIST NO. 81, at 441 (Alexander Hamilton) (E. H. Scott ed., 1898) (“I admit, however, that the Constitution ought to be the standard of construction for the laws . . . . [T]his doctrine is . . . deducible . . . from the general theory of a limited Constitution . . . .”).

71. U.S. CONST. art. I, § 8, cl. 18 (“The Congress shall have 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.”).

congressional action.<sup>72</sup> The same holds for presidential action. Determining its proper scope is relevant to the next consideration.

#### *4. Constitutionally exclusive authority*

As Justice Jackson's *Youngstown* concurrence suggests, the exclusivity of constitutional powers is a necessary consideration in a Category III analysis. Elucidating his mathematical formula,<sup>73</sup> Justice Jackson stated that under Category III, presidential action "can be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject. In short, we can sustain the President only by holding that . . . [his action] is *within his domain and beyond control by Congress*."<sup>74</sup> This suggests that Congress may not intrude on the President's domain when dealing with constitutional powers that are exclusive to the presidential office. The logical corollary to Justice Jackson's formulation is that Congress may restrict the President whenever the two branches hold concurrent authority over a matter.<sup>75</sup> This conclusion is consistent with the basic structure of the federal government: the legislative power is vested in Congress while the executive power is vested in the President, and the power to execute the laws is given shape by the very laws which are to be executed.<sup>76</sup>

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72. Cf. *McCulloch v. Maryland*, 17 U.S. 316 (1819) (adopting a broad, but not unbounded, reading of the Necessary and Proper Clause); THE FEDERALIST NO. 44, at 251 (James Madison) (E. H. Scott ed., 1898) ("Had the Constitution been silent on this head [i.e., the Necessary and Proper Clause], there can be no doubt that all the particular powers, requisite as means of executing the general [i.e., enumerated] powers would have resulted to the Government, by unavoidable implication.")

73. The President "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

74. *Id.* at 640 (emphasis added).

75. See Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391, 445–51 (2008); *id.* at 452 ("Under Jackson's *Youngstown* approach, the President's power fluctuates based on whether Congress has independent, overlapping, concurrent power over the matter. If Congress does, then that power negates whatever independent power the President may have in case of a conflict. Only where Congress does not have concurrent power can the President's independent constitutional authority trump or override a conflicting statute." (footnote omitted)). But see Raven-Hansen & Banks, *supra* note 11, at 887–89 (arguing that when the President and Congress have concurrent authority, "courts must weigh the extent to which the restriction prevents the President from accomplishing his constitutionally assigned functions against the need for the restriction to promote objectives within the authority of Congress").

76. See U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."); *id.* art. II, § 1, cl. 1 ("The executive Power shall be

A *Youngstown* Category III analysis involves comparing presidential and congressional powers over a particular issue to determine whether the Constitution gives exclusive rather than shared authority to the President. Thus, “exclusive” is not the same as “implied,”<sup>77</sup> “inherent,”<sup>78</sup> “independent,”<sup>79</sup> or “core.”<sup>80</sup> If Congress were to prohibit the President from performing an exclusive executive function, either through failing to provide funds or enacting other restrictions, it would unconstitutionally intrude on the exclusive domain of the President. Similarly, it would be unconstitutional for Congress to usurp an exclusive executive function. For example, Congress may not receive ambassadors or issue pardons.<sup>81</sup> The authority of the President to make tactical

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vested in a President of the United States of America.”).

77. The distinction between whether a power is express or implied aids in a *Youngstown* Category III analysis only to the extent that such a distinction is helpful in determining the scope of the relevant constitutional grants of authority. See *supra* Part III.B.3.

78. “It is common for defenders of presidential prerogatives to conflate inherent . . . executive war powers with preclusive ones, and to assume that any powers granted by Article II must also be immune from statutory limitation.” Barron & Lederman, *Framing the Problem*, *supra* note 1, at 741–43. However, inherent presidential power is relevant to a *Youngstown* Category II analysis (where the President acts in the absence of congressional action), not a *Youngstown* Category III analysis (where Congress has acted to limit the President’s authority).

79. If the President’s power is independent, it arises out of the Constitution rather than legislation. But deciding that a presidential power is independent of Congress does not answer the question of whether the authority is exclusive or shared. See Lobel, *supra* note 75, at 447–49 (distinguishing “exclusive” from “independent” and “inherent” power); *id.* at 464 (“That the President has independent power stemming from his Commander in Chief power means that he can act independently of congressional authorization, not in disregard of it.”). As with “inherent,” this term is more appropriate for a *Youngstown* Category II analysis. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (“When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers . . .”).

80. Professors Barron and Lederman argue that Congress may not intrude on “core” executive powers. See Barron & Lederman, *Framing the Problem*, *supra* note 1, at 721, 726–29. Professor Lobel criticizes that approach as inconsistent with Justice Jackson’s formulation of a *Youngstown* Category III analysis because it essentially results in a balancing test. See Lobel, *supra*, note 75, at 451–55 (“The core/periphery framework inappropriately conflates centrality with exclusivity.”). However, Professors Barron and Lederman explicitly reject any balancing test and argue that their approach is consistent with *Youngstown*. See Barron & Lederman, *Framing the Problem*, *supra* note 1, at 726, 729, 738–39. They also use the term “preclusive” in their analysis, which would be consistent with Justice Jackson’s formulation and avoids any implication of a balancing test.

81. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147–48 (1872) (“It is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon; and it is granted without limit. . . .

battlefield decisions has traditionally been viewed as the quintessential exclusive executive power upon which Congress may not intrude.<sup>82</sup> But Professors David Barron and Martin Lederman argue that the only exclusive executive authority under the Commander-in-Chief Clause is “a prerogative of *superintendence* when it comes to the military chain of command itself.”<sup>83</sup> In other words, “Congress may not assign such ultimate decisionmaking discretion to anyone else (including subordinate military officers).”<sup>84</sup> Professor Jules Lobel has also recently challenged the traditional view of exclusive presidential authority. He argues that aside from the President’s exclusive “right to command,”<sup>85</sup> the President and Congress have “concurrent constitutional power over the conduct of authorized warfare,” and that any line-drawing between the powers of the two branches thus reflects practical and institutional considerations rather than constitutional dictates.<sup>86</sup>

However, this Comment argues that a proper *Youngstown* Category III analysis should be highly contextual, focusing on the specific legislative action in question and the scope of relevant constitutional provisions. The constitutionality of a particular restriction cannot be determined by claims of general wartime authority. Therefore, the foregoing framework does not automatically lead to any conclusions about the ultimate scope of presidential and congressional authority. Furthermore, the exclusivity element of this framework relates only to a *Youngstown* Category III scenario, where “[presidential] power is at its lowest ebb”<sup>87</sup>—it says

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Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law.”). See also FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 4, at 193; Fisher, *Purse Strings*, *supra* note 61, at 762–63.

