FROM NADIR TO ZENITH: THE POWER TO DETAIN IN WAR

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Remarkably . . . the state of the law regarding the scope of the President's authority to detain . . . remains unsettled.[1]

I. Introduction

On January 30, 2009, the United States charged Mohammed Jawad with attempted murder for an attack on a U.S. military patrol in December 2002.[2] Six months later, the U.S. District Court for the District of Columbia ordered his release from custody for lack of evidence. The court's order mandated that the Government delay Jawad's release until "15 days following the submission of . . . information to the Congress."[3] On its face, the order is paradoxical—essentially, the court ordered Jawad's release and, in the same stroke of the pen, his detention. The Supplemental Authorization Act (SAA) of 2009 created this apparent paradox by prohibiting appropriated funds from being used "to transfer or release an individual detained at Naval Station, Guantanamo Bay, Cuba . . . unless the President submits to the Congress" certain information.[4]

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[1] Gherebi v. Obama, 609 F. Supp. 2d 43, 45 (D.D.C. 2009).

[2] Charge Sheet, Bacha v. Obama, No. 05-2385, 2009 WL 2365846 1 (D.D.C. Jan. 30, 2008).

[3] Order, Bacha v. Obama, No. 05-2385, 2009 WL 2365846 (D.D.C. July 30, 2009).

[4] Supplemental Authorization Act of 2009, Pub. L. No. 111-32, § 14102(e), 123 Stat. 1859 (2009).

This application of the SAA implicates significant separation of powers concerns. Most fundamentally, who controls the detention of individuals on the battlefield? [5] Assuming the President possesses some inherent authority to detain—as this article does—to what extent can Congress prescribe the President's authority? Could Congress go so far as to direct the detention of a particular individual or class of individuals; or, conversely, could they prohibit the detention of the same? Though these questions involve fundamental constitutional issues and have been the focus of four Supreme Court rulings[6] and more than 200 federal court opinions since 2001,[7] the issue remains decidedly unsettled. This article argues that the President possesses some inherent power to detain, the breadth of which, relative to Congress, is a function of two factors: the location of detention (e.g., whether it occurs outside or inside the United States and its territories) and the nature of the detention (e.g., the intensity of the conflict in which the detention occurs).[8]

Part II of this article explores the authority to detain individuals on the battlefield under both international and domestic law. Both treaty law and Customary International Law (CIL) provide reasonably clear authority to detain individuals during the conduct of armed conflict.[9] Domestically, the authority is more uncertain.[10] Given the constitutional allocation of war powers generally, and the absence of an express allocation of detention authority specifically, the existence and parameters of powers in this area remain fiercely contested issues.[11] Broadly stated, Presidents have historically exercised detention authority

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[5] The terms "detain" and "detention" as used in this article reference the initial physical apprehension of an individual who is a non-U.S. citizen. They do not refer to the continued internment or detention of the individual. The point at which the power to initially detain transmutes into indefinite detention power (or lack thereof) is not clear. This distinction, however, is beyond the scope of this article. The term "on the battlefield" refers to a detention made by a member of the military for other than law enforcement purposes. It has no geographic limitations; that is, an individual can be detained "on the battlefield" inside or outside the United States. For a discussion on the separation of war powers and the detention of U.S. citizens, see Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L. & POL'Y REV. 153, 164 (2004).

[6] Hamdi v. Rumsfeld, 542 U.S. 507 (2004), Boumediene v. Bush, 553 U.S. 723 (2008), Rasul v. Bush, 542 U.S. 466 (2004), Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[7] Search by author on November 24, 2009 on WestLaw for federal cases containing the terms "Guantanamo" and "Habeas" revealed 275 results.

[8] *See infra* Part IV.

[9] *See infra* Part II.

[10] *See infra* Part II.

[11] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004), *Boumediene*, 553 U.S. 573 (2008), Rasul v. Bush, 542 U.S. 466, (2004), Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

without congressional authorization, and Congress has largely acquiesced.[12] This is not, however, universally true.[13]

Building on the foundation established in Part II, Part III examines not what limitations Congress *can* impose, but what limitations they *have* imposed since September 11, 2001 (9/11). Specifically, this section examines the Authorization for the Use of Military Force (AUMF),[14] the Authorization for the Use of Force Against Iraq (AUMF Iraq),[15] the Detainee Treatment Act,[16] the Military Commissions Act,[17] the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001(PATRIOT Act),[18] and the Supplemental Appropriations Acts of 2009 and 2010.[19] This section concludes that to the extent these statutes are limitations, they only limit actions which occur *after* the detention. None of these acts directs, prescribes, or regulates the President's authority to detain.[20]

Part IV of the of the article provides a framework to analyze these current issues as well as the broader issue of the extent to which Congress may restrict the President's inherent detention authority. The framework finds that the President enjoys maximum detention powers during open and active conflict, termed "high conflict," occurring outside of the United States.[21] The President's detention powers ebb to their minimum level—and Congress's powers stand at their high point—during reduced or inactive conflict, or "low conflict," inside the United

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[12] *See infra* Part II.
[13] *See id.*
[14] Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF].
[15] Authorization for the Use of Military Force Against Iraq, Pub. L. No. 107-243, 116 Stat. 1497–1502 (2002) [hereinafter AUMF Iraq].
[16] Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2739 (2005) [hereinafter Detainee Treatment Act].
[17] Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600, 2636 (2006) [hereinafter Military Commissions Act].
[18] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter PATRIOT Act].
[19] Supplemental Authorization Act of 2009, Pub. L. No. 111-32 § 14,102, 123 Stat. 1859 (2009) [hereinafter SSA]. The pertinent language in the 2009 Act is identical to the language in the 2010 Act. *See* Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 9011, 123 Stat. 3409, 3468 (2010) [hereinafter DoD Appropriations Act, 2010].
[20] *See infra* notes 191–235 and accompanying text.
[21] *See infra* Part IV.

States.[22] Circumstances mixing the factors, such as "low conflict" outside the United States, produce an Executive versus Legislative balance of powers falling somewhere between those extremes.[23] Consequently, the power of the President relative to Congress is presented on a spectrum, rather than in rigidly defined categories.[24]

The issue of separation of war powers is both extraordinarily broad and endlessly contentious. Countless books, articles, laws, and judicial decisions have attempted to wrest with the nature of presidential war powers. Given the breadth of the issues addressed, this article has inherent limitations. While this article does discuss some historical treatment of the issue, it does not purport to provide a comprehensive examination of the historical development of presidential war powers.[25] Second, when discussing separation of war powers, it is impossible to fully avoid the debate as to the existence and scope of preclusive or unitary Executive powers.[26] This article necessarily addresses the debate,

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[22] *See infra* Part IV.

[23] *See id.*

[24] *See id.*; *see also* Appendix (graphically illustrating the framework).

[25] Several articles comprehensively explore the historical aspect of this topic. *See, e.g.*, Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1545–55 (1997) [hereinafter Calabresi & Yoo, *The Unitary Executive During the First Half-Century*]; Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667 (2003) [hereinafter Calabresi & Yoo, *The Unitary Executive During the Second Half-Century*]; David J. Barron & Martin Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 712-20 (2008).

[26] Inherent power refers to powers of the President which can be found in the Constitution. The phrase "preclusive powers" or "unitary executive" refer broadly to the concept that some of the President's inherent powers are preclusive, that is, they cannot be reviewed or limited by any other branch. *See generally* Calabresi & Yoo, *supra* note 25 (discussing the history of the unitary executive). This article does not endorse a preclusive theory of war powers, or the unitary executive theory. Neither constitutional history nor a broad reading of the cases addressing the issue support the idea that the President has exclusive authority over any war powers. *See, e.g.*, THE FEDERALIST No. 75, at 467 (Alexander Hamilton) (G.P. Putnam's Son ed., 1888) ("The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interest of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States."). *See also* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701 (2003). Further, while the Court has at times endorsed a broad theory of Executive war powers; see, e.g., *Ex parte* Milligan, 71 U.S. 2, 139 (1866) (Chase, C.J., concurring) and

but does not seek to provide a comprehensive review or discussion of the issue. To the extent the article discusses inherent powers, it is strictly in the context of the Executive's detention authority. Further, where the framework presented in Part IV provides guidance concerning the extent of the Executive's detention authority, it does not purport to provide definitive answers to every situation, particularly in the current conflict. As has been previously noted, "[t]here are inherent uncertainties associated with applying legal rules developed in other contexts to the war on terrorism . . . ."[27]

II. Authority to Detain

A. Authority to Detain Under International Law

It has long been assumed—without much examination or explanation—that the capture and detention of an enemy on the battlefield is "universally" accepted as an "important incident of war."[28] The Court in *Hamdi v. Rumsfeld*[29] addressed the issue, holding that "[t]he purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again."[30] Citing *Ex parte Quirin*,[31] *Hamdi* found that "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war."[32] This perfunctory analysis is not without precedent.[33]

Fleming v. Page, 50 U.S. 603, 615 (1850), this has not been a uniform and consistent reading of the constitution. Additionally it seems as though this was not the understanding of the early Congress. Vladeck, *supra* note 5, at 164 (noting that The Militia Act of 1792, as amended in 1795, Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424, 424, gave the President power to respond to invasion or "imminent danger." If the President possessed any preclusive Commander-in-Chief powers, then certainly responding to a domestic invasion would be one of them).

[27] Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2056 (2005).

[28] *Ex parte* Quirin, 317 U.S. 1, 28–31 (1942).

[29] 542 U.S. 507 (2004).

[30] *Id.* at 518–19 (citing *Ex parte* Quirin, 317 U.S. at 28-30), Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT'L REV. RED CROSS 571, 572 (2002), WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 788 (rev. 2d ed. 1920).

[31] 317 U.S. 1 (1942).

[32] Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004).

[33] *See, e.g*, *In re* Territo, 156 F.2d 142, 145 (9th Cir. 1946) ("Those who have written texts upon the subject of prisoners of war agree that all persons who are active in opposing an army in war may be captured and except for spies and other non-uniformed plotters and actors for the enemy are prisoners of war.").

This assumption—that persons on the battlefield may be captured by the opposing force—has its roots in history, treaty law, and customary international law. When addressing the authority to detain on the battlefield, courts have routinely relied on William Winthrop's treatise on Military Law written in 1896.[34] In that work, Winthrop writes that "[t]he time has long passed when 'no quarter' was the rule on the battlefield, or when a prisoner could be put to death by virtue simply of his capture."[35] Winthrop provides only slightly more analysis than the modern courts, citing as authority an obscure publication entitled Manual, *Laws of War, Part II*[36] and Francis Lieber, author of the Lieber Code, the first codification of the laws of war.[37]

The base source of wartime detention authority in modern jurisprudence is treaty law.[38] All four Geneva Conventions and both Additional Protocols plainly contemplate detention of individuals during armed conflict.[39] This is hardly surprising as the drafters of these treaties

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[34] *See e.g. Quirin*, 317 U.S. at 32; *Application of* Yamashita, 327 U.S. 1, 10 (1946), *Hamdi*, 542 U.S. at 518); Hamdan v. Rumsfeld, 548 U.S. 557, 590 (2006); *In re* Territo, 156 F.2d at 145.

[35] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 1228 (Little, Brown and Company rev. 2d ed. 1896).

[36] This is apparently a reference to a publication entitled *The Laws of War on Land*, published by the International Law Institute in 1880. *See* Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 314 & n.107 (2005). The manual, drafted in the form of a treaty or statute, holds without citation to authority that "[i]ndividuals who accompany an army, but who are not a part of the regular armed force of the State, such as correspondents, traders, sutlers (sic), etc., and who fall into the hands of the enemy, may be detained for such length of time only as is warranted by strict military necessity." International Law Institute, *The Laws of War on Land* (1880), *available at* http://www1.umn.edu/humanrts/instree/1880a.htm.

[37] FRANCIS LIEBER, U.S. DEP'T OF WAR, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863). *See also* RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR (1983) (providing extensive background on Francis Lieber and the intellectual genesis for the code).

[38] *See, e.g., In re* Territo, 156 F.2d 142 (9th Cir. 1946) (upholding the detention of an Italian prisoner of war under the 1929 Geneva Conventions).