82. *Hamdan v. Rumsfeld*, 548 U.S. 557, 592 (2006) (“Congress cannot direct the conduct of campaigns . . . .” (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring))).

83. Barron & Lederman, *Framing the Problem*, *supra* note 1, at 696. As noted above, Professors Barron and Lederman don’t use the term “exclusive,” but that appears to be the essential meaning of their analysis. See *supra* note 80.

84. Barron & Lederman, *Framing the Problem*, *supra* note 1, at 697.

85. See Lobel, *supra* note 75, at 450–51.

86. See *id.*, at 398 (“Those powers are divided in practice by timing, not subject matter. The President has the power of initiative, the ability and authority to act quickly in the face of rapidly changing wartime realities in the theater of action. Congress, on the other hand, has a more deliberative, reflective power, allowing it to check and limit presidential initiative both before and after the Executive acts.” (emphasis omitted)).

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

nothing about the scope of inherent presidential power to act in the face of congressional silence or acquiescence, or the scope of presidential power to act with congressional authorization.

#### IV. AUTHORITY OVER DETENTION & FOREIGN NEGOTIATIONS: CONCURRENT OR EXCLUSIVE?

The provisions of the 2011 National Defense Authorization Act in question are not constrained by any constitutionally mandated activities. Therefore, the following Part will first examine potential express restrictions on the authority of Congress, ultimately concluding that the Act does not violate any express restrictions. This Part will then consider the scope of presidential and congressional detention authority. In their responses to Congress, President Obama and Attorney General Holder suggest that the detention restrictions challenge three fundamental presidential powers: prosecutorial discretion, war powers, and foreign affairs powers.<sup>88</sup> This Part will therefore review the scope of any constitutional authority for both the President and Congress in each of these categories. This discussion reveals that the political branches have concurrent authority over wartime detention; therefore, the restrictions in the 2011 National Defense Authorization Act are constitutional.

##### *A. Express Restrictions on Congress*

The Suspension Clause and the Bill of Attainder Clause serve as two restrictions on congressional power that are potentially relevant to the detainee transfer limitations. However, Congress structured the 2011 National Defense Authorization Act in such a way as to avoid a conflict with the Suspension Clause, and the legislative policy behind the Act is such that the Act does not constitute a bill of attainder.

The Suspension Clause declares that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>89</sup> This serves as an express restriction on the power of Congress to limit access to federal courts for individuals to challenge their detention by the

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88. *See supra* notes 35–37, 45, and accompanying text.

89. U.S. CONST. art. I, § 9, cl. 2.

executive.<sup>90</sup> In June 2008, the Supreme Court declared that Congress could not deprive Guantánamo Bay detainees of the privilege of the writ of habeas corpus without “act[ing] in accordance with the requirements of the Suspension Clause.”<sup>91</sup> The 2011 National Defense Authorization Act restrictions on transferring detainees to other countries could run afoul of the Suspension Clause if such restrictions prevented the executive from complying with the order of a habeas court. However, the Act makes an express exception to transfer restrictions in order for the executive “to effectuate an order affecting the disposition of the individual that is issued by a court or competent tribunal of the United States having lawful jurisdiction.”<sup>92</sup> The Act thus avoids any conflict with the Suspension Clause.

The impact of the Bill of Attainder Clause is less obvious from the face of the Act. The Supreme Court has defined a bill of attainder as “a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.”<sup>93</sup> Thus, a bill of attainder must meet three requirements: “specification of the affected persons, punishment, and lack of a judicial trial.”<sup>94</sup> The ACLU has argued that the transfer restrictions in the 2011 National Defense Authorization Act amount to a bill of attainder.<sup>95</sup> Because the law targets Guantánamo Bay detainees, “the transfer provisions single out an identifiable group of people for differential treatment . . . .”<sup>96</sup> The ACLU argued that the restrictions on transfer to the United States and to third countries qualify as punishment under bill of

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90. Stephen Vladeck argues that the Suspension Clause is better understood as a grant of power to Congress presented in the negative, which gives the legislature the authority to suspend the writ under certain circumstances. This in turn “provided structural constitutional underpinnings for the common-law right that already existed, and specified the *only* instances in which that right could be abridged.” Stephen Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275, 277 (2008). If Vladeck’s position is accurate, Congress’s efforts to deny habeas corpus to detainees should be examined under the third consideration: construing the scope of a textual grant of power.

91. *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

92. 2011 National Defense Authorization Act, Pub. L. No. 111-383, § 1033(a)(2), (c)(3), 124 Stat. 4351-52.

93. *Nixon v. Adm’r Gen. Servs.*, 433 U.S. 425, 468 (1977).

94. *Selective Serv. Sys. v. Minn. Public Interest Research Group*, 468 U.S. 841, 847 (1984).

95. See ACLU, *supra* note 29.

96. *Id.*

attainder precedent because, read in conjunction, the restrictions effectively impose “continued imprisonment” at Guantánamo Bay.<sup>97</sup> Finally, the ACLU argued that the punishment was imposed without judicial trial “because the vast majority of detainees subject to enforced legislative imprisonment will not face trial.”<sup>98</sup>

Upon closer examination, the restrictions do not seem to meet the punishment requirement of a bill of attainder. A bill of attainder is prohibited because it involves “a congressional determination of . . . blameworthiness and a desire to punish . . . .”<sup>99</sup> To determine whether a law is punitive, the Supreme Court has identified three inquiries: “(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, ‘viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes’; and (3) whether the legislative record ‘evinces a congressional intent to punish.’”<sup>100</sup> Imprisonment has historically been viewed as punishment,<sup>101</sup> but it is not clear that the restrictions in the 2011 Act in fact impose imprisonment. At most, the restrictions indirectly lengthen a detainee’s imprisonment.<sup>102</sup> Yet whether a particular detainee’s detention is prolonged depends not solely on the legislative act in question, but also upon the executive’s determination of when it had planned to release the individual.<sup>103</sup> In other words, both legislative and executive action are required to inflict punishment in this case, creating uncertainty as to which

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97. *Id.*

98. *Id.*

99. *Nixon v. Adm’r Gen. Servs.*, 433 U.S. 425, 476 (1977). “The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomfiting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation.” *Id.* at 470 n.32 (quoting *United States v. Lovett*, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring)) (internal quotation marks omitted).

100. *See Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 852 (1984) (quoting *Nixon*, 433 U.S. at 475–76, 478).

101. *Id.*

102. The ACLU seems to acknowledge that the “punishment” imposed is not imprisonment but “continued imprisonment” or having one’s “release from imprisonment blocked.” *See* ACLU, *supra* note 29.

103. Even though President Obama’s policy involves closing Guantánamo Bay, the Administration plans to keep some individuals in executive detention if and when closure occurs. *See* DEP’T OF JUSTICE ET AL., FINAL REPORT: GUANTANAMO REVIEW TASK FORCE 23–25 (2010) (stating that forty-eight detainees would remain in detention for the duration of the war on terror).

detainees will actually suffer punishment.<sup>104</sup> Furthermore, the restrictions serve a legitimate nonpunitive purpose, as Congress intended. The general motivation behind any wartime detention policy is to keep captives away from the battlefield.<sup>105</sup> In passing the restrictions on transfers to other countries, Congress appears to have been motivated by a concern that detainees released to other countries would return to the battlefield; in passing the prosecution restrictions, Congress appears to have been motivated by a policy preference for prosecuting wartime detainees in military commissions rather than civilian courts.<sup>106</sup> Thus, the restrictions constitute “an act of nonpunitive legislative policymaking” rather than a bill of attainder.<sup>107</sup>

Because the restrictions in the 2011 National Defense Authorization Act do not run afoul of any express constitutional restrictions, the inquiry must turn to the sources and scope of presidential and congressional power over wartime detention.

### *B. Prosecutorial Discretion*

A centerpiece of President Obama’s detention policies is the trial of certain detainees in civilian courts.<sup>108</sup> The President is traditionally given wide discretion to execute the laws, particularly in criminal prosecutions. When Attorney General Holder announced that the Administration would move forward with military commissions in light of the legislative restrictions on prosecutions in civilian courts,

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104. The argument that the restrictions constitute an unconstitutional bill of attainder might be stronger with respect to Khalid Sheikh Mohammed, who is specifically named in the 2011 National Defense Authorization Act, and the four other named individuals whom the Department of Justice had planned to prosecute in civilian courts. *See* 2011 National Defense Authorization Act, Pub. L. No. 111-383, § 1032, 124 Stat. 4351 (phrasing the restriction on transfers to the United States in terms of “Khalid Sheikh Mohammed or any other detainee”); DEP’T OF JUSTICE ET AL., *supra* note 103, at 21.

105. *See infra* note 124 and accompanying text.

106. *See supra* Part II.

107. *See* *Nixon v. Adm’r Gen. Servs.*, 433 U.S. 425, 477 (1977). If the Law of Nations Clause serves as the constitutional source of power for the restrictions in question, the restrictions would in some regard have a punitive overtone. *See* U.S. CONST. art. I § 8, cl. 10 (“The Congress shall have Power . . . To define and *punish* . . . Offenses against the Law of Nations . . . .” (emphasis added)); *see also infra* notes 151–163, 177–179, and accompanying text. However, basing legislative action in a punitive power is not inconsistent with finding a nonpunitive policy motivating the legislature.

108. *See, e.g.*, ERIC HOLDER, U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL ANNOUNCES FORUM DECISIONS FOR GUANTANAMO DETAINEES, (Nov. 13, 2009), *available at* <http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html>.

he stated that “[d]ecisions about who, where and how to prosecute have always been—and must remain—the responsibility of the executive branch.”<sup>109</sup>

Prosecutorial discretion arises from the Vesting and Take Care Clauses.<sup>110</sup> The Vesting Clause declares that “[t]he executive Power shall be vested in a President of the United States of America.”<sup>111</sup> The Take Care Clause states that the President “shall take Care that the Laws be faithfully executed . . . .”<sup>112</sup> Together, these provisions solidly place in the President the power of executing the law.

But before determining whether the Vesting and Take Care Clauses grant exclusive authority to the executive to determine matters of “who, where and how to prosecute,” we should first determine the appropriate meaning of the clauses. Some scholars have argued that the Take Care Clause confers a duty rather than a power on the President.<sup>113</sup> This would eliminate any redundancy with the Vesting Clause. However, resolving this dispute is not necessary to determine whether the Clause limits the congressional action in question. Assuming the Clause grants power, it grants power only to “faithfully execute[]” the laws.<sup>114</sup> Faithful execution of the laws would presumably refer to all aspects of a law, including the conditions, provisos, and limitations enacted as part of a law. The Clause would lose all meaning if the President were not bound by the restrictions set forth in the statutes to be executed. In other words, the Take Care Clause at most grants the power to execute the laws, not to make the laws.

Similarly, the Vesting Clause grants *executive* authority, as distinguished from *legislative* or *judicial* authority.<sup>115</sup> Any power

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109. Holder, *supra* note 40.

110. See, e.g., Morrison v. Olson, 487 U.S. 654, 697–99, 705–08 (1988) (Scalia, J., dissenting) (prefacing a discussion of prosecutorial discretion with an examination of the Vesting Clauses); Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIRCUIT REV. 1, 9–10 (2009) (identifying the Take Care Clause and general separation-of-powers principles as the most common justifications for prosecutorial discretion).

111. U.S. CONST. art. II, § 1, cl. 1.

112. *Id.* art. II, § 3.

113. See William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 484–85, 491–92 (1989).

114. U.S. CONST. art. II, § 3.

115. Compare *id.* art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . . .”) and *id.* art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may

granted by the Vesting or Take Care Clauses would indeed be exclusive, but that would only preclude Congress from usurping the power of execution from the President. Impinging upon the exclusive prosecutorial functions of the President would entail the unlikely scenario of Congress attempting to prosecute detainees itself or to assign that power to an entity outside the executive branch. Defining the conditions of prosecution—which is what every criminal law does in essence—does not infringe on the exclusive power of the President. In the course of the war, the President is charged with “carry[ing] into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.”<sup>116</sup> The contours of such laws, however, are defined by Congress. Furthermore, to the extent prosecutorial discretion is grounded in general separation-of-powers concerns, it primarily deals with separation between the executive and the judiciary.<sup>117</sup> Therefore, the restrictions in the 2011 National Defense Authorization Act are not invalidated by the Vesting Clause or the Take Care Clause.