[39] *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 5, 19, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S.; Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 4, 5, 6, 42, 43, 45, 46, & 78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of Aug.12, 1949, and Relating to the Protection of Victims of International Armed Conflicts

drew heavily from the Lieber Code.[40] Authority to detain under treaty law is, however, limited to circumstances of "declared war or . . . any other armed conflict . . . between two or more High Contracting Parties."[41] Where armed conflict does not exist, International Law may still be applicable in one of two circumstances. The first is when the United Nations Security Council has passed a Resolution which would establish a legal authority to detain.[42] For instance, Security Council Resolution 1386, concerning Afghanistan post-invasion, authorized "the Member States participating in the International Security Assistance Force to take all necessary measures to fulfill its mandate."[43] This has been construed to authorize detentions in Afghanistan.[44]

Further, as a second circumstance, some have argued that in the absence of armed conflict, and application of the full Geneva Conventions, CIL would apply to provide detention authority.[45] This argument holds that in order for States to comply with other accepted provisions of CIL (e.g., humane treatment, prohibition against arbitrary detention, non-refoulment), States must be allowed to detain in accordance with CIL.[46] Finally, as *Hamdi* appeared to acknowledge, it could be argued that detention on the battlefield has itself become CIL.[47]

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arts. 11, 42, 44, 45, 46, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 5, June 8, 1977, 1125 U.N.T.S. 609.

[40] HARTIGAN, *supra* note 37, at 1 ("The Hague and Geneva Conventions were indebted directly to [the Lieber Code].").

[41] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *but cf.*, Benjamin J. Priester, *Who is a "Terrorist"? Drawing the Line Between Criminal Defendants and Military Enemies*, 2008 UTAH L. REV. 1255, 1293 (2008) (arguing that "Common Article 3 contemplates the detention of both noncombatants and former combatants during the conflict.").

[42] *See generally* Major Robert E. Barnsby, *Yes, We Can: The Authority to Detain as Customary International Law*, 202 MIL. L. REV. 132, 145, 165 (Winter 2009).

[43] S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001). The "mandate" of the Member States is expressed in S.C. Res. 1383, U.N. Doc. S/RES/1383 (Sept. 22, 2001) and S.C. Res. 1378, U.N. Doc. S/RES/1378 (Sept. 14, 2001).

[44] Major Olga Marie Anderson & Major Katherine A. Krul, *Seven Detainee Operations Issues to Consider Prior to Your Deployment*, ARMY LAW. May 2009, at 7, 9–10 ("ISAF's detention authority appears to stem from the language in the UNSCR that directs ISAF to 'take all necessary measures to fulfill its mandate.'") (citations omitted).

[45] Barnsby, *supra* note 42, at 133 ("regardless of the type of conflict in which states are engaged, the authority to detain individuals rises to the level of [Customary International Law].").

[46] *Id*. at 132.

[47] Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004).

B. Authority to Detain Under Domestic Law

1. The Inherent Tension

Where the authority to detain under international law is relatively clear and undisputed, the authority under domestic law is markedly more complex. The authority to detain enemy combatants is an example of what Justice Rehnquist has referred to as the "never-ending tension between the President . . . and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances."[48] That tension has its origins in the roots of the revolution, and the Founding Fathers' fundamental distrust of both the military and a strong executive.[49]

At the Constitutional Convention, George Mason proposed adding language to the Constitution warning against the dangers of standing armies in peacetime.[50] Writing in the *Federalist Papers*, Alexander Hamilton envisioned a Commander-in-Chief who would hold only "occasional command of such part of the militia of the nation, as by legislative provision may be called into the actual service of the Union."[51] Further, he noted that while the President would be Commander-in-Chief of the military, the President's power "would be nominally the same with that of the king of Great Britain, but in

[48] Dames & Moore v. Regan, 453 U.S. 654, 654 (1981).

[49] Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civil Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 344 & n.15 (1999) ("The mandate of civilian control of the military pervades our constitutional structure and stems from the deep distrust on the part of the Founding Fathers of a standing army. Such a distrust was based on European and American experiences of great power wielded by a permanent armed force" (citing J. Bryan Echols, *Open Houses Revisited: An Alternative Approach*, 129 MIL. L. REV. 185, 200 (1990)).

[50] James Madison, Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia in 1878, vol. 5, at 544 (Jonathan Elliot ed., U.S. Gov't Printing Office 1845) ("Mason, being sensible that an absolute prohibition of standing armies in time of peace might be unsafe, and wishing at the same time to insert something pointing out and, guarding against the danger of them, moved to preface the clause (art. I sect. 8) 'To provide for organizing, arming and disciplining the Militia &c" with the words "And that the liberties of the people may be better secured against the danger of standing armies in time of peace'"). *See generally* JOHN R. GRAHAM, A CONSTITUTIONAL HISTORY OF SECESSION 132 (2002) (providing Elliott's Debates, pp. 544–45, Tansill's documents, pp. 725–26, and 2 Ferrand's Records 616–17).

[51] THE FEDERALIST No. 69, at 460 (Alexander Hamilton) (Henry Holt and Company ed., 1898).

substance much inferior to it."[52] In essence, the Commander-in-Chief power would "amount to nothing more than supreme command and direction of the military and naval forces . . . ."[53]

The same concerns were shared by James Madison. Writing in the *Federalist Papers*, Madison warned:

> [T]he liberties of Rome proved the final victim to her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision.[54]

Madison reiterated these concerns in the Third Congress, where he introduced a motion that would have required "that the troops should only be employed for the protection of the frontier."[55] Madison, Mason, and Hamilton's distrust of the military was not uncommon, but it was the exception, not the rule: only 26 of the 135 delegates voted for Madison's motion.[56] Plainly, this is a debate with deep history and divergences of opinion.

2. Presidential Power

Despite the long-standing tension over the separation of war powers, there has been little consistency of opinion and even less consensus on how war powers are divided between the branches.[57] This debate has

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[52] *Id*.
[53] *Id*.
[54] THE FEDERALIST, NO. 41, at 265 (James Madison) (Cass Sunstein ed., 2009).
[55] HOWARD WHITE, EXECUTIVE INFLUENCE IN DETERMINING MILITARY POLICY IN THE UNITED STATES 115 (1979) (quoting 3 ANNALS OF CONG. 1515 (1795)).
[56] *Id*. (noting that no less an authority than George Washington warned against "mercenary armies, which have at one time or another subverted the liberties of almost all the countries . . . ."); *see also* Reid v. Covert, 354 U.S. 1, 24 n.43 (1955) (quoting 26 THE WRITINGS OF GEORGE WASHINGTON, SENTIMENTS ON A PEACE ESTABLISHMENT (May 2, 1783), *in* THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–1799, at 388 (John C. Fitzpatrick ed., U.S. Gov't Printing Office 1931)).
[57] William Michael Treanor, *Fame, The Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 696–97 (1997).

manifested frequently in recent history: the Japanese-American internments in the Second World War (W.W.II.),[58] Truman's steel plant seizures,[59] the War Powers Resolution,[60] various intelligence improprieties which gave rise to the Church Committee hearings,[61] and the Iran-Contra affair.[62] Not surprisingly, Presidents have often sought broad inherent powers, arguing that such breadth is necessary to effectively wage war.[63] For instance, after President Truman seized the nation's steel mills in 1952, he gave a press conference extolling the powers of the President, an office which has "very great inherent powers to meet great national emergencies."[64] He cited a litany of previous

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> The roster of scholars engaged in the controversy over the original understanding of the warmaking power reads like a who's who of constitutional scholars and scholars of foreign affairs. On one side of the debate—the pro-Congress side—are such academics as Raoul Berger, Alexander Bickel, John Hart Ely, Louis Fisher, Harold Koh, Leonard Levy, Charles Lofgren, Arthur Schlesinger, Jr., and William Van Alstyne. . . . In contrast, other scholars have adopted a pro-Executive stance. These include Phillip Bobbitt, Robert Bork, Edward Corwin, Henry Monaghan, Eugene Rostow, Robert Turner, W. Michael Reisman, and John Yoo, among others."

Id. (citations omitted).

[58] *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944).

[59] *See generally* Charles E. Egan, *Impeachment Step on Truman Asked for* Steel Seizure, N.Y.TIMES, 1 (Apr. 20, 1952) ("Congressional action looking to possible impeachment proceedings against President Truman because of his seizure of the steel mills was demanded today of the House of Representatives by George L. Bender, Republican member-at-large from Ohio.").

[60] *See generally* Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984), and Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 864–66 (1972).

[61] *See generally* Christopher M. Ford, *Intelligence Demands in a Democratic State: Congressional Intelligence Oversight*, 81 TUL. L. REV. 721 (2007) (discussing the history of congressional oversight of intelligence operations).

[62] *See* 1 LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 555 (1993) ("The Iran/contra prosecutions illustrate in an especially stark fashion the tension between political oversight and enforcement of existing law.").

[63] *See, e.g.*, President George W. Bush, Signing Statement (Sept. 18, 2001) (In signing into law the Authorization for the Use of Military Force, President Bush issued a signing statement which noted, "Senate Joint Resolution 23 recognizes the seriousness of the terrorist threat to our Nation and the authority of the President under the Constitution to take action to deter and prevent acts of terrorism against the United States. In signing this resolution, I maintain the longstanding position of the Executive branch regarding the President's Constitutional authority to use force, including the Armed Forces of the United States and regarding the Constitutionality of the War Powers Resolution.").

[64] President Harry S. Truman, Press Conference (Apr. 24, 1952).

Presidents who had taken similar actions, including Presidents Jefferson, Tyler, Polk, Lincoln, Johnson, and Franklin Roosevelt.[65] Presidents have cited a variety of constitutional provisions as the source of their war powers. Most fundamentally, it has been widely noted that the grant of powers in Article II is inherently permissive, granting the President "[t]he Executive Power."[66] This is in contrast to the restrictive language found in Article I, which provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[67] The Constitution further vests in the President the power to "take care that the laws be faithfully executed."[68] Additionally, the Presidential oath demands that the President "preserve, protect and defend the Constitution of the United States."[69] Presidents have also cited as authority for their powers cases that declare the President to be the "sole organ" in foreign affairs.[70]

Finally, and central to most Executive war powers claims, the Constitution clearly establishes the President as "Commander-in-Chief."[71] Historically, the courts have given broad deference to the President when acting under the Commander-in-Chief power, a power which the Court has recognized as "something more than an empty title."[72] In *Fleming v. Page*, the Court held that "[a]s commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces . . . and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."[73] Similarly, in discussing the powers of a military commander on the battlefield in *Reid v. Covert*, the Court held that "[i]n the face of an actively hostile enemy, military commanders necessarily have broad power over persons

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[65] *Id*.
[66] U.S. CONST. art. II, § 1. *See also* Calabresi & Yoo, *supra* note 25 (discussing the history of the unitary executive).
[67] U.S. CONST. art. II, § 1.
[68] *Id.* art. II, § 4.
[69] *Id.* art. II, § 4, cl. 8.
[70] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936). ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.") (citations omitted); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 812 n.19 (1982) (noting that the conduct of foreign affairs is one of the "central Presidential domains."); *see also infra* notes 249–50 and accompanying text.
[71] U.S. CONST. art. II, § 2.
[72] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 641 (1952) (Jackson, J. concurring).
[73] Fleming v. Page, 50 U.S. 603, 615 (1850).

on the battlefront."[74] The Commander-in-Chief power does not, however, afford the President unconstrained authority to conduct war and detain individuals on the battlefield; such powers must be weighed against congressional war-making powers.[75]

3. Congressional Power

There are several war-making powers which support congressional regulation of detention operations, specifically the power to "provide for the common Defence,"[76] "[t]o raise and support Armies,"[77] "[t]o provide and maintain a Navy,"[78] "[t]o make Rules for the Government and Regulation of the land and naval Forces,"[79] and "to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."[80] Further, the Constitution provides that Congress shall "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."[81] Collectively, these powers provide a robust claim on the authority to direct detention policy.

C. The Interplay of Congressional and Presidential Powers

1. Generally

The extent of the President's authority to detain in wartime—with or without congressional consent—has been fiercely debated between the branches of government, in the courts, and among the people since the founding of the nation. The courts have provided little guidance on this issue, and have rarely addressed the separation of powers question in the context of detention authority. Where they have addressed tangential issues, their opinions offer little consistency or certitude.

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[74] Reid v. Covert, 354 U.S. 1, 33 (1957).
[75] *See infra* notes 82–188 and accompanying text.
[76] U.S. CONST. art. II, § 8, cl. 1.
[77] *Id.* art. II, § 8, cl. 12.
[78] *Id.* art. II, § 8, cl. 13.
[79] *Id.* art. II, § 8, cl. 14.
[80] *Id.* art. II, § 8, cl. 11.
[81] *Id.* art. II, § 8, cl. 18.