### *C. Wartime Detention Authority*

The authority to detain enemies in a time of war has long been viewed as an important war power of the government.<sup>118</sup> As a war power, presidential detention authority would derive from the Commander-in-Chief Clause if its source is constitutional. History suggests that Congress also has concurrent detention authority. During the 1798–1800 Quasi-War with France, for example, Congress passed several laws authorizing detention of French captives, setting conditions on detention, and authorizing the

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from time to time ordain and establish.”), *with id.* art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

116. *Ex parte Quirin*, 317 U.S. 1, 26 (1942).

117. *See Krauss, supra* note 110, at 2–15.

118. *See, e.g., United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 700 (C.C.D. Neb. 1879) (No. 14,891) (“[T]he government might, in time of war, remove them to any place of safety so long as the war should last, but perhaps no longer, unless they were charged with the commission of some crime. This is a war power merely, and exists in time of war only. Every nation exercises the right to arrest and detain an alien enemy during the existence of a war, and all subjects or citizens of the hostile nations are subject to be dealt with under this rule.”).

exchange or release of prisoners.<sup>119</sup> The regulations passed in the Quasi-War demonstrate the understanding of Congress that it had authority to regulate detention, but this history does not clearly reveal the source of that authority.<sup>120</sup> Possible sources of congressional detention authority include the Captures Clause, the power of the purse, and the Law of Nations Clause.<sup>121</sup>

### *1. Commander-in-Chief Clause*

Wartime detention authority is rooted in the law of war, a branch of the law of nations, or, as it is known today, customary international law. “From the very beginning of its history [the Supreme] Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.”<sup>122</sup> In *Ex parte Quirin*, the Supreme Court identified detention authority as “[a]n important incident to the conduct of war,” founded in the law of war.<sup>123</sup> In a plurality decision,

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119. Act of June 28, 1798, ch. 62, § 4, 1 Stat. 574, 575 (authorizing detainees to be held “in any place of safety within the United States, in such manner as [the President] may think the public interest may require”); Act of July 9, 1798, ch. 68, § 8, 1 Stat. 578, 580 (directing federal civil or military officers to “take charge for [the detainees’] safe keeping and support, at the expense of the United States”); Act of Feb. 28, 1799, ch. 28, 1 Stat. 624 (authorizing the President “to exchange or send away from the United States to the dominions of France, as he may deem proper and expedient, all French citizens that have been or may be captured and brought into the United States”); Act of Mar. 3, 1799, ch. 45, 1 Stat. 743 (authorizing the President to impose “the most rigorous retaliation” against any French detainee found responsible for maltreating an impressed United States sailor found aboard any British ship); see also Barron & Lederman, *A Constitutional History*, *supra* note 3, at 971–72, 977, 981.

120. “Congress’s power to dictate the taking and treatment of prisoners seems to have been understood during the Revolutionary War and the 1790s, yet the source of that power is unclear.” Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683, 1744 (2009); see also *id.* at 1722, 1727 (discussing regulations of prisoners in the Revolutionary War and possible sources of that authority under the Articles of Confederation); *id.* at 1734–35 (discussing the Quasi-War regulations and pointing to congressional debates suggesting the authority is rooted in the Law of Nations Clause or Declare War Clause).

121. See Barron & Lederman, *Framing the Problem*, *supra* note 1, at 735–36 n.143 (locating congressional detention authority in the Captures Clause, Law of Nations Clause, and Declare War Clause).

122. *Ex parte Quirin*, 317 U.S. 1, 27–28 (1942).

123. *Id.* at 28–29 (“An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.”).

the Court recently affirmed in the context of the war on terrorism that detention—for the duration of the conflict—and prosecution of enemy combatants is justified under the law of war to secure the battlefield and preserve the ability of the President to prosecute the war.<sup>124</sup>

Yet the law of war defines rather than grants authority. There must be some constitutional or legislative provision that supplies the authority, such as the Commander-in-Chief Clause or a congressional authorization of war.<sup>125</sup> In *Ex parte Quirin*, the Court suggested that the President and Congress may have concurrent authority. The Court recognized that the President was acting pursuant to an act of Congress in creating military commissions during World War II to try detainees for offenses against the law of nations.<sup>126</sup> But the President was also acting under “such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.”<sup>127</sup> Similarly, the plurality in *Hamdi v. Rumsfeld* found congressional authorization for the executive detention of enemy combatants in the war on terrorism, and thus did not reach the President’s claim of “plenary authority to detain pursuant to Article II of the Constitution.”<sup>128</sup> More specific to the power to prosecute detainees, the Court suggested in *Hamdan v. Rumsfeld* that the President’s power derived solely from congressional authorization: “Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences.”<sup>129</sup> The

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124. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (“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)).

125. *Ex parte Quirin*, 317 U.S. at 25 (“Congress and the President, like the courts, possess no power not derived from the Constitution.”).

126. *Id.* at 28.

127. *Id.* at 26, 28 (“The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared . . . .”); see U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . .”).

128. *Hamdi*, 542 U.S. at 516–17 (finding legislative authorization in the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)).

129. *Hamdan v. Rumsfeld*, 548 U.S. 557, 592 (2006) (quoting *Ex parte Milligan*, 71

Court raised the possibility that the President may have independent power “in cases of a controlling necessity,” but noted that the Court has never definitively resolved that issue and refused to do so in *Hamdan* as well.<sup>130</sup>

Thus, the Court has suggested—but never squarely held—that when Congress authorizes the President’s war powers, the Commander-in-Chief Clause grants the President powers incident to the conduct of war, including authority over wartime detainees.

## 2. *Captures Clause*

One common source cited for congressional detention authority is the Captures Clause.<sup>131</sup> As discussed above,<sup>132</sup> in setting forth a framework for analyzing limits on congressional power, the proper scope of each constitutional grant must be determined before deciding whether constitutional power over a particular matter is exclusive or concurrent. The Captures Clause appears on its face to grant Congress authority to regulate detention: Congress has power to “make Rules concerning Captures on Land and Water.”<sup>133</sup> Chief Justice John Marshall suggested as much in dicta in an 1814 case.<sup>134</sup> Yet Professor Ingrid Wuerth has argued recently—and quite persuasively—that the original meaning of the Captures Clause was in fact intended only as a source of authority over enemy property.<sup>135</sup> Wuerth argues that the Clause is best understood as granting power over “moveable property taken for adjudication as prize, but not persons,” and “the power to authorize the making of captures and also to determine their legality.”<sup>136</sup> The natural implication of Professor Wuerth’s analysis is that the Captures Clause cannot serve as a solid basis for congressional limitation on the President’s

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U.S. (4 Wall.) 2, 139–40 (1866) (Chase, C.J., concurring)).

130. *Id.* at 592–93 (quoting *Ex parte Milligan*, 71 U.S. at 140).

131. *See, e.g.*, Barron & Lederman, *Framing the Problem*, *supra* note 1, at 735 n.143; Lobel, *supra* note 75, at 457.

132. *See supra* Part III.B.3.

133. U.S. CONST. art. I, § 8, cl. 11.

134. *See* *Brown v. United States*, 12 U.S. (8 Cranch) 110, 126 (1814); *see also* Barron & Lederman, *Framing the Problem*, *supra* note 1, at 733, 735 n.143.

135. *See generally*, Wuerth, *supra* note 120.

136. *Id.* at 1744–45. Wuerth acknowledges, however, that her research revealed “countervailing evidence”; she cautions against reading more clarity into the text and history of the Constitution than is warranted. *Id.* at 1744.

detention authority. Congressional authority must be found in the power of the purse or the Law of Nations Clause.

### *3. Power of the purse*

While the Constitution does not explicitly grant the power of the purse to Congress, a number of provisions read together make it clear that “[t]he Legislature . . . commands the purse . . . .”<sup>137</sup> The most prominent textual support is phrased as a restriction supposedly directed at the executive branch rather than an explicit grant of power to Congress: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .”<sup>138</sup> Congress not only has authority to collect funds for the Treasury but is also authorized “to pay the Debts and provide for the common Defence and general Welfare . . . .”<sup>139</sup> Congress has power “To raise and support Armies”<sup>140</sup> and “provide and maintain a Navy.”<sup>141</sup> Furthermore, the Necessary and Proper Clause<sup>142</sup> shores up the other clauses to create a solid constitutional foundation for congressional control over spending.<sup>143</sup>

Congress has successfully invoked its spending power to end or restrict military engagements in Southeast Asia, Angola, Nicaragua, and Somalia.<sup>144</sup> Some of these restrictions left the President with considerable discretion,<sup>145</sup> while others were more absolute.<sup>146</sup> The

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137. THE FEDERALIST NO. 78, at 425 (Alexander Hamilton) (E. H. Scott ed., 1898).

138. U.S. CONST. art. I, § 9, cl. 7.

139. *Id.* art. I, § 8, cl. 1.

140. *Id.* art. I, § 8, cl. 12.

141. *Id.* art. I, § 8, cl. 13.

142. *Id.* art. I, § 8, cl. 18.

143. Stith, *supra* note 55, at 1348; *see also* THE FEDERALIST NO. 78, at 425 (Alexander Hamilton) (E.H. Scott ed. 1898); Raven-Hansen & Banks, *supra* note 11, at 838–45 (describing the appropriations power as a substantive, significant congressional power).

144. *See* Department of Defense Appropriations Act 1994, Pub. L. No. 103-139, § 8151(b)(2)(B), 107 Stat. 1476 (1993) (Somalia); Act of Oct. 30, 1986, Pub. L. No. 99-591, § 216, 100 Stat. 3341-307 (Nicaragua); International Security Assistance and Arms Exports Control Act, Pub. L. No. 94-329, § 404, 90 Stat. 757 (1976) (Angola); Act of July 1, 1973, Pub. L. No. 93-52, § 108, 87 Stat. 134 (Southeast Asia); Second Supplemental Appropriations Act, Pub. L. No. 93-50, § 307, 87 Stat. 129 (1973) (same).

145. *See* Department of Defense Appropriations Act 1994, Pub. L. No. 103-139, § 8151(b)(2)(B)(ii), 107 Stat. 1476 (1993) (adding a number of qualifications to the general restriction of funding for military action in Somalia, including “[t]hat nothing herein shall be deemed to restrict in any way the authority of the President under the Constitution to protect the lives of Americans”).

146. *See* Act of July 1, 1973, Pub. L. No. 93-52, § 108, 87 Stat. 134 (“Notwithstanding

power to end war could be seen as a necessary and proper incident of the power of Congress to declare war,<sup>147</sup> yet these funding restrictions have typically been justified solely on grounds of congressional power over spending.<sup>148</sup> Indeed, the connection of several of the funding clauses to war powers suggests that the power of the purse was intended as a particularly potent check on the President's war-making powers. For example, the restriction on Congress's appropriations power requiring that funds for the army must be renewed every two years<sup>149</sup> was seen historically as a requirement that Congress not abrogate its oversight role, lest a standing army be maintained and used without the consent of the people.<sup>150</sup> Thus, Congress appears to have power to regulate the conduct of war at least to some degree through its appropriations power.

#### 4. Law of Nations Clause

The Law of Nations Clause gives Congress the power to “define and punish . . . Offenses against the Law of Nations.”<sup>151</sup> On its face, this Clause may not be an obvious source of congressional detention authority. Indeed, in categorizing the powers of Congress in *The Federalist Papers*, James Madison classified the Law of Nations

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any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.”).

147. Cf. Barron & Lederman, *Framing the Problem*, *supra* note 1 at 734 (“Congress’s power to ‘declare War’ has been interpreted to encompass the lesser included power to limit the scope and nature of hostilities in which U.S. armed forces may engage.”).

148. See Fisher, *Purse Strings*, *supra* note 61, at 763; Stith, *supra* note 55, at 1360–61 (noting that Congress turned to funding restrictions on the war in Southeast Asia “only after a statutory ‘declaration of policy’—not tied to continued funding—had failed to achieve that end”).

149. U.S. CONST. art. I § 8, cl. 12.

150. Alexander Hamilton described this provision as “a precaution which, upon a nearer view of it, will appear to be a great and real security against military establishments without evident necessity.” THE FEDERALIST NO. 24, at 131 (Alexander Hamilton) (E. H. Scott ed., 1898); see also THE FEDERALIST NO. 26 at 143 (Alexander Hamilton) (E. H. Scott ed., 1898) (“They are not *at liberty* to vest in the Executive department permanent funds for the support of an army, if they were even incautious enough to be willing to repose in it so improper a confidence.”).