Most fundamentally, a President's actions—whether seizing steel mills during the Korean War or detaining terrorists in the present conflict—"must stem either from an act of Congress or from the Constitution itself."[82] Commentators have noted that the Constitution expressly provides certain war-making powers to Congress (e.g., to declare war, to establish a military justice system); whereas the Executive arguably "lacks any exclusive war or military powers."[83] Additionally, where the Constitution expressly grants powers to Congress, these powers are necessarily exclusive.[84]

Thus, textually, war-making powers "not granted exclusively to Congress are vested concurrently with the President and Congress, meaning that either can exercise such authorities."[85] It has been argued that "[w]hen congressional statutes conflict with presidential orders within this area of overlap, the former always trumps the latter."[86] The Court confirmed this in the context of military detention, explaining "[w]hether or not the President has independent power . . . he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."[87] This passage, of course, does not preclude the argument that the President possesses some inherent war powers.

2. Congressional Action/Inaction

Youngstown Sheet & Tube Co. v. Sawyer provides the core discussion of congressional and Executive separation of powers, and proves a useful

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

[83] Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 305 (2008); *see also* Barron & Lederman, *The Commander in Chief at Lowest Ebb—A Constitutional History*, *supra* note 25, at 947 ("Aside from the President's prerogative of superintendence over the armed forces and the federally conscripted militia, the evidence does not reveal an original understanding that the Commander in Chief enjoyed preclusive authority over matters pertaining to warmaking.").

[84] Prakash, *supra* note 83, at 306.

[85] *Id*. at 304.

[86] *Id*.

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

analog to the issue of detention authority. Both *Youngstown* and the current question of Executive detention authority concern powers not expressly delegated in the Constitution, actions taken by Congress on the periphery of the core issue,[88] and claims of inherent Executive powers.[89] In his seminal *Youngstown* concurrence, Justice Jackson established the three zones in which the President may act: with congressional authority, against congressional authority, or in the "zone of twilight in which [the President] and Congress may have concurrent authority, or when its distribution is uncertain." [90] He found that that where "the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[91] Conversely, he found where "the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers . . . ."[92] In the "zone of twilight" where Congress has not acted, "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."[93]

Dames & Moore v. Regan[94] addressed issues similar to those addressed in *Youngstown*, but in a foreign affairs context. Recalling that Justice Jackson himself thought the three categories "a somewhat over-simplified grouping," Justice Rehnquist reinterpreted Jackson's taxonomy as a spectrum of authority "running from explicit congressional authorization to explicit congressional prohibition."[95]

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[88] In *Youngstown Sheet and Tube*, Congress never passed legislation prohibiting the President from seizing domestic industries. Rather, Congress had earlier considered and rejected such legislation. *Youngstown Sheet and Tube*, 343 U.S. at 600 ("a general grant of seizure powers had been considered and rejected in favor of reliance on ad hoc legislation"). In the current conflict, Congress has never prescribed the President's authority to detain. All legislation has concerned issues which occur after the initial detention. *See infra* Part III.

[89] *Id.* at 586 (noting that "[t]he contention is that presidential power should be implied from the aggregate of his powers under the Constitution.").

[90] *Youngstown Sheet &Tube*, 434 U.S. at 637 (Jackson, J., concurring).

[91] *Id.* at 635.

[92] *Id.* at 637.

[93] *Id.*

[94] 453 U.S. 654 (1981).

[95] *Id.* (quoting *Youngstown Sheet & Tube*, 343 U.S. at 635 (Jackson, J., concurring)).

3. Inherent Authority to Detain?

a. History of Presidential Detention Authority

Presidents have historically exercised detention authority without Congressional authorization. Congress has rarely challenged this power, and the courts have been reluctant to interfere. The history of this issue provides crucial context to understanding the current paradigm and predicting and resolving future conflicts concerning detention authority.

(1) Pre-Civil War

In their examination of the historical evolution of the Commander-in-Chief power, Professors David J. Barron and Martin S. Lederman assert that from the very first act concerning the military, Congress has limited the President's ability to conduct war—including, arguably, the detention of individuals on the battlefield. [96] And indeed, this act provides extensive regulations on the composition and conduct of the force, prescribing the number of soldiers, height requirements, age requirements, staffing of units, pay, rations, and the oath of service.[97] The Act was passed, however, at the behest of President Washington[98] and did not direct the day-to-day operations of the military or delineate the rules of detention. Only after finding the act "agreeable," did President Washington submit a list of officers for congressional

[96] Barron & Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, *supra* note 25, at 955 (The Act "did not signal a desire to leave the President free of statutory encumbrances in exercising his powers of command in battle. Instead, it imposed on the armed forces themselves the rules promulgated in the Articles of War that the preconstitutional Congress had enacted in 1775 and 1776.").

[97] THE PUBLIC AND GENERAL STATUTES PASSED BY THE CONGRESS OF THE UNITED STATES OF AMERICA FROM 1789 TO 1827, at 90–92 (Joseph Story ed. 1828).

[98] *See* WHITE, *supra* note 54, at 98. On August 10, 1789, President Washington sent a letter to congress concerning the pre-constitutional army, which had been established "in order to protect the frontiers from the depredations of the hostile Indians, to prevent all instructions on the public lands, and to facilitate the surveying and selling of the same for the purpose of reducing the public debt." Letter from George Washington, President of the United States, to the United States Senate (Aug. 10, 1789), *reprinted in* 1 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1908, at 60 (Bureau of Nat'l Literature and Art ed., 1908) [hereinafter Washington Letter]. In that letter, President Washington implored the Senate to bring the military establishment into conformity with the laws of "the Constitution of the United States." *Id*. Congress responded by passing the above-mentioned statute the next month. WHITE, *supra* note 54, at 98.

commission.[99] Months after passage of this legislation in 1790, President Washington tested the limits of presidential war powers by raising an army and deploying them against Native Americans in the Wabash River region without congressional consent.[100] He did so after attempting to work with Congress on establishing an army for the campaign.[101] Impatient with Congress's anemic response to his request for troops, Washington went forward without Congressional cooperation.[102] Only later that year did the President inform Congress that the Wabash River tribes were making "aggravated provocations" and that he had "accordingly authorized an expedition . . . ."[103] While some in Congress were upset that "war [had] been undertaken . . . without any authority of Congress," they took no action to limit Washington's actions.[104]

Less than a decade later, between 1798 and 1800, the United States became engaged in an undeclared sea war with France sometimes called the "imperfect war."[105] That conflict resulted in several Supreme Court cases which largely affirmed Congress's ability to limit or control the President's military operations—including, arguably, wartime detentions. In the first case, *Bas v. Tingy*,[106] the Court held that Congress has the power to define the nature and extent of war, both declared and undeclared.[107] In *Talbot v. Seeman*, the Court examined the right of Captain Talbot to salvage the captured vessel *The Amelia*.[108] Writing for the court, Chief Justice Marshall found that "[t]he whole powers of war, by the constitution of the United States, vested in congress . . . ."[109]

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[99] Washington Letter, *supra* note 98 at 63; *but cf*., Barron & Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, *supra* note 25, at 958 ("Washington, Adams, and Jefferson administrations were marked throughout by pitched struggles over how much leeway the executive branch enjoyed to use appropriations as it thought most efficacious").

[100] ALEXANDER DECONDE, PRESIDENTIAL MACHISMO: EXECUTIVE AUTHORITY, MILITARY INTERVENTION, AND FOREIGN RELATIONS 15 (2000).

[101] WHITE, *supra* note 55 at 98.

[102] *Id*.

[103] George Washington, U.S. President, Second Annual Address to Congress (Dec. 8, 1790), *reprinted in* THE ADDRESSES AND MESSAGES OF THE PRESIDENTS OF THE UNITED STATES, 1789–1846, at 37 (Edwin Williams ed., 1846).

[104] JOURNAL OF WILLIAM MACLAY 349 (New York, Edgar Maclay ed., 1890) (quoting Pennsylvania Senator William Maclay).

[105] SEA POWER: A NAVAL HISTORY 87–89 (Elmer Belmont Potter ed., 2d ed. 1981).

[106] Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).

[107] *Id*.

[108] Talbot v. Seeman, 5 U.S. 1 (1 Cranch) (1801).

[109] *Id.* at 28–29.

Three years later, the court again addressed the issue in *Little v. Berreme*,[110] which concerned the capture of the Danish vessel, *The Flying Fish*, pursuant to a Presidential order which allowed U.S. ships to seize American ships "bound to *or from* French ports . . . ."[111] This authority exceeded the authority provided in a Congressional authorization, which allowed for seizure of American ships if they are "bound or sailing *to* any port or place within the territory of the French Republic . . . ."[112] Writing again for the court, Chief Justice Marshall found the seizure unlawful.[113] Marshall provided scant analysis for his decision, remarking only that:

> It is by no means clear that the president of the United States, whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce.[114]

Some commentators have argued this passage suggests the President may have inherent war powers in the absence of Congressional action.[115]

Several years later, *Brown v. United States*[116] addressed the related issue of the Executive's war making powers in the face of Congressional action. The Court noted that "[i]f, indeed, there be a limit imposed as to

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[110] 6 U.S. 170 (1804).
[111] Little v. Berreme, 6 U.S. 170, 171 (1804) (emphasis added).
[112] *Id.* (emphasis added).
[113] *Id.*
[114] *Id*. at 177 (citing U.S. CONST. art. II, § 4).
[115] Barron & Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, *supra* note 25, at 969 ("Chief Justice Marshall held, in effect, that even though the President might well have had the inherent Constitutional power to issue such an order in the absence of a statute, that did not matter because federal statutory law had prohibited the seizure by implication."). *But cf*. John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, at 23, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539257 (noting that "Marshall did not search for a preclusive core of presidential or commander-in-chief power over the navy, over national wartime policy.").
[116] 12 U.S. (8 Cranch) 110 (1814).

the extent to which hostilities may be carried by the Executive, I admit the Executive cannot lawfully transcend that limit . . . ." However, the Court concluded, "if no such limit exist, the war may be carried on according to the principles of modern law of nations, and enforced when, and where, and on what property the Executive chooses."[117]

On the eve of the Battle of New Orleans in December, 1814, General Andrew Jackson took the Court's holding to its Constitutional extremes. During a period of martial law before the Battle of New Orleans,[118] General Jackson detained a newspaper reporter who wrote an unfavorable article, and the federal judge who granted the reporter's writ of habeas corpus.[119] Congress had not authorized these detentions, yet it did nothing to limit or punish Jackson's application of his detention authority.[120]

In 1817, General Jackson again pushed the limits of Executive war powers when he invaded Spanish Florida without congressional approval.[121] During the campaign, Jackson detained two British citizens who were advising the Seminoles.[122] He tried the two at courts-martial and then executed both.[123] This action caused a great national debate about Jackson's authority to invade, as well as his authority to detain and execute the British advisors.[124] The Military Committee of Congress censured him for the execution, though the full Congress declined to take

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[117] Brown v. United States, 12 U.S. 110, 147, (1814) (February 1814 term).
[118] JON MEACHAM, AMERICAN LION 31 (2008).
[119] WILLIAM GRAHAM SUMNER, AMERICAN STATESMAN: ANDREW JACKSON 55 (New York, Houghton, Mifflin & Co. 1882).
[120] After the Judge was released from jail, he fined Jackson a $1000, which he paid. Abraham Lincoln, Letter to Erastus Corning and Others, June 12, 1863, *reprinted in* THE ESSENTIAL LINCOLN: SPEECHES AND CORRESPONDENCE 139 (Orville Vernon Burton, ed. 2009). Thirty years later, Congress repaid the fine with interest. At the time the fine was paid, several Congressmen defended Jackson's unauthorized detentions, noting that he "imposed no restraint that any man devoted to the country would regret . . . ." 15 THOMAS HART BENTON, ABRIDGMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856, at 52 (New York, D. Appleton & Co. 1863) (1856).
[121] ROBERT VINCENT REMIMI, ANDREW JACKSON 83 (1999).
[122] ROBERT VINCENT REMINI, THE LIFE OF ANDREW JACKSON 119–20 (1990).
[123] *Id.*
[124] *See, e.g.*, 6 THOMAS HART BENTON, ABRIDGMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856, at 228 (New York, D. Appleton & Company 1859) (1856) (reflecting the debate in Congress over Jackson's actions and the great variety of opinion on the propriety of his conduct).

any action against him.[125] In this instance, not only had Congress not approved of the detentions, it had not even approved of the campaign under which the detentions occurred.[126] Notably, Congress did nothing to Jackson for either incident[127] and passed no laws limiting or even regulating the President's detention authority. Congress's actions, or lack thereof, suggest an implied endorsement of the Executive's authority to detain individuals during conflict without congressional approval.

(2) Civil War

During the Civil War, both President Lincoln and the Congress took several unprecedented actions which tested the limits of their Constitutional war powers generally and detention powers specifically. The first test of Presidential war powers came when the Court considered the *Prize Cases*.[128] Addressing the constitutionality of Lincoln's order to blockade the Southern ports, the majority held that the President, "in fulfilling his duties as Commander-in-chief," has the power to determine the method of waging war.[129] The Court noted that Congress had ratified the President's blockade order, but it did not address whether the President's action would be upheld absent the ratification.[130] In 1861, President Lincoln suspended the writ of Habeas Corpus.[131] This action gave rise to several significant cases which more directly discussed

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[125] *Id.* at 247 (recalling that Henry Clay, then Speaker of the House, came out forcefully against Jackson's actions, warning of a military uncontrolled by Congress. Drawing allusions to Alexander the Great, Julius Cesar, and Napoleon, Clay warned the Congress of the dangers of popular military men operating without constraint. He concluded his remarks with a stark warning: "[Jackson's supporters] may carry him triumphantly through this House. But, if they do, in my humble judgment, it will be a triumph of the principle of insubordination—a triumph of the military over the civil authority—a triumph over the powers of this House—a triumph over the constitution of the land.").

[126] REMIMI, *supra* note 121, at 83.

[127] *See* John Yoo, *Andrew Jackson and Presidential Power*, 2 CHARLESTON L. REV. 521 (2008) (noting that after the invasion of Florida, "[a]s Jackson journeyed to Washington to personally manage his defense, public opinion turned strongly in his favor.").

[128] 2 U.S. 635 (1863).

[129] *Id.* at 670.

[130] *Id.* at 695 ("Congress assembled on the call for an extra session the 4th of July, 1861, and among the first acts passed was one in which the President was authorized by proclamation to interdict all trade and intercourse.").

[131] Letter from Abraham Lincoln, U.S. President, to General Winfield Scott, Commanding General, Army of the United States (July 2, 1861), *in* 5 THE WRITINGS OF ABRAHAM LINCOLN 316 (Arther Brooks Lapsley ed., 1906).

executive war powers including *Ex parte Merryman*[132] and *Ex parte Milligan.*[133] *Ex parte Merryman* provides a particularly powerful admonishment of the President's unilateral detention policies. On May 25th, 1861, John Merryman was detained without trial by military authorities at Fort McHenry, Maryland.[134] Merryman had been detained pursuant to President Lincoln's order of the suspension of Habeas Corpus on April 27, 1861.[135] The Court ruled the suspension unconstitutional and ordered *Merryman* released. Writing for the court, Chief Justice Taney warned the Government:

> I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.[136]

Merryman was later released, but President Lincoln continued the suspension and detained thousands more.[137] President Lincoln defended his measures in part on the actions of Andrew Jackson in the War of 1812.[138]

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[132] 17 Fed.Cas. 144, 152 (1868).
[133] 71 U.S. 2, 139 (1866).
[134] THE CIVIL WAR ARCHIVE: THE HISTORY OF THE CIVIL WAR IN DOCUMENTS 821 (Henry Steele Commager & Erik A. Bruun eds., 2000) (1950).
[135] *Id.*
[136] *Ex parte* Merryman, 17 Fed.Cas. 144, 152 (1868).
[137] Of historical (and constitutional) note, there are some who believe that President Lincoln was prepared to arrest Chief Justice Taney as a result of his opinion in *Merryman*. In his biography of Taney, Samuel Tyler, *Memoir of Roger Brooke Taney, LL.D*, 427 (New York, John Murphy & Co. ed. 1872), Samuel Tyler wrote that "as he left the house of his son-in-law . . . [Taney] remarked that it was likely he should be imprisoned in Fort McHenry before night; but he was going to the court to do his duty."
[138] THE ESSENTIAL LINCOLN: SPEECHES AND CORRESPONDENCE 140 (2009).

> First, that we had the same Constitution then as now; secondly, that we then had a case of invasion, and now we have a case of rebellion; and, thirdly, that the permanent right of the people to public discussion, the liberty of speech and of the press, the trial by jury, the law of evidence, and the habeas corpus suffered no detriment

Five years after *Ex parte Merryman*, the Court addressed the President's authority to create and carry out military tribunals in *Ex parte Milligan*.[139] The Court found the President did not have the power to "institute tribunals" without the consent of Congress.[140] Having no authorization from Congress, and finding no authority in the Constitution, the Court struck down the President's actions.[141] Chief Justice Chase dissented in part, noting that Congress's war power "necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief."[142] Chase found the authority to establish tribunals was "within the power of Congress . . . ."[143]

The significance of *Milligan* remains unclear. In their analysis of military tribunals, Professors Katyal and Tribe note that *Milligan* leaves "the President little unilateral freedom to craft an order to detain people on his own suspicion for indefinite warehousing or trial at his pleasure in a system."[144] A close reading of the case, however, suggests a contrary conclusion.

> whatever by that conduct of Gen. Jackson, or its subsequent approval by the American Congress.

Id.

[139] *Ex parte* Milligan, 71 U.S. 2 (1866).

[140] *Id.*

[141] *Id.* at 3.

> Military commissions organized during the late civil war, in a State not invaded and not engaged in rebellion, in which the Federal courts were open, and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offence, a citizen who was neither a resident of a rebellious State, nor a prisoner of war, nor a person in the military or naval service. And Congress could not invest them with any such power.

Id.

[142] *Id.* at 136.

[143] *Id.* at 140 (Chase, C.J., concurring).

[144] Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1279–80 (2002) ("This general principle of *Milligan*—a principle never repudiated in subsequent cases—leaves the President little unilateral freedom to craft an order to detain people on his own suspicion for indefinite warehousing or trial at his pleasure in a system of military justice.").

Arguing for Milligan, attorney David D. Field suggested that the President's power as Commander-in-Chief should extend only to members of the military and camp followers.[145] As Professors Katyal and Tribe suggest, if the Court intended to proscribe an inherent authority to try and detain, then the Court could simply have adopted Mr. Field's argument. It did not. Instead, it crafted a much narrower rule, providing that the President has no independent authority to "institute tribunals." Interestingly, Katyal and Tribe do not conclusively argue that the President lacks authority to detain. They note that *Milligan* leaves "little unilateral freedom," which implies some inherent (or unilateral) authority exists.[146] Further, their critique is expressly applicable to the detention and "indefinite warehousing or trial" of individuals.[147] It is notable that in *Milligan*, neither Chief Justice Chase nor the majority addressed the President's inherent authority to detain. Indeed, the Supreme Court has never squarely addressed the question.[148]

Merryman is remembered for the Court striking down the President's suspension of the writ of Habeas Corpus, while *Milligan* stands for the proposition that a U.S. citizen cannot be subject to a military tribunal when the civilian courts are functioning.[149] Largely forgotten is that both

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[145] *Milligan*, 71 U.S. at 20.
[146] Katyal & Tribe, *supra* note 144, at 1280.
[147] *Id*.
[148] The court has acknowledged the issue, but has never ruled on the issue. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 682 (2006) ("Although the President very well may have inherent authority to try unlawful combatants for violations of the law of war before military commissions, we need not decide that question because Congress has authorized the President to do so."); Hamdi v. Rumsfeld, 542 U.S. 507, 587 (2004) ("Although the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the President to do so."); Greene v. McElroy, 360 U.S. 474, 496 (1959) ("But the question which must be decided in this case is not whether the President has inherent power to act or whether Congress has granted him such a power; rather, it is whether either the President or Congress exercised such a power and delegated to the Department of Defense the authority to fashion such a program."); *but cf.*, United States v. Heinszen, 206 U.S. 370, 378 (1907) ("Indeed, the civil government, as established in the islands by the President, either in virtue of his inherent authority or as a result of the power recognized and conferred by the act of Congress approved March 2, 1901 . . ."); Loving v. United States, 517 U.S. 748, 776 (1996) (Scalia, J., concurring in part and concurring in judgment) (noting that under the commander-in-chief power, the President's "inherent powers are clearly extensive.").
[149] *Id*. at 1292–93 ("Nevertheless, [*Ex parte Quirin*] makes clear that, under the *Milligan* principle, when military tribunals are substituted for available civil alternatives, specific authorization is necessary even when Congress has supposedly codified judicial precedent purporting to discern authority in preexisting statutes.").

cases are ostensibly detention authority cases. The suspension came in the form of an order from Lincoln to General Winfield Scott, who directed that if he, Scott, found "resistance" between New York and Washington that he could "suspend the writ of habeas corpus for the public safety."[150]

Three days after Lincoln's order, he issued a statement to Congress.[151] Three days after Lincoln's order, he issued a statement to Congress. In the statement, Lincoln offered a defense of his action and appeared to defer to Congress, noting the decision to legislate on this issue "is submitted entirely to the better judgment of Congress." Barron and Lederman read this passage to suggest Lincoln had ceded control to Congress on the issue.[152] It is important to note that Lincoln never claimed the right to suspend was a preclusive right.[153] Further, while their reading of Lincoln's July 4 address may be accurate and relevant, equally pertinent is Congress' reaction to Lincoln's suspension. It took Congress one year, seven months, and twenty-six days to craft a response to Lincoln's action.[154] When it did take action on March 3, 1863, Congress did not declare the President's actions illegal.[155] Indeed, Congress used carefully crafted language designed to avoid finding the President culpable;[156] in effect, as one commentator has noted,

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[150] Letter from Abraham Lincoln, U.S. President, to General Winfield Scott, Commanding General, Army of the United States (July 2, 1861), *in* 5 THE WRITINGS OF ABRAHAM LINCOLN 316 (Arther Brooks Lapsley ed., 1906).

[151] Abraham Lincoln, Special Session Message (July 4, 1861), *in* EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA, DURING THE GREAT REBELLION 123-29 (4th ed., 1882) (1864). *See* George C. Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress*, 3 BULL. OF THE U. OF WIS. HISTORICAL SERIES 217, 223 (1907) (recalling that Lincoln's message was dated July 4, 1861, it was not read to the Congress until July 5, 1861).

[152] Barron & Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, *supra* note 25, at 1000–01.

[153] Abraham Lincoln, Special Session Message (July 4, 1861), *in* MCPHERSON, *supra* note 151, at 126 ("Now it is insisted that Congress, and not the Executive is vested with [the power to suspend Habeas Corpus]. But the Constitution itself is silent as to which or who is to exercise this power.").

[154] The time between the date on which Congress read Lincoln's July 4 Address, July 5, 1861, and the date on which it took action, March 3, 1863. An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, ch. 81, 12 Stat. 755 (1863).

[155] *Id.* The Government later argued this point in support of its position in *Ex parte Milligan.* William G. Howell, *Wartime Judgments of Presidential Power: Striking Down But Not Back*, 93 MINN. L. REV. 1778, 1796 n.104 (2009).

[156] Sellery, *supra* note 151, at 264 (referencing the carefully worded text of the legislation, Dr. Sellery notes that "[t]his phraseology is not accidental; it is the product of

recognizing "the President's right to suspend."[157] Less well known than *Milligan* and *Merryman*, but no less significant, was Congress's role in the conduct of the war itself. In December 1861, Congress established the Joint Committee on the Conduct of the War to investigate the Union defeat at Ball's Bluff.[158] The Committee quickly expanded its scope "to cover military operations throughout the country."[159] The Committee, staffed with political opponents of Lincoln, exerted tactical control over the conduct of military operations. As one commentator has noted, the Committee "trenched closely upon authority of the president."[160] Despite this, Lincoln chose to cooperate with the committee, perhaps out of a fear of political retribution or embarrassment.[161] The Committee represents perhaps the high-water mark of congressional involvement in the conduct of combat operations.

(3) Post-Civil War

The issue of detention authority lay largely dormant until the advent of the Second World War. The issue was first addressed in *Ex parte Quirin*,[162] where the Court considered the validity of military commissions applied to Nazi saboteurs who had been captured in the United States.[163] At its core, *Quirin* concerns the propriety of the commissions rather than the propriety of detentions.[164] Commentators

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a prolonged process of refinement, commencing July 6, 1861, in which the dominating motive was unquestionably a desire not to deny the President's right to suspend.").

[157] *Id*. at 264–65 ("Congress, in passing the act, asserted its right to take control of the suspension of the privilege of the writ. If the first section was a recognition by Congress of the legality of Presidential suspension, the remainder of the act was an assertion of the jurisdiction of Congress over the matter of habeas corpus suspension.") (citations omitted).

[158] REPORT OF THE JOINT COMMITTEE ON THE CONDUCT OF THE WAR pt. II, at 9 (1863). *See also* DAVID HERBERT DONALD, LINCOLN 326 (1995).

[159] DONALD, *supra* note 158, at 326.