151. U.S. CONST. art. I § 8, cl. 10 (“The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations . . .”).

Clause as part of a “class of powers” involving “Regulation of the intercourse with foreign nations” rather than “Security against foreign danger.”<sup>152</sup> The latter class involved “those [powers] of declaring war and granting letters of marque; of providing armies and fleets; of regulating and calling forth the militia; of levying an borrowing money,”<sup>153</sup> while the Law of Nations Clause was classified with powers “to make treaties; to send and receive ambassadors, other public ministers, and consuls; to define and punish piracies and felonies committed on the high seas, . . . to regulate foreign commerce,” and the slave importation clauses.<sup>154</sup>

Yet this dichotomy is consistent with grounding detention authority in the Law of Nations Clause. Wartime detention is governed by the law of war, which is a subset of the law of nations. Congressional power under the Law of Nations Clause may sometimes relate to the security of the nation, but it will always relate to the nation’s interaction with the international legal community. The security implications of wartime detention do not diminish its foreign policy implications.<sup>155</sup> The Supreme Court has recognized the connection between the Law of Nations Clause and detention authority, particularly in relation to congressional authority to create military commissions to try detainees.<sup>156</sup> During World War II, the Court held in *Ex parte Quirin* that the Law of Nations Clause granted Congress authority to provide for trial by military commission of anyone who violated the law of war.<sup>157</sup>

Congress’s power under the Law of Nations Clause can be categorized as regulatory and jurisdictional. The regulatory aspect of the Clause is rooted in both the power to “define . . . Offenses” and to “punish” offenders. Two aspects of this regulatory power require clarification: the class of possible offenders and the scope of the

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152. THE FEDERALIST NOS. 41, at 224, 42 (James Madison) (E. H. Scott ed., 1898).

153. *Id.* NO. 41, at 224.

154. *Id.* NO. 42, at 233.

155. *Cf.* Wuerth, *supra* note 120, at 1737 (“A reprisal power that extended to taking people—already uncommon by the late eighteenth century—might have been given to Congress by virtue of its power to ‘define and punish . . . Offenses against the Law of Nations. . . . Reprisals were granted as a response to wrongdoing by other countries, and were thus one means of punishing an offense against the law of nations.”).

156. *See* Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT’L SEC. L. & POL’Y 295, 315–25 (2010) (discussing Supreme Court cases dealing with military commissions).

157. *Ex parte Quirin*, 317 U.S. 1, 27–28 (1942).

power to define offenses. First, the law of nations can be violated not only by individuals—such as the Guantánamo Bay detainees—but also by governments.<sup>158</sup> Second, Congress’s power under the Clause goes beyond mere domestic replication of the law of nations: it can also prohibit activities “well beyond the contemporaneous international law.”<sup>159</sup> Furthermore, Congress may enact laws in derogation of the law of nations.<sup>160</sup> Thus, when Congress incorporates the law of nations into domestic law, it can enact requirements on individuals and the President that are either more or less stringent than the law of nations.

The jurisdictional aspect of the Clause is rooted in the power to “punish” offenders. As illustrated in *Ex parte Quirin*, the power to establish tribunals to punish offenses against the law of nations has traditionally been seen as a central power granted by the Clause.<sup>161</sup> In order to punish individual offenders, Congress would need to establish a tribunal with jurisdiction to do so, or vest an existing tribunal with such jurisdiction.<sup>162</sup> By extension, Congress would also have the authority to determine the jurisdictional question of where detainees may *not* be prosecuted. Similarly, the Law of Nations

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158. J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 849–53 (2007) (describing a “dual conception” of the Clause that allows “power to regulate both individuals and states (foreign or American)”); Raven-Hansen & Banks, *supra* note 11, at 906–08.

159. Raven-Hansen & Banks, *supra* note 11, at 906–07 (“Congress is not confined to domesticating international law . . .”).

160. *Cf.* *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). The *Charming Betsy* canon entails a strong presumption against interpreting statutes as conflicting with the law of nations, *id.*, but it necessarily implies that Congress has the power to pass laws contrary to the law of nations.

161. *See Ex parte Quirin*, 317 U.S. at 27–28; *see also* Kent, *supra* note 158, at 896–902. Describing the drafting history of the Law of Nations Clause, Professor Andrew Kent argues that the Framers rejected a narrower version of the Clause—which focused on the power to establish tribunals and authorize punishment—in favor of a broader version—which “gives an unmediated and direct power to Congress itself to ‘punish.’” *See* Kent, *supra* note 158, at 900. In adopting the broader language, it is unlikely that the Framers intended to exclude the narrower jurisdictional power.

162. For example, when Congress first passed a law defining the crime of piracy, it included a provision designating where such offenses could be prosecuted. *See* Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113–14 (“[T]he trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought.”). The power to define and punish piracies is a companion to the power to define and punish offense against the law of nations. *See* U.S. CONST. art. I, § 8, cl. 10 (“The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations . . .”).

Clause, coupled with the Necessary and Proper Clause, would grant Congress the power to determine the location of the detainee in order to protect its power to punish offenders.<sup>163</sup>

Therefore, the Law of Nations Clause gives Congress authority to authorize detention, determine the location of detention, set jurisdictional parameters for trial, and enact other regulations which would limit the President's detention authority. Coupled with the power of the purse to regulate military affairs, this Clause gives Congress significant authority over wartime detention. Thus, the President's authority is not exclusive in this area, and the restrictions on transferring detainees to the United States for prosecution are constitutional.

#### *D. Foreign Affairs & Third-Country Transfer Restrictions*

The restrictions on transfers to other countries may present a closer question. The restrictions place significant burdens on the President's ability to negotiate with other countries. The President must demand that the receiving country share intelligence with the United States and, when necessary, take steps to strengthen its detention system.<sup>164</sup> Although the conditions do not explicitly regulate the President's negotiation power, they have that effect: intelligence-sharing and security guarantees must be part of any transfer agreement negotiated by the President. The restrictions also prohibit sending detainees to countries that have had past problems with recidivism, although they give the President some discretion by allowing for a national security exception to this restriction.<sup>165</sup> An examination of presidential and congressional authority over foreign affairs—and negotiations in particular—suggests that the two branches may share concurrent authority over this issue.

##### *1. Presidential foreign affairs power*

In *United States v. Curtiss-Wright Export Corp.*, the Supreme Court declared that the President is “the sole organ of the federal

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163. See, e.g., Act of June 28, 1798, ch. 62, § 4, 1 Stat. 574, 575 (authorizing confinement “in any place of safety within the United States” for French prisoners captured in the Quasi-War of 1798–1800).

164. 2011 National Defense Authorization Act, Pub. L. No. 111–383, § 1033(b), 124 Stat. 4351–52. See discussion of the specific restrictions on the transfer of detainees to other countries, *supra* notes 30–31 and accompanying text.