[160] Michael Les Benedict, *The Perpetuation of Our Political Institutions: Lincoln, The Powers of the Commander in Chief, and the Constitution*, 29 CARDOZO L. REV. 927, 955–56 (2008).

[161] *Id*. *See also* Barron & Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, *supra* note 25, at 1010 (noting that the committ micromanaged "the conduct of the war by use of the threat of negative publicity and exposure of malfeasance, rather than through statutory or other formal enforcement mechanisms.").

[162] 317 U.S. 1 (1942).

[163] *Id.*

[164] *Ex parte* Quirin, 317 U.S. 1, 18 (1942) (The decision of the Court concerned the legality of the commission even though the Court phrased the issue as whether the detention of petitioners by respondent for trial by Military Commission . . . is in

have rightly noted that the court appears to have upheld the commissions because they were undertaken in accordance with laws previously passed by Congress.[165] The Court discusses exclusively the acts of Congress relating to the establishment of commissions under the Articles of War.[166] The court does not address previous congressional attempts to prescribe the power of the President to detain individuals. Furthermore, the Court notes that the commissions were established by the President under "authority conferred upon him by Congress," and under "such authority as the Constitution itself gives the Commander-in-Chief.[167] This suggests the Court's contemplation of some inherent Executive war power.

The next year, the Court addressed the myriad of issues concerning the internment of Japanese-Americans in *Hirabayashi v. United States*[168] and *Yasui v. United States.*[169] A year later, the Court decided two more internment cases: *Korematsu v. United States*[170] and *Ex parte Endo.*[171] Of the four cases, only *Ex parte Endo* addressed the detention power.[172] In

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conformity to the laws and Constitution of the United States.). Attorneys for the defendants never argued the President lacked authority to detain them. *See* Transcript of Record at 2869–2908, *Ex parte* Quirin, 317 U.S. 1 (1942).

[165] *Quirin*, 317 U.S. at 11 ("By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also 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.").

[166] *Id*. at 10.

> By the Articles of War . . . Congress has provided rules for the government of the Army. It has provided for the trial and punishment, by courts martial, of violations of the Articles by members of the armed forces and by specified classes of persons associated or serving with the Army. . . . But the Articles also recognize the "military commission" appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial.

Id.

[167] *Id*. at 11.

[168] 320 U.S. 81 (1943).

[169] 320 U.S. 115 (1943).

[170] 323 U.S. 214 (1944).

[171] 323 U.S. 283 (1944).

[172] Vladeck, *supra* note 5, at 174 ("[O]nly *Endo* invoked the detention power itself. The other three—Hirabayashi, Yasui, and Korematsu—all involved challenges to criminal convictions for violating exclusion orders, an offense Congress criminalized via statute.") (citations omitted).

Endo, the court held that the Government could not detain a citizen that they themselves did not consider a threat.[173] The Court analyzed the authorities granted to the War Relocation Authority under Executive Order 9066 and congressional legislation which "ratified and confirmed Executive Order No. 9066."[174]

The Court began its analysis in *Endo* by noting that "the Constitution when it committed to the Executive and to Congress the exercise of the war power necessarily gave them wide scope for the exercise of judgment and discretion so that war might be waged effectively and successfully."[175] It is noteworthy that the Court endorsed broad constitutional war making powers for both the President and Congress. The Court continued:

> We do not mean to imply that detention in connection with no phase of the evacuation program would be lawful. *The fact that the Act and the orders are silent on detention does not of course mean that any power to detain is lacking.* Some such power might indeed be necessary to the successful operation of the evacuation program. . . . But we stress the silence of the legislative history and of the Act and the Executive Orders on the power to detain to emphasize that any such authority which exists must be implied.[176]

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[173] *Ex parte* Endo, 323 U.S. 283 (1944).

[174] *Id*. at 287 (citing 18 U.S.C. § 97(a) (1942)).

> That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.

Id.

[175] *Id*. at 298–99 (citing Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 93 (1943)).

[176] *Id*. at 301–02 (emphasis added).

This passage is remarkable in that, like *Quirin*, it suggests a latent, implied power to detain; or, at the very least, does not dismiss the idea that Congress or the President may have implied detention powers.

b. The Bush Administration

Given the historical record, the Bush Administration's claims on inherent powers were not historically unique. What was unique was the scope of the claimed powers.[177] Specifically, the Administration maintained that it had the "inherent authority to detain those who take up arms against this country pursuant to Article II, Section 2, of the Constitution . . . ."[178] In their brief to the court in *Padilla v. Rumsfeld*, the administration argued that this authority was "at the heart of [the President's] Constitutional powers as Commander-in-Chief."[179] They made the same argument in *Hamdi v. Rumsfeld*, arguing that the Court had "long recognized that the commander-in-chief power 'is not limited to victories in the field and the dispersion of the insurgent forces,' but

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[177] Barrron & Lederman, *The Commander in Chief at Lowest Ebb—A Constitutional History*, *supra* note 25; *see also* Barron & Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, *supra* note 25, at 712–20 (noting that "the Bush Administration has repeatedly made striking assertions of preclusive war powers"); Elizabeth M. Iglesias, *Foreword, Article II: The Uses and Abuses of Executive Power*, 62 U. MIAMI L. REV. 181 (2008) (noting that the Bush administration in *Hamdi* and Hamdan argued a "breathtaking array of asserted Executive powers"); Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335 (2005) (noting that the government's arguments in the Padilla case were "perhaps, the boldest assertion of Executive authority since Truman's seizure of the steel mills more than half a century earlier.").

[178] The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 2001 WL (OLC) 34726560 (Sept. 25, 2001) ("We conclude that the Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the Nation in its foreign relations, to use military force abroad—especially in response to grave national emergencies created by sudden, unforeseen attacks on the people and territory of the United States."); Padilla v. Rumsfeld, 352 F.3d 695 (2nd Cir. 2003), *rev'd and remanded on other grounds*, 542 U.S. 426 (2004); *see also* Brief for the Respondents, Padilla v. Rumsfeld, 542 U.S. 426 (2004) (No. 03-1027) ("The Government maintains that no explicit authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution.").

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

'carries with it inherently the power to guard against the immediate renewal of the conflict?"[180]

Neither the majority in *Padilla* nor the plurality in *Hamdi* addressed the President's claims of inherent powers.[181] Justice Thomas, writing in dissent in *Hamdi*, addressed the issue and found that "[t]he Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations."[182] Citing historical precedent, Justice Thomas noted that "[t]his Court has long recognized these features and has accordingly held that the President has Constitutional authority to protect the national security and that this authority carries with it broad discretion."[183]

The Second Circuit also addressed the claim in *Padilla*, finding that "[t]he Constitution's explicit grant of the powers authorized in the Offenses Clause, the Suspension Clause, and the Third Amendment, to Congress is a powerful indication that, absent express congressional authorization, the President's Commander-in-Chief's powers do not support Padilla's confinement."[184] Similarly, the Fourth Circuit addressed the issue of inherent detention authority in *al-Marri v. Pucciarelli*.[185] The plurality applied the *Youngstown* framework to

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[180] Government's Brief to the Court, Hamdi v. Rumsfeld, 542 U.S. 507 (Mar. 2004) (quoting Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 507 (1870)) (citing *In re* Yamashita, 327 U.S. 1, 12 (1946)).

[181] The Court in *Hamdi v. Rumsfeld*, however, had no problem exploring the President's authority over enemy combatants. They did so in the context of the AUMF, while largely ignored the President's claims of "plenary authority to detain pursuant to Article II of the Constitution." Hamdi v. Rumsfeld, 542 U.S. 507, 516–517 (2004). Justice Souter did address this claim tangentially in a concurring opinion, writing: "in a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen [without Congressional approval] if there is reason to fear he is an imminent threat to the safety of the Nation and its people." *Id.* at 552 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

[182] *Id.* at 580 (Thomas, J., dissenting).

[183] *Id.* (Thomas, J., dissenting) (citing 10 ANNALS OF CONG. 613 (1800)) (emphasis in original), *Prize Cases*, 2 Black 635, 668, 670 (1863), Fleming v. Page, 9 How. 603, 615 (1850), United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936), Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

[184] Padilla v. Rumsfeld, 352 F.3d 695 (2nd Cir. 2003), *rev'd and remanded on other grounds*, 542 U.S. 426 (2004).

[185] al-Marri v. Pucciarelli, 543 F.3d 213 (4th Cir. 2008), *vacated and remanded*, al-Marri v. Spagone, 129 S. Ct. 1545 (2009) (To assess claims of presidential power, the Supreme Court has long recognized, as Justice Kennedy stated most recently, that courts look to the "framework" set forth by Justice Jackson in *Youngstown Sheet and Tube Co. v.*

examine the President's claims that he had "inherent Constitutional power" to detain Ali aleh Kahlah al-Marri, a Qatari national and legal resident of the United States, who was detained in Illinois as an enemy combatant.[186] The court found that "[i]n contrast to the AUMF, which is silent on the detention of asserted alien terrorists . . . in the PATRIOT Act . . . Congress carefully stated how it wished the Government to handle aliens believed to be terrorists who were seized and held within the United States."[187]

Writing in dissent in *al-Marri*, Chief Judge Williams seems to accept the government's inherent authority argument, noting that the AUMF combined with "some inherent Article II power to wage war" provides ample authority to detain al-Marri.[188] The plurality opinion in *al-Marri*—to the extent that it stands after being vacated by the Supreme Court—applies only to "resident aliens" not enemy combatants.[189]

III. The War on Terror

As noted by the court in *al-Marri*, since 9/11, Congress has taken several measures to limit or prescribe the President's detention authority.[190] The resulting laws, however, merely regulate, to some extent, what occurs *after* the detention. Neither Congress nor the courts have attempted to prescribe or regulate the Executive's power to detain on the battlefield.

Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (Kennedy, J., concurring)).

[186] *al-Marri*, 543 F.3d at 221.

[187] *Id.* at 248.

[188] *Id.* at 288 (Williams, Chief Judge, dissenting in part) (quoting Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs.").

[189] *Id.* at 250 (noting that their holding does "not question the President's wartime authority over enemy combatants").

[190] *Id.* at 248 ("In contrast to the AUMF, which is silent on the detention of asserted alien terrorists . . . in the PATRIOT Act . . . Congress carefully stated how it wished the Government to handle aliens believed to be terrorists who were seized and held within the United States.").

A. AUMF and *Hamdi v. Rumsfeld*

Beyond claims of inherent Article II powers, both the Bush and Obama administrations have found express authorization for detention under two Congressional joint resolutions: The AUMF[191] and the AUMF Iraq.[192] The AUMF provides an extremely broad grant of authority to the President to wage war against those responsible for 9/11:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[193]

The AUMF does not, however, expressly include the power to detain. The authority to detain under the AUMF was the issue addressed by the Court in *Hamdi v. Rumsfeld*.[194]

In 2001, Yaser Esam Hamdi was detained by U.S. forces in Afghanistan.[195] He was transferred to Guantanamo, and in June 2002, his father filed a Habeas petition on his behalf.[196] The Government moved to dismiss the petition, submitting a policy memorandum in support of its motion.[197] This memorandum—commonly known as the Mobbs Declaration after its author, Michael Mobbs—asserted that detention was proper because Hamdi was a member of the Taliban and surrendered on the battlefield to U.S.-allied forces.[198] The district court found this declaration insufficient and ordered the production of several documents

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[191] AUMF, *supra* note 14.
[192] AUMF Iraq, *supra* note 15.
[193] AUMF, *supra* note 14.
[194] Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004). Some have argued that the AUMF "arguably authorizes the President to do whatever [Law of Armed Conflict] permits . . . ." Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2653 (2005) (citing Bradley & Goldsmith, *supra* note 27, at 2047).
[195] *Hamdi*, 542 U.S. at 511.
[196] *Id.*
[197] *Id.*
[198] *Id.* at 513.

for *in camera* review.[199] The Government appealed this production order, and the Fourth Circuit granted its appeal.[200]

In a wide-ranging opinion, the Fourth Circuit held that because Hamdi was detained in a "zone of active combat in a foreign theater of conflict," there existed a sufficient basis for detention.[201] As summarized by the Supreme Court, the Fourth Circuit found that "separation of powers principles prohibited [the court] from 'delv[ing] further into Hamdi's status and capture . . . .'"[202] The Supreme Court disagreed, granted certiorari and decided the case. Indeed, Justice Thomas alone accepted the Fourth Circuit's logic that the case was beyond review by the courts.[203]