165. 2011 National Defense Authorization Act, § 1033(c), 124 Stat. 4352.

government in the field of international relations.”<sup>166</sup> Although the President has traditionally held broad authority over foreign affairs, few constitutional clauses directly address such power: the President has power, “with the Advice and Consent of the Senate, to make Treaties” and nominate and appoint ambassadors and consuls,<sup>167</sup> and to “receive Ambassadors and other public Ministers.”<sup>168</sup> Given the limited scope of explicit constitutional authority over foreign affairs, the President’s foreign affairs power has been read broadly throughout history to incorporate several implied powers derived from the few express powers in the Constitution.<sup>169</sup>

The restrictions on the transfer of detainees to other countries could arguably infringe on the President’s power to negotiate with foreign countries.<sup>170</sup> The negotiation power is inherent in the power to make treaties and the power to receive ambassadors. Like the power to receive ambassadors, the power to *make* treaties—as opposed to advise on and consent to the adoption of a treaty—is viewed as an exclusive executive power.<sup>171</sup> Many have argued that the “negotiation prerogative,” therefore, would also be exclusive to the President.<sup>172</sup> As the Court declared in *Curtiss-Wright*, “the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate;

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166. 299 U.S. 304, 320 (1936).

167. U.S. CONST. art. II, § 2, cl. 2.

168. *Id.* art. II, § 3.

169. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 13–45 (2d ed 1996) (discussing theories used to justify the President’s historically broad foreign affairs authority).

170. *See* discussion of the specific restrictions on the transfer of detainees to other countries at *supra* notes 30–31 and accompanying text.

171. *See* U.S. CONST. art. II, § 2, cl. 2; *see also* James Wilson, *Speech to the Pennsylvania Convention, Dec. 4, 1787*, in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 434 (Jonathan Elliot ed., 2d ed. 1836) (“The Senate can make no treaties: they can approve of none, unless the President of the United States lays it before them.”); *id.* at 443 (“With regard to their power in forming treaties, they can make none[;] they are only auxiliaries to the President.”).

172. *See* Phillip R. Trimble, *The President’s Foreign Affairs Power*, 83 AM. J. INT’L L. 750, 755 (1989) (“Everyone agrees that the President has the exclusive power of official communication with foreign governments. This power includes the related power to negotiate agreements—on any matter—subject to any necessary implementing action to give the agreement domestic legal effect.”); *see also* Issues Raised by Foreign Relations Authorization Bill, 14 Op. O.L.C. 37, 37–41 (1990) (stating that Congress may not dictate the makeup of an international delegation).

but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.”<sup>173</sup>

*Curtiss-Wright* recognizes that at the core of the negotiation process lies an exclusive presidential power. But this recognition does not end the analysis. The full extent of the President’s exclusive power can only be determined by examining congressional power—if any—over foreign affairs and negotiations in particular.

## 2. Congressional foreign affairs power

Several constitutional provisions ensure a role for Congress in foreign affairs. The Foreign Commerce Clause gives Congress a significant role in foreign relations by allowing Congress to institute embargoes and economic sanctions against other countries.<sup>174</sup> The power of the purse gives Congress the authority to fund not only the international agreements entered into by the President, but also the negotiating effort itself.<sup>175</sup> Furthermore, the Constitution envisions some role in the treaty formation process for the Senate: “[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .”<sup>176</sup> Although the Senate’s role is often seen as merely voting on the treaties, the text of the Treaties Clause suggests two stages of involvement: advising and consenting to the making of a treaty, and voting on the finished product.

As discussed above, the Law of Nations Clause provides Congress certain powers over foreign affairs.<sup>177</sup> The Clause embodies “a foreign affairs power” that gives Congress “substantial powers of initiative regarding coercive international policymaking.”<sup>178</sup> However, the power to punish foreign states does not appear to be the source of authority for the transfer restrictions in the 2011 National Defense Authorization Act. Rather, those restrictions appear to be based in the power to punish individuals. Just as the

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173. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (emphasis omitted).

174. *See* U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations . . . .”); Kent, *supra* note 157, at 916.

175. *See* Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U. PA. L. REV. 1511, 1519–22 (1988–1989) [hereinafter Fisher, *Treaty Process*].

176. U.S. CONST. art. II, § 2, cl. 2.

177. *See supra* notes 151–62 and accompanying text.

178. Kent, *supra* note 158, at 856, 911–24.

power to punish detainees would logically require power to maintain control over the location and custody of the detainees, the power to punish would also require power to control the terms of release.<sup>179</sup> This suggests congressional power to set the terms of negotiations to transfer, release, or exchange detainees with other countries.

This reading of the Law of Nations Clause appears inconsistent with the traditionally broad interpretation of the President's foreign affairs authority, particularly over negotiations. It is useful, therefore, to examine historical practice to determine whether congressional authority over negotiations truly is unprecedented. "Past practice does not, by itself, create power,"<sup>180</sup> but history and practical effect may put a useful "gloss" on the powers granted in the Constitution.<sup>181</sup>

Early historical practice demonstrates that Congress did have a role in communications with foreign nations, at least in terms of setting national objectives and the outer parameters of negotiations.<sup>182</sup> The history of early U.S. relations with the Barbary States demonstrates this role in a way that implicated Congress's appropriations, foreign commerce, and law of nations powers. As corsairs from Algiers increased their attacks on American merchant ships in the 1790s, the House of Representatives requested a report from Secretary of State Thomas Jefferson regarding the situation in the Mediterranean.<sup>183</sup> In his report to both houses of Congress,

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179. See U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . ."). Congress authorized the exchange of prisoners in the Quasi-War with France. See Act of Feb. 28, 1799, ch. 28, 1 Stat. 624. Although the authorization did not place restrictions on the release and instead authorized the President to exchange or release prisoners "as he may deem proper and expedient," *id.*, the authorization suggests that the early Congress believed it had a role in initiating the process that would lead to termination of detention.

180. *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981); see also *INS v. Chadha*, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.").

181. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.").

182. See Fisher, *Treaty Process*, *supra* note 175, at 1512–16 (noting that some early presidents sought advice from the Senate before entering into treaties).