In its briefs and at oral argument, the Government argued that the President's "plenary authority to detain pursuant to Article II of the Constitution" was sufficient to authorize his actions; in other words, congressional authorization was not required. [204] The Court refused to address this issue, instead agreeing "with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF."[205] The Court explained, noting that the detention of individuals "engaged in armed conflict against the United States . . . in active combat . . . is so fundamental and accepted as incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[206]

Despite this seemingly broad language, the decision was limited to "individuals who fought against the United States in Afghanistan as part

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[199] *Id.*
[200] *Id.*
[201] Hamdi v. Rumsfeld (*Hamdi III*), 316 F.3d 450, 459 (4th Cir. 2003).
[202] *Hamdi*, 542 U.S. at 514–15 (quoting *Hamdi III*, 316 F.3d 450 (4th Cir. 2003)) (citations omitted).
[203] *Id.* at 579 (Thomas, J., dissenting) ("The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision. As such, petitioners' habeas challenge should fail, and there is no reason to remand the case.").
[204] *Id.* at 516–17.
[205] *Id.*
[206] *Id.* at 518 (Justices Souter and Ginsburg offered a concurring opinion which accepted the principle that the AUMF could provide authority to detain in accordance with the "laws of war." However, they argued, Hamdi was not treated as a Prisoner of War and thus the government could not invoke this authority.).

of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks . . . ." [207] Further, the court declined to define the term "enemy combatant," noting that "[t]he permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them."[208] Thus, the scope of this "fundamental and accepted" power "incident to war" remained an open question. Indeed, as one district court addressing the issue noted in April, 2009, "[R]emarkably, despite the years that have passed since these habeas corpus petitions were filed, the state of the law regarding the scope of the President's authority to detain the petitioners remains unsettled."[209]

B. Other Congressional Actions

1. The PATRIOT Act

The PATRIOT Act sought to "deter and punish terrorist acts in the United States and around the World, to enhance law enforcement investigatory tools, and for other purposes."[210] Where the AUMF is silent on detention of suspected terrorists, the PATRIOT Act explicitly authorizes certain detentions.[211] Section 412 of the PATRIOT Act mandates "mandatory detention of suspected terrorists."[212] The Act further details which individuals the Attorney General is required to detain, and the procedures for release.[213] Thus, the Act is permissive rather than restrictive. Furthermore, the Act does not limit the President's authority to detain individuals on foreign battlefields. While the Act does not include any geographic limitations on its application, given that the Act is an amendment to the Immigration and Nationality Act and its limited application to "alien" terrorists, these sections are implicitly limited to the detention of individuals within the United States. [214]

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[207] *Id.*
[208] *Id.* at 522.
[209] Gherebi v. Obama, 609 F. Supp. 2d 43, 45 (D.D.C. 2009).
[210] Pub. L. No. 107-56, 115 Stat. 272, 272 (2001).
[211] *Id.* § 412.
[212] *Id.*
[213] *Id.*
[214] *Id.*

2. Detainee Treatment Act and Military Commissions Act

The Detainee Treatment Act of 2005 (Detainee Treatment Act) and the Military Commissions Act of 2009[215] (Military Commissions Act) regulate actions which occur after the battlefield detention. The Detainee Treatment Act dictates how the Department of Defense (DoD) will treat detainees, and includes guidance on how they should be interrogated.[216] The Military Commissions Act regulates how detainees will be tried after their detention. [217] Neither act addresses the authority of the President to detain.[218] Both acts do, however, contemplate that the Executive will detain individuals in the course of military operations.

3. Supplemental Appropriations Act

The SAA of 2010[219] contained several limitations on the ability of the President to conduct detention operations.[220] Specifically, the Act prohibited the use of appropriated funds to facilitate the release of any detainee from "Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia."[221] More constitutionally troubling, the Act also prohibited the use of any appropriated funds to release any detainee from Guantanamo to any location in the world until "the President submits to the Congress, in classified form fifteen days prior to such transfer" certain information.[222]

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[215] The Department of Defense Authorization Act, 2010, HR 2647-385, amended the Military Commissions Act of 2006.
[216] *Id.*
[217] *Id.*
[218] Detainee Treatment Act, *supra* note 16.
[219] Pub. L. No. 111-32, 123 Stat. 1859 (June 24, 2009).
[220] These provisions were first introduced in the Supplemental Appropriations Act (SSA) of 2009. *Id.*
[221] Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 9011, 123 Stat. 3409, 3468.
[222] *Id*. The SAA presents other constitutional issues beyond the scope of this article. Most notably, the act may represent an unconstitutional suspension of the Writ of Habeas Corpus. *See* Petitioner's Response to Notice that Respondents Will No Longer Treat Petitioner As Detainable Under the AUMF and Request for Appropriately Tailored Relief at 4 n.2, Al-Halmandy et. al. v. Obama et. al., No. 05-2385 (D.D.C. 2009) (citing INS v. Cyr, 533 U.S. 289, 312 (2001), Tennessee Valley Authority v. Hill, 437 U.S. 153, 190 (1978)) ("Indeed, the Supplemental Appropriations Act cannot have altered this Court's authority to order the most central of habeas remedies: Petitioner's immediate release. It is well established that an act of Congress does not constrict the scope of habeas by implication.).

As with the Detainee Treatment Act and Military Commission Act, the SAA does not purport to control or limit the President's ability to detain individuals on the battlefield.

C. Resolving the Scope of Powers Issue in the War on Terror

Plainly, Congress has taken a number of actions relating to the President's authority to detain. As discussed, with the possible exception of the 2010 SSA, these actions are most likely constitutional legislative acts. Accepting the constitutionality of these actions, the question becomes one of breadth: what is the scope of the AUMF and related legislation; and has Congress so completely spoken as to preclude the exercise of an inherent presidential authority? The lower courts are struggling with the former question, while the broader question of inherent presidential authority remains open and largely unaddressed.[223]

Courts addressing the President's authority to detain in the current conflict have exclusively addressed the question in the context of the AUMF. No court has suggested the Detainee Treatment Act, Military Commissions Act, or Supplemental Appropriations Act restrict the President's authority to detain on the battlefield. *Gherebi v. Obama* was the first of several cases in the District Court of the District of Columbia attempting to determine "whether the AUMF authorizes the President to detain anyone incidental to the government's conflict with any organization . . . [and] assuming such authority exists . . . [what is the scope of the authority]."[224] *Gherebi v. Obama* was a consolidated *Habeas*

[223] None of these congressional actions attempted to limit or prescribe the President's detention power. Further, none of these acts addressed Bush Administration claims that such detention powers were inherent (or even preclusive). *See, e.g.*, The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 2001 WL (OLC) 34726560 (Sept. 25, 2001) ("We conclude that the Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the Nation in its foreign relations, to use military force abroad—especially in response to grave national emergencies created by sudden, unforeseen attacks on the people and territory of the United States."); Brief for the Petitioner at 27, Padilla v. Rumsfeld, 542 U.S. 426 (2004) (No. 03-1027) (Powers of detention are "at the heart of [the President's] Constitutional powers as Commander in Chief." Brief for the Petitioner at 27, Padilla v. Rumsfeld, 542 U.S. 426 (2004) (No. 03-1027)).

[224] Gherebi v. Obama, 609 F. Supp. 2d 43, 54 (D.D.C. 2009); *see also* Hamlily v. Obama, 616 F. Supp. 2d 63, 66 (D.D.C. 2009) (noting that the instant issue was the "scope of the government's authority to detain . . . detainees pursuant to the Authorization for the Use of Military Force.").

case of more than a dozen Guantanamo detainees who challenged the legality of their confinement and sought immediate release.[225] Judge Walton issued a memorandum opinion addressing only "the question of the scope of the President's authority to detain all the petitioners [under the AUMF]."[226] Judge Walton found that the AUMF "functions as an independent basis in domestic law for the President's asserted detention authority, and adopts the basic framework advanced by the government for determining whether an individual is subject to that authority."[227]

Hamlily v. Obama addressed the same issues as *Gherebi*.[228] In response to a court order, the Government provided a "definitional framework" which detailed their position on the President's authority to detain under the AUMF:

> The President has the authority to detain persons that the President determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al Qaida forces or associated forces that are engaged in hostilities against the United States . . . .[229]

This was essentially the same framework advanced by the government, and accepted by the court, in *Gherebi*.[230] *Hamlily*, however, found "no authority in domestic law or the law of war . . . to justify the concept of 'support' as a valid ground for detention."[231] The *Hamlily* court came to this conclusion even after expressly accepting the

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[225] *Gherebi*, 609 F. Supp. 2d at 45.
[226] *Id.* at 55 n.7; *see also id.* at 53 ("Under the Bush administration, the government had repeatedly asserted that it could detain individuals pursuant to the President's authority as Commander in Chief under Article II, sec. 2, clause of the Constitution . . . [t]hese contentions are absent from the government's most recent memorandum of law.").
[227] *Id.* at 55.
[228] *Id.* at 63.
[229] *Id.*
[230] *Id.* ("The government suggests that in non-international armed conflicts, the President can detain anyone who is a member of a 'dissident armed force[ ]' or 'other organized armed group [ ]' engaged in hostilities with the United States.") (quoting Gov't Mem., *Gherebi v. Obama*, at 9).
[231] *Id.* at 69.

traditional "deference accorded to the Executive in this realm . . . ."[232] Two subsequent district courts have expressly adopted Judge Bates's rationale in Hamlily.[233]

It is noted that *Gherebi*, *Hamlily*, and related cases addressed only the President's authority under the AUMF. Before *Gherebi* was argued, the Bush administration had consistently argued that it "could detain individuals pursuant to the President's authority as Commander-in-Chief . . . ."[234] *Gherebi* did not address this argument and before *Hamlily* was argued, the Obama administration "clarified that it believes that its detention authority arises solely from the AUMF."[235]

IV. Framework

Given the history discussed above, the courts and Congress have often acknowledged some inherent Presidential authority to detain on the battlefield during times of war. This proposition is hardly revelatory, as the power to detain is necessarily attendant to the conduct of military operations.[236] Where, as noted above, Congress has taken actions which limit or prescribe the President's authority to detain, the question becomes: what remains of the President's inherent power? The answer to that question examines the President's inherent detention authority as a function of both the location and nature of the conflict.

A. Location of the Detention

1. Generally

The phrase "location of the detention" refers to whether the detention occurs inside or outside the geographic United States. Courts and

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[232] *Gherebi*, 609 F. Supp. 2d at 69.
[233] Al Odah v. United States, 2009 WL 2730489, 4 (D.D.C. 2009) ("the Court shall adopt the reasoning set forth in Judge John D. Bates's decision in *Hamlily v. Obama*); Anam v. Obama, No. 04-1194, 2009 WL 2917034 (D.D.C. 2009) ("The Court hereby adopts the *Hamlily* opinion.").
[234] *Gherebi*, 609 F. Supp. 2d at 53 n.4 (citing Hamdi v. Rumsfeld, 542 U.S. 507, 516–17 (2004) and al-Marri v. Pucciarelli, 534 F.3d 213, 221 (4th Cir. 2008).
[235] *Id.*
[236] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004) ("detention to prevent a combatant's return to the battlefield is a fundamental incident to waging war.").

legislation have both frequently drawn distinctions in war powers cases between exercises of war powers domestically vice those exercised outside the United States. Though rarely addressed explicitly by the courts or legislatures, the reasons are twofold. First, courts and legislatures recognize that domestic exertions of power pose a greater threat to civil liberties than foreign exertions. The second reason courts and laws draw a geographic distinction has its roots in the historical and legal maxim that the President's powers in foreign affairs are more broad than in domestic affairs.

2. Civil Liberties

It is natural that courts are more distrustful of domestic exercises of Executive power than foreign exercises of the same. The Founding Fathers and the courts both have been wary of a tyrannical Executive wielding unchecked power over the population.[237] Naturally, the closer geographically to the United States the Executive exercises its power, the greater the likelihood for infringement on citizens' civil liberties. The courts and Congress have long recognized this distinction, and have subjected the Executive to more scrutiny where its power has been exercised domestically. In *Youngstown*, Justice Jackson summarized the heightened fears of domestic applications of war-making powers by the President:

> I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence. [238]

Jackson seems to acknowledge the increased role of Congress when the President exerts war powers domestically. He notes that the President's

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[237] THE FEDERALIST No. 33, at 192 (Alexander Hamilton) (G.P. Putnam's Son ed., 1888) ("[I]f the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify.").

[238] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 645–46 (1952) (Jackson, J., concurring).

"command power" is not "absolute" and must be "subject to limitations consistent with a Constitutional Republic whose law and policy-making branch is a representative Congress."[239]

The distinction between exercising war powers inside versus outside the United States is a recurring issue in the conduct of intelligence operations. The Church and Pike Committees, which led to a dramatic contraction of the President's authority to conduct intelligence operations in the 1970s, were largely precipitated by domestic improprieties and concern for civil liberties.[240] In *Laird v. Tatum*,[241] the Supreme Court addressed issues related to a domestic Army covert surveillance program.[242] In dissent, Justice Douglass painted a stark picture of unconstrained war-making powers exercised domestically:

> The First Amendment was designed to allow rebellion to remain as our heritage. . . . The Bill of Rights was designed to keep agents of government and official eavesdroppers away from assemblies of people. The aim was to allow men to be free and independent and to assert their rights against government. There can be no influence more paralyzing of that objective than Army surveillance. When an intelligence officer looks over every nonconformist's shoulder in the library, or walks invisibly by his side in a picket line, or infiltrates his club, the America once extolled as the voice of liberty heard around the world no longer is cast in the image which Jefferson and Madison designed, but more in the Russian image. . . .[243]

While perhaps not fully agreeing with Justice Douglass, the Executive has at times embraced the concept that war powers exercised

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[239] *Id.*

[240] *See* S. Select Comm. to Study Governmental Operations With Respect to Intelligence Activities, Intelligence Activities and the Rights of Americans, S. REP. NO. 94-755, 94th Cong. 2d Sess. (1976).

[241] Laird v. Tatum, 408 U.S. 1 (1972).

[242] The Court did not address the constitutionality of the program. *Id*. at 10 (limiting their review by noting that "a complainant [may] allege[] that the exercise of his First Amendment rights [are] being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose.").

[243] *Id.* at 28–29 (Douglass, J., dissenting).

domestically present a greater threat to civil liberties than those powers exercised outside the United States. Executive Order 12,333 concerns intelligence activities of the U.S. Government.[244] The Department of Defense (DoD) regulation which implements this order notes that its purpose is to conduct effective intelligence operations "while ensuring their activities that affect United States persons are carried out in a manner that protects the Constitutional rights and privacy of such persons."[245] Concerns for domestic violations of civil rights are so great that the regulation presumes individuals located physically inside the United States are U.S. persons.[246] The regulation also draws a distinction between U.S. persons inside or outside of the United States.[247] The regulation provides the greatest restrictions on operations directed at U.S. persons located in the United States.[248]

3. Presidential Power in Foreign Affairs

While the extent of the President's powers may be subject to debate, it is widely accepted that the President exercises more expansive powers in foreign affairs than domestically.[249] This principle was most notably established in *United States v. Curtiss-Wright Export Corp*.[250] There, the majority found the President can act in foreign affairs under both Congressional authorization and "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."[251] The apparent breadth of this holding has been rigorously attacked by commentators as being dicta and historically incorrect.[252] Further, the weight of *Curtiss-*

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[244] Exec. Order 12,333, 3 C.F.R. 200 (1981), *reprinted in* 50 U.S.C. § 401 (2006).
[245] U.S. DEP'T OF DEFENSE, INSTR. 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS § 1.2 (1982).
[246] *Id.*
[247] *Id.*
[248] *Id.* §§ 5.1 to 9.1.
[249] *See, e.g.*, Julian Ku & John Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 206 (2006) ("But putting to one side the normative element of this debate, it should be undisputed that as a descriptive matter the President exercises broad power in these areas, far broader than those he has in domestic affairs.").
[250] 299 U.S. 304 (1936).
[251] *Id.* at 320.
[252] HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWERS AFTER THE IRAN-CONTRA AFFAIR 94 (1990) ("*Curtiss-Wright* has received withering criticism.").

Wright and its progeny have been the subject of academic debate.[253] This article does not seek to resolve this debate; it simply acknowledges the greater breadth of Executive power in foreign affairs.[254] Regardless of the reasons or the historical development, Presidents wield more power—and conversely, Congress wields less power—in foreign affairs. This reality should apply with equal force to the scope of the President's authority to detain domestically versus the authority to detain outside the borders.

4. Judicial Treatment

Looking at the detention authority cases chronologically, *Ex parte Milligan* is the first to draw a clear distinction based on where the detention occurred. The Court noted that Milligan's conduct occurred "within . . . the theatre of military operations. . . ."[255] The Court held that martial law must be limited to circumstances where the courts are closed and where the detention occurs in "the theatre of active military operations, where war really prevails . . . ."[256] The Court did not so expressly address geography in *Ex parte Merryman*. There, the court limited its holding to the President's power over "life, liberty or property" of a "private citizen."[257] While this does not strictly represent a geographic distinction, it does implicitly acknowledge a distinction between those inside the United States (generally citizens) and those outside the United States (generally not citizens).

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[253] *Compare* Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 488, 496 (2002) (arguing that "the vesting of the Executive, commander-in-chief, and treaty-making powers in the Executive branch has been understood as granting the President plenary control over the conduct of foreign relations"), *with* KOH, *supra* note 252, at 94–95 (arguing that "[a]s elaborated by the Framers and construed through the first three eras of American foreign policy, the National Security Constitution envisioned a narrowly limited realm of exclusive presidential power in foreign affairs.").

[254] Despite his misgivings concerning *Curtiss-Wright*, even Professor Koh acknowledges that "the president almost always seem[s] to win in foreign affairs." KOH, *supra* note 252, at 117 ("Executive initiative, congressional acquiescence, and judicial tolerance explains why the president almost invariably wins in foreign affairs.").

[255] *Ex parte* Milligan, 71 U.S. 2, 8 (1866).

[256] *Id.*

[257] 17 Fed.Cas. 144, 149 (1868).

In *Ex parte Quirin* the Court famously held that detained individuals are no "less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations . . . ."[258] This passage, in isolation, appears to dispense with any significance attached to the location of the conduct. However, the location of the detention was central to the decision. The Court found that the petitioners became "unlawful belligerents" only when they "passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose"[259] and the offense became complete when the petitioners "entered . . . our territory in time of war."[260] Plainly, the Court contemplates a geographic aspect to the authority of the President to detain (and try) the petitioners.[261]

In *Johnson v. Eisentrager*,[262] the breadth of the President's powers and the propriety of his actions were based largely on the location of the detainees' capture.[263] The Court found that U.S. courts had no jurisdiction over the plaintiffs because, unlike in *Quirin*, "[N]one of the places where they were acting, arrested, tried or imprisoned were, it was contended, in a zone of active military operations, not under martial law or any other military control, and no circumstances justified transferring them from civil to military jurisdiction."[264]

Reid v. Covert addressed the constitutionality of the detention and trial of civilians by military courts-martial in occuppied Japan and England. The Court noted that several lower courts had "upheld military trial of civilians performing services for the armed forces 'in the field' during time of war."[265] The Court then declined to apply that rationale to the instant case, noting that "[e]xperts on military law, the Judge Advocate General and the Attorney General have repeatedly taken the

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[258] *Ex parte* Quirin, 317 U.S. 1, 38 (1942).
[259] *Id.*
[260] *Id.*
[261] *But cf.* Johnson v. Eisentrager, 339 U.S. 763, 795 (1950) (Black, J., dissenting) ("*Quirin* . . . lend[s] no support to that conclusion, for in upholding jurisdiction they place no reliance whatever on territorial location.").
[262] 339 U.S. 763.
[263] *Id.* at 795 (Black, J., dissenting) (noting that the majority relies only on whether the belligerents "were captured, tried and imprisoned outside our territory.").
[264] *Id.* at 780.
[265] Reid v. Covert, 354 U.S. 1, 33 (1955) (citations omitted).

position that 'in the field' means in an area of actual fighting."[266] *Reid* echoes Justice Jackson's concurrence in *Youngstown Sheet & Tube v. Sawyer*, where he plainly draws a distinction between domestic and foreign exercises of Presidential power. [267]

By its terms, the AUMF applies without geographic limitation; it simply provides authority to "use all necessary and appropriate force against" certain "nations, organizations, or persons . . . ."[268] *Hamdi v. Rumsfeld* and its progeny, however, have largely discussed this authorization in a geographic context. The plurality in *Hamdi* was careful to note that the opinion concerned only "individuals who fought against the United States *in Afghanistan* . . . ."[269] In formulating this limited opinion, the plurality noted that "because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of necessary and appropriate force, Congress has clearly and unmistakable authorized detention in the [instant case]."[270] The phrase "return to the battlefield" is a geographic limitation which implies the individual was captured on the battlefield. Similarly, the Fourth Circuit made its determination based simply on the fact that Hamdi was detained in a "zone of active combat in a foreign theater of conflict."[271]

The Second Circuit in *Padilla v. Rumsfeld* also acknowledged the Court's longstanding distinction between internal and external

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[266] *Id.* (citing WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 100–02 (2d ed., reprint 1920); GEORGE B. DAVIS, MILITARY LAW 478–79 (3d ed. 1915); EDGAR S. DUDLEY, MILITARY LAW AND THE PROCEDURES OF COURTS-MARTIAL 413– 414 (2d ed. 1908); 14 Ops. Att'y. Gen. 22; 16 Ops. Att'y. Gen. 48; Dig. Op. JAG 151 (1912); *id.* (1901) 56, 563; *id.* 76, 325–326, 599– 600 (1895); *id.* 49, 211, 384 (1880)).

[267] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

> I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence.

Id.

[268] Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

[269] Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (emphasis added).

[270] *Id.* at 519.

[271] Hamdi v. Rumsfeld, 316 F.3d 450, 459 (4th Cir. 2003).

Presidential actions, noting that "separation of powers concerns are heightened when the Commander-in-Chief's powers are exercised in the domestic sphere."[272] Similarly, the Fourth Circuit in *al-Marri v. Pucciarelli* looked carefully at whether the individual detained was detained inside or outside the United States.[273]

Applying the location of the conflict as a criterion in analyzing the President's powers is not novel or unique to this article.[274] For example, Professors Derek Jinks and David Sloss recently argued that "in the absence of international legal rules, the President as Commander-in-Chief would have the exclusive power to control battlefield operations during wartime."[275] Using location of the conflict as a criterion of Presidential power is not without its critics. Professors Barron and Lederman argue that the asymmetric and international character of current warfare makes it difficult to draw a distinction between actions taken in the "field" with those taken "outside the field."[276]

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[272] Padilla v. Rumsfeld, 352 F.3d 695, 713 (2nd Cir. 2003), *rev'd and remanded on other grounds*, 542 U.S. 426 (2004).

[273] al-Marri v. Pucciarelli, 543 F.3d 213, 250 (4th Cir. 2008) ("'[T]he fact that the petitioners in this case were not captured on or near the battlefields of Afghanistan, unlike the petitioner in *Hamdi*, is of no legal significance to this conclusion because the AUMF does not place geographic parameters on the President's authority to wage this war against terrorists. To find otherwise 'would contradict Congress's clear intention.'").

[274] Barron & Lederman, *The Commander in Chief at Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, *supra* note 25, at 753 ("[O]ne classic means of attempting to distinguish permissible statutes from impermissible ones relates to whether they purport to regulate troops in the 'field of battle.'").

[275] Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions*?, 90 CORNELL L. REV. 97, 169 (2004).

[276] Barron & Lederman, *The Commander in Chief at Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, *supra* note 25, at 753 ("In the war on terrorism, for example, the distinction between the "field" and actions "outside the field" is potentially thin, given the President's contention that the line between the home front and the battlefield has faded to insignificance."). Professor Ingrid Brunk Wuerth has also notably critiqued this criterion. Writing on the relevance of the War of 1812 on today's detention paradigm, Professor Wuerth found that detention cases from the War of 1812 "suggest that it is incorrect to place so much importance on whether the capture occurred on the 'battlefield' (or the 'zone of combat') or on whether the capture took place in the United States or abroad." Ingrid Brunk Wuerth, *The President's Power to Detain "Enemy Combatants": Modern Lessons From Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567, 1587 (2004). Professor Worth's analysis is, however, limited to the detention of U.S. citizens. Furthermore, as Professor Worth acknowledges, the War of 1812 cases "did not formally consider . . . distinctions [based on geography]."

Unlike the Bush administration, this article does not argue that we are engaged in a boundless war.[277] Pragmatically, a framework which recognizes a spectrum of authority based on location of the conflict reflects counterinsurgent warfare, which is comprised of a spectrum of degrees of conflict.[278] Where a conflict is open, pervasive, violent, and widespread,[279] or what can be termed "high" conflict, the President's inherent detention authority is at its zenith. Conversely, where the conflict is sporadic and low grade,[280] or "low" conflict, the President's authority is reduced.