183. See Report of the Secretary of State Relative to the Mediterranean Trade (Dec. 28,

Jefferson presented three options: continue to pay ransom for captured American citizens, “obtain peace by purchasing it” like European states had done, or “repel force by force.”<sup>184</sup> Jefferson closed his letter by stating that it was up to Congress to choose among these objectives, to limit the funding available to carry out the chosen objective, and to determine whether to allow the President to secure the assistance of allies in any war effort:

Upon the whole, it rests with Congress to decide between war, tribute, and ransom, as the means of re-establishing our Mediterranean commerce. If war, they will consider how far our own resources shall be called forth, and how far they will enable the Executive to engage, in the forms of the constitution, the co-operation of other Powers. If tribute or ransom, it will rest with them to limit and provide the amount; and with the Executive, observing the same constitutional forms, to make arrangements for employing it to the best advantage.<sup>185</sup>

In response, Congress chose a dual course of preparing for war while negotiating peace. It authorized the building of six frigates, but stipulated that the construction should cease “if a peace shall take place between the United States and the Regency of Algiers.”<sup>186</sup> James Madison favored negotiations over rebuilding the navy.<sup>187</sup> He suggested an alternative resolution that would appropriate a specified sum of money for the negotiations.<sup>188</sup> Although Madison’s resolution would have given the President flexibility in pursuing negotiations “in such manner as should be found most effectual for obtaining a peace,” it necessarily would have set specific restrictions on the terms of negotiations by appropriating a specified sum of money to pay for the peace.<sup>189</sup> Furthermore, it would have provided an alternative objective: if peace was not possible for that sum, the President should use the money to negotiate with European powers

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1790), in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, No. 44, at 104–05 (1833).

184. *Id.* at 104–05.

185. *Id.* at 105.

186. Act of Mar. 27, 1794, ch. 12, §§ 1, 9, 1 Stat 350, 350–51.

187. *See* 4 ANNALS OF CONGRESS 433 (1794).

188. *See id.* at 438 (“That the sum of --- dollars be provided to be employed in such manner as should be found most effectual for obtaining a peace with the Regency of Algiers; and failing of this, that the sum should be applied to the end of obtaining protection from some of the European Powers.” (internal quotation marks omitted)).

189. *See id.*

to obtain protection in the Mediterranean.<sup>190</sup> In the end, Congress adopted a generic appropriations bill, worded as any other contemporary bill funding negotiations with foreign nations: “That a sum of one million dollars . . . be appropriated to defray any expenses which may be incurred, in relation to the intercourse between the United States and foreign nations . . . .”<sup>191</sup> Nevertheless, this still set the outer limits of the President’s authority to negotiate with Algiers.

Congressional involvement in setting the objects and parameters of negotiations is not necessarily inconsistent with a view of the President as the “sole organ” of the government in foreign affairs. The term “sole organ” originates with John Marshall as he served in the House of Representatives, and he used the term to refer to the President as the sole organ for communicating with foreign nations.<sup>192</sup> “Marshall’s ‘sole organ’ observation merely stands for the unproblematic proposition that the President is the conduit for formal interaction with foreign states.”<sup>193</sup> Certainly, any attempt to usurp the negotiation function from the President would intrude on an exclusive presidential power. Congress could not, for example, send its own envoy to negotiate on behalf of the United States.<sup>194</sup> Yet the historical record suggests that Congress has some constitutional authority in the arena of negotiations. The President may indeed “be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of

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190. *See id.*

191. Act of Mar. 20, 1794, ch. 7, 1 Stat. 345. At the time, a typical annual appropriation for foreign relations was between \$40,000 and \$60,000. *See* Act of Jul. 1, 1790, ch. 22, § 1, 1 Stat. 128; Act of May 8, 1792, ch. 41, § 3, 1 Stat. 284, 285; Act of Feb. 9, 1793, ch. 4, 1 Stat. 299, 300; Act of May 7, 1793, ch. 41, § 2, 1 Stat. 487.

192. *See generally* Michael P. Van Alstine, *Taking Care of John Marshall’s Political Ghost*, 53 ST. LOUIS U. L.J. 93 (2008–2009) (discussing the historical and political context of Marshall’s comment).

193. *Id.* at 128 (citation omitted). *Cf.* HENKIN, *supra* note 169, at 41 (“Spokesman, even ‘representative’, does not necessarily imply that the President has authority to determine the content of what he should communicate, to make national policy.”).

194. Some presidents have included legislators in international delegations. *See* Fisher, *Treaty Process*, *supra* note 175, at 1517 (citation omitted). Such inclusion would not impede on the President’s exclusive negotiation authority because the legislators participated at the invitation of the President as part of an envoy headed by the executive branch. *Cf.* Issues Raised by Foreign Relations Authorization Bill, 14 Op. O.L.C. 37, 37–41 (1990) (stating that an appropriations requirement was unconstitutional because it would deny funding for certain international negotiations unless the delegation included members of a congressionally appointed body).

success.”<sup>195</sup> Setting aside arguments of institutional competence, however, when Congress acts through one of its foreign affairs powers, it has concurrent authority to determine foreign policy and at least set broad terms of negotiations.

When Congress restricted the President’s authority to transfer detainees to foreign countries, it did so through the appropriations power and its power to define and punish offenses against the law of nations. These foreign affairs powers give Congress concurrent authority over the policies and scope of negotiations in the present case. Therefore, the restrictions are constitutional even though they arguably dictate some terms of any negotiation the President may undertake to transfer detainees.

#### V. CONCLUSION

Congress and the President share concurrent constitutional authority over wartime detention. The two political branches also share some concurrent authority over the field of negotiation, although the overlap may be less than in the area of detention. Given this concurrent power, Congress may restrain the authority of the President as long as the Constitution does not expressly prohibit congressional action or require Congress to act otherwise. The restrictions in the 2011 National Defense Authorization Act do not run afoul of any such provisions, including the Suspension Clause and the Bill of Attainder Clause. Therefore, the restrictions are constitutional.

Although Congress has constitutionally restrained the President, the President certainly is not powerless in this continuing clash over detention policy. But while the restrictions are in place, the President’s power is political rather than constitutional. The President may persuade opponents using arguments about the institutional advantages of presidential discretion and initiative, or cajole opponents using veto threats and other forms of political influence. But when Congress enacts restrictions rooted in a

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195. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (internal quotation marks omitted).

concurrent constitutional power, the President is constitutionally bound to comply.

*William M. Hains\**

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\* William M. Hains received his Juris Doctor from the J. Reuben Clark Law School, Brigham Young University, in April 2011. He currently serves as a law clerk for the Honorable J. Frederic Voros Jr. on the Utah Court of Appeals. He would like to thank Professor Howard Nielson and Carla Crandall for their suggestions on an earlier draft of this paper and the BYU Law Review staff for their editorial assistance. He would also like to thank Chrisy for her support and patience. The views expressed in this Comment are his own.