B. Nature of the Detention

The "Nature of the Detention" refers broadly to the intensity or "nature" of the conflict in which the detention occurs. Taken collectively, the decisions discussed below draw clear distinctions based on the nature of the conflict in which detention occurs. Where the conflict is more intense, the courts afford the President more latitude to conduct military operations, including detentions. This legal paradigm is largely a function of the nature of Congress and the Executive. In short, the structure and organization of Congress does not lend itself to their involvement in tactical details during high intensity combat.

With the notable exception of the Joint Committee on the Conduct of the War, Congress's role in the conduct of war has been strategic in nature. Congressional involvement is typified by declarations of war, authorizations for the use of force, and passage of large-scale

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[277] George W. Bush, U.S. President, Address to the Nation (Aug. 29, 2001) ("Our war on terror will be much broader than the battlefields and beachheads of the past. The war will be fought wherever terrorists hide, or run, or plan.").

[278] *See generally* Peter W. Chiarelli & Patrick R. Michaelis, *Winning the Peace: The Requirement for Full-Spectrum Operations*, MIL. REV., July–Aug. 2005.

[279] For instance, the Second Battle of Falluja, Iraq in late 2004. *See, e.g.*, DEXTER FILKINS, THE FOREVER WAR 190–210 (2009) (recounting the Second Battle of Falluja).

[280] For example, the "War on Terror" physically occurs in part inside the United States. Detaining a suspected terrorist on U.S. soil would represent the nadir of presidential detention authority. And indeed, all individuals detained within the United States on terrorist related charges have been detained by civil rather than military authorities. Resulting prosecutions have also been conducted through the civil justice system rather than through the military justice or military commissions system. *See* Press Release, U.S. Department of Justice, Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System (June 9, 2009), *available at* http://www.justice.gov/opa/pr/2009/June/09-ag-564.html.

appropriations bills.[281] Congress has not directed individual troop movements, drafted battle plans, established targeting lists, determined when and where to move troops, or exerted any other similar tactical control.

War requires actions that are quick, decisive, deliberate, secretive, and politically perilous—actions not commonly attributed to Congress. Alexander Hamilton recognized this reality, noting "[O]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."[282] Hamilton continued, stating that "[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree that the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."[283] These qualities, frequently attributed to the Executive, lend themselves to the tactical minutia of combat, including which individuals to detain and how to detain them. Congress, conversely, is deliberate, methodical, more closely attuned to citizenry, and better adapted to strategic, long-term, policy-making.

Since Congress is not consumed by the day-to-day conduct of war, it can consider ancillary issues raised by detention operations, such as international comity and core national values. Thus, where the conflict is a "low" conflict, it is relatively unproblematic for Congress—if it chose—to establish detention policy. Conversely, where the conflict becomes more heated, it becomes markedly more difficult and unwise for Congress to control detentions.[284] In a "high" conflict where soldiers are literally fighting for their lives, it is imprudent and virtually impossible for Congress to dictate the actions of individual soldiers and commanders.

The courts have implicitly recognized this reality. Dissenting in *Johnson v. Eisentrager*, Justice Douglass noted that "[a]ctive fighting forces must be free to fight while hostilities are in progress. . . . When a

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[281] *See supra* Part II.B.3.
[282] THE FEDERALIST No. 74, at 463 (Alexander Hamilton) (G.P. Putnam's Son ed., 1888).
[283] *Id.* at 437.
[284] Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) ("[I]n the very nature of things military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved.").

foreign enemy surrenders, the situation changes markedly."[285] In *Ex parte Endo*, the Court also acknowledged the importance of the level of conflict on their analysis. Indeed, the Court expressly notes that their analysis of the internment legislation was inextricably linked to the war: "[T]he purpose and objective of the Act and of these orders are plain. Their single aim was the protection of the *war effort* against espionage and sabotage. *It is in light of that one objective that the powers conferred by the orders must be construed*."[286]

In re Territo, another World War II detention case, arose from the capture of Gaetano Territo in Italy in 1943.[287] The Ninth Circuit upheld his detention under the 1929 Geneva Convention, which authorized his capture "on the field of battle [because at the time] he was a member of the armed forces of a belligerent part."[288] Territo argued that his status as a prisoner of war should change because open hostilities between Italy and the United States had ended.[289] The court implicitly acknowledged the validity of this argument, but ultimately rejected Territo's argument, noting that "no treaty of peace has been negotiated with Italy and petitioner remains a prisoner of war."[290]

Reid v. Covert also expressly considered the nature of the conflict in which the detention took place. Noting that several lower courts had "upheld military trial of civilians performing services for the armed forces 'in the field' during time of war,"[291] the Court held that "[t]o the extent that these cases can be justified . . . they must rest on the Government's 'war powers.' In the face of an *actively hostile enemy*, military commanders necessarily have broad power over persons on the battlefront."[292] The Court then declined to apply that rationale to the instant case, noting that Japan and England in 1953 "could properly be said to be an area where active hostilities were under way at the time Mrs. Smith and Mrs. Covert committed their offenses or at the time they were tried."[293] The Cold War was simply not "hot" enough to justify military courts-martial jurisdiction over civilians.

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[285] Johnson v. Eisentrager, 339 U.S. 763, 796 (1950) (Black, J., dissenting).
[286] *Ex parte* Endo, 323 U.S. 283, 300 (1944) (emphasis added).
[287] *In re* Territo, 156 F.2d 142 (9th Cir. 1946).
[288] *Id*. at 144.
[289] *Id*. at 146–47.
[290] *Id*. at 148.
[291] Reid v. Covert, 354 U.S. 1, 33 (1955).
[292] *Id.* (emphasis added).
[293] *Id.*

The *Hamdi* plurality echoed *Reid v. Covert* and *Quirin*, recognizing that "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war."[294] In weighing the breadth of the authorization contained in the AUMF, the plurality concluded that "[i]f the record establishes that United States troops are still involved in *active combat* in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the AUMF."[295]

In the context of international law and the attendant detention authority, the nature of the conflict is of equal importance. The panoply of detention-related rules derived from the Geneva Conventions are only triggered in the case of "declared war or . . . any other armed conflict . . . between two or more High Contracting Parties."[296] While "armed conflict" may be easily discerned in many circumstances, there are an equal number of circumstances in which it is not clear whether "armed conflict" exists. To resolve this issue, courts have looked to the nature of the conflict to determine if the Conventions and attendant detention authorities apply. For instance, in examining this issue in the *Tadic* case, the International Criminal Tribunal for the Former Yugoslavia (ICTY) adopted a three part test which looks at "(1) the participants' own understandings and intentions; (2) their level of organization; and (3) the *intensity and duration* of the violence."[297]

V. Conclusion

Wary of a tyrannical Executive, the Founding Fathers sagely provided the legislative body certain powers essential to the conduct of war.[298] At the same time, they realized an elective body of hundreds could not effectively implement the tactical minutia of fighting a war; an endeavor

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[294] Hamdi v. Rumsfeld, 542 U.S. 507, 518–19 (2004).
[295] *Id.* at 521 (emphasis added).
[296] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *but cf.*, Priester, *supra* note 41, at 1293 (arguing that "Common Article 3 contemplates the detention of both noncombatants and former combatants during the conflict.").
[297] Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT'L L. 369, 376 (2008) (citing Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995)) (emphasis added).
[298] *See infra* p. 94 and note 39. I will re-check this number once I have paginated the entire volume.

which requires secrecy, speed, and decisiveness—traits not commonly associated with a large group of elected politicians.[299] Thus, the Constitution vests the powers of Commander-in-Chief in the President.[300] The extent of this power, relative to Congress's war powers, is a source of unending debate. This is particularly so with regards to the power to detain, a power not among those expressly delegated in the Constitution, and one that does not lend itself to being easily classified as a "Congressional" war power or an "Executive" war power.

The proposed framework necessarily acknowledges some inherent presidential authority to detain during times of war. International and domestic law clearly empower the Executive (acting through the military) to detain individuals on the battlefield. The historical record supports this conclusion. Time and again, presidents have detained persons on the battlefield without implied or express Congressional consent. Successive Congresses and courts have acquiesced to this executive exercise of power. The Court has never ruled the President does not have the inherent power to detain, and Congress has never attempted to "occupy" the field of military detentions by controlling the minutia of battlefield detentions. To the extent Congress has become involved in detention policy, it is decidedly on the periphery of the core issue.

Where Congress has acted, the question becomes to what extent has legislation limited the exercise of inherent Presidential authority? In the current conflict, Congress has acted rather extensively through the AUMF,[301] the AUMF Iraq,[302] the Detainee Treatment Act,[303] the Military Commissions Act,[304] the PATRIOT Act,[305] and the SAA of 2009[306] and 2010.[307] The AUMF, the AUMF Iraq, and the PATRIOT Act, however, are all permissive statutes, empowering rather than restricting the President. The Detainee Treatment Act, Military Commissions Act, and

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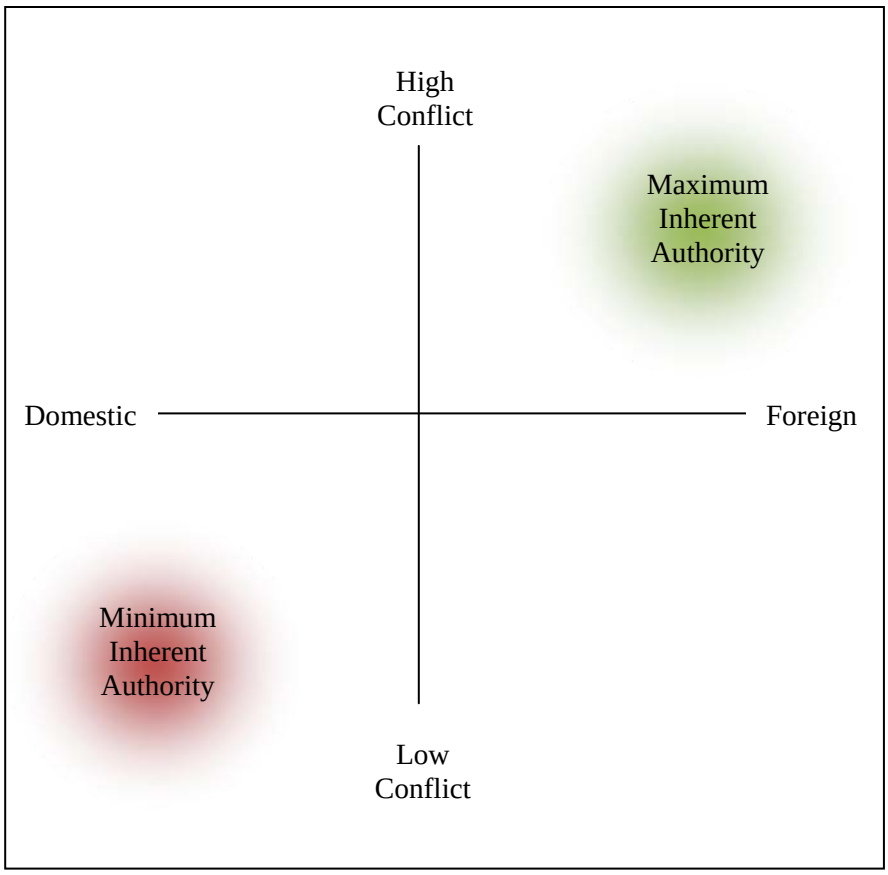
[299] *See* THE FEDERALIST No. 74, at 463 (Alexander Hamilton) (G.P. Putnam's Son ed., 1888) ("Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."). *See also* Jinks & Sloss, *supra* note 275, at 169–70.
[300] U.S. CONST. art. II, § 2.
[301] AUMF, *supra* note 14.
[302] AUMF Iraq, *supra* note 15.
[303] Detainee Treatment Act, *supra* note 16.
[304] Military Commissions Act, *supra* note 17.
[305] PATRIOT Act, *supra* note 18.
[306] Supplemental Authorization Act of 2009, *supra* note 19.
[307] Department of Defense Appropriations Act, 2010, *supra* note 19.

SAA are restrictive statutes, but they only concern what occurs after initial detention. None of these statutes directs, prescribes, or regulates the President's authority to detain. Further, none of these statutes refutes either the broad claims or inherent and preclusive detention authority made (promulgated?) by the Bush Administration.[308]

War is never neat and tidy. Perhaps it is unremarkable that constitutional scholarship on war powers is equally muddled. Nevertheless, for pragmatic, historical, and constitutional reasons, it is clear that the President holds some inherent authority to detain individuals on the battlefield. Equally clear is the supposition that Congress has some role in prescribing the detention paradigm. The extent to which each can act is a simple function of the nature and location of the detention.

[308] *See infra* note 178.

Appendix